STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA LANMAN, Personal Representative of the Estate of EUGENE H. LANMAN, Deceased, Plaintiff-Appellee, v KALAMAZOO PSYCHIATRIC HOSPITAL, Defendant-Appellant.	UNPUBLISHED January 12, 2006 No. 263665 Court of Claims LC No. 03-000130-MH

Before: Hoekstra, P.J., and Neff and Davis, JJ.

PER CURIAM.

Defendant Kalamazoo Psychiatric Hospital appeals as of right an order denying its motion for summary disposition on the basis of governmental immunity. We reverse and remand this case to the trial court for entry of an order granting defendant's motion for summary disposition.

Decedent Eugene H. Lanman was initially taken by police to a different hospital, which found decedent in need of inpatient psychiatric care. The police took decedent to defendant hospital, where he was found in need of care but capable of giving informed consent. Decedent signed a voluntary admission form, and defendant hospital admitted him for long-term psychiatric care, gave him medicine for back pain and placed him in a "quiet room." Overnight, decedent became increasingly agitated, eventually culminating in a struggle with defendant's staff and injection of a calming drug. Decedent stopped breathing, allegedly as a result of compression of his breathing capacity by defendant's staff during the struggle. Defendant's staff then performed CPR. Decedent was transported to a general hospital emergency room, where he remained until his death a little more than two weeks later. Plaintiff filed suit. Relevant to this appeal, plaintiff alleged a breach of contract claim premised on the voluntary admission form. Plaintiff also alleged an independent claim under the federal Emergency Medical Treatment and Active Labor Act (EMTALA), 42 USC 1395dd. The trial court found both claims to be pleaded in avoidance of governmental immunity and factually supportable at trial.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We also review de novo questions of statutory interpretation "to discern and give effect to the Legislature's intent," with the presumption that unambiguous language should be enforced as written. *Gladych v New Family*

Homes, Inc, 468 Mich 594, 597; 664 NW2d 705 (2003). Likewise, proper interpretation of a contract and the applicability of governmental immunity are questions of law subject to review de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003); *Pierce v Lansing*, 265 Mich App 174, 176; 694 NW2d 65 (2005).

Governmental immunity is controlled by the Governmental Immunity Act (GIA), MCL 691.1401 *et seq*. Under MCL 691.1407(1):

> Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

"If a plaintiff successfully pleads and establishes a non-tort cause of action, § 7 will not bar recovery simply because the underlying facts could have also established a tort cause of action." *Ross v Consumers Power Co* (*On Rehearing*), 420 Mich 567, 647-648; 363 NW2d 641 (1984). Plaintiff alleges that one of her claims sounds in contract and is therefore not subject to the statute. Plaintiff alleges that immunity to the EMTALA claim has been waived.

We first consider the breach of contract claim, which alleges both an express and an implied contract.

Defendant first argues that the parties did not have an express contract. We disagree, but we find that the parties' contract did not include any particular treatment obligations. A breach of contract claim requires plaintiff to establish all of the elements of a contract. *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). "In Michigan, the essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). However, a contract's enforceability is not dependent on mutuality of obligation so long as one party has given consideration for the other party's obligation. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 600; 292 NW2d 880 (1980).

Decedent and one of defendant's doctors signed a "voluntary admission form," which plaintiff argues is a contract for specific types of treatment based on the Michigan Mental Health Code, MCL 330.1001 *et seq*. We disagree. The particular form in this case only constitutes an offer stating the applicant's desire to be admitted to the hospital in exchange for certain promises. See *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). In relevant part, decedent agreed to consent to treatment and to facilitate payment for any treatment received. Defendant agreed to follow certain procedures in the event it decided to admit decedent or provide certain kinds of treatment against his will. We presume that this offer was accepted by defendant's decision to admit decedent, which did establish an express contract. Otherwise, the contract based on this form only *authorizes* treatment, it does not require it.

Defendant next argues that the parties did not have an implied contract. We agree. An implied contract may arise where circumstances and the parties' conduct and language imply that the parties intended to contract, but where they did not explicitly put that intent into words.

Featherston v Steinhoff, 226 Mich App 584, 589; 575 NW2d 6 (1997). There is no elemental difference between an implied contract and an express contract other than "the character of the evidence necessary to establish the contract." *Borg-Warner Acceptance Corp v Dep't of State*, 169 Mich App 587, 590; 426 NW2d 717 (1988), rev'd on other grounds 433 Mich 16 (1989). Relevant to this appeal, an implied contract still depends on consideration. *Lowery v Dep't of Corrections*, 146 Mich App 342, 359; 380 NW2d 99 (1985). "[I]t is well settled that doing what one is legally bound to do is not consideration for a new promise." *Yerkovich v AAA*, 461 Mich 732, 740-741; 610 NW2d 542 (2000).

We have addressed an argument similar to plaintiff's "that the admission application signed by the decedent constituted an implied agreement between defendants and the decedent to provide appropriate care and treatment for the decedent." *Freiburger v Dep't of Mental Health*, 161 Mich App 316, 318; 409 NW2d 821 (1987). At the time, MCL 330.1810 provided that "[n]o person shall be denied services because of an inability to pay for such services on the part of the individual, the spouse, or the parents." See 1974 PA 258. That statute imposed a preexisting duty "to provide services to all persons in need of mental health services, regardless of their ability to pay," so there was no consideration for the alleged contract. *Freiburger*, *supra*. The statute now reads "an individual shall not be denied services because of the inability of responsible parties to pay for the services." MCL 330.1810. This is only a stylistic change. See *In re Marin*, 198 Mich App 560, 563; 499 NW2d 400 (1993). We reach the same result today as we did in *Freiburger*. On these facts, plaintiff's breach of contract claim is "a tort case." *Freiburger*, *supra* at 320. Consequently, the trial court erred in denying summary disposition of plaintiff's contract claims.

Next, we address whether the facts of this case support an EMTALA claim. EMTALA imposes two primary requirements on participating hospitals.[1] First, it requires that a participating hospital afford an appropriate medical screening to all persons who come to its emergency room seeking medical assistance. 42 USC 1395dd(a). Second, it requires that if an emergency medical condition is found to exist, the participating hospital must render those services that are necessary "to stabilize" the patient's condition. See 42 USC 1395dd(b)(1)(a).[2]

In her complaint, plaintiff alleged that defendant violated EMTALA when, "despite recognizing the existence of an emergency medical condition," its staff "did nothing to stabilize [decedent's] emergency medical condition, or to prevent his condition from deteriorating further to the point that he became a danger to others as well as himself." However, even if accepted as true, plaintiff's allegations in this regard do not support an EMTALA claim under the facts of this case.

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[1] EMTALA defines a "participating hospital" as a "hospital that has entered into a provider agreement under section 1395cc of this title." 42 USC 1395dd(e)(2). Neither party disputes that KPH is a participating hospital.

[2] As an enforcement mechanism for these requirements, the EMTALA creates a private right of action for violations of the act. See 42 USC 1395dd(d)(2).

In *Harry v Marchant*, 291 F3d 767, 770 (CA 11, 2002) (en banc), the Eleventh Circuit Court of Appeals addressed the issue whether "EMTALA requires a hospital to provide stabilization treatment to a patient with an emergency medical condition who is not transferred." In that case, an on-call physician acting on behalf of a patient's primary care provider refused to authorize the patient's admission into the defendant hospital's intensive care unit (ICU), despite the emergency room physician's recommendation that she be admitted for treatment of pneumonia. *Id*. at 768. Several hours later, the patient's regular primary care physician examined and admitted the patient into the ICU. *Id*. at 768-769. Shortly thereafter, the patient lapsed into respiratory and cardiac failure and died. *Id*. at 769. The personal representative of the patient's estate brought suit against the hospital and its emergency room personnel, alleging that the defendants violated EMTALA by failing to stabilize and treat the patient's emergency medical condition. *Id*. In reversing an earlier panel decision finding that the plaintiff's complaint supported an EMTALA claim for failure to stabilize the patient's condition, the court, sitting en banc, noted that the term "to stabilize" was expressly defined by EMTALA. *Id*. at 770. Specifically, the court noted that

> [u]nder EMTALA, the term "to stabilize" means "with respect to an emergency medical condition . . . [a hospital must] provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result or occur *during the* ***transfer*** of the individual from a facility." [*Id*. at 770-771, quoting 42 USC 1395dd(e)(3)(A) (emphasis added).]

Addressing the language emphasized above, the court reasoned that "[c]onstruing EMTALA to mandate stabilization treatment irrespective of a transfer renders the words 'during the transfer,' contained in the statutory definition of the term 'to stabilize,' superfluous." *Id*. at 771-772. Thus, the court found that "[t]o give effect to the clear language of the statute, [it] must conclude that the triggering mechanism for stabilization treatment under EMTALA is transfer," and that, therefore, "EMTALA mandates stabilization of an individual only in the event of a 'transfer' as defined in EMTALA."[3] *Id*.

In reaching this conclusion, the court noted that the legislative history and purpose of EMTALA was consistent with such a construction:

> EMTALA's main objective was to prevent the practice of "patient dumping," [i.e, the practice of some hospital emergency rooms turning away or transferring indigents to public hospitals without prior assessment or stabilization treatment.] By mandating treatment only in the context of a patient transfer, the stabilization requirement addresses Congress' concern regarding rejection of patients without converting EMTALA into a federal malpractice statute. In prescribing minimal standards for screening and transferring patients, but not for patient care outside

[3] The term "transfer" is defined by the act as "the movement (including the discharge) of an individual outside of a hospital's facilities at the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital." 42 USC 1395dd(e)(4).

> these two narrowly defined contexts, Congress confined EMTALA solely to address its concerns and, at the same time, avoided supplanting state malpractice and tort remedies. [*Id*. at 773-774.]

Absent a conflict among the various federal appellate circuits, we are bound by the holding of a federal appellate court concerning interpretation of a federal statute. *Abela v General Motors Corp*, 257 Mich App 513, 526; 669 NW2d 271 (2003). We are aware of no conflict with the en banc decision of the court in *Harris*, *supra*, and, in any event, agree that the EMTALA stabilization requirement is unambiguous, and plainly applies only to those instances where a patient treated for an emergency medical condition is transferred or discharged. See *Gladych*, *supra*. Consequently, because plaintiff's decedent was neither transferred nor discharged, but rather admitted to the defendant hospital for long term treatment of his psychiatric condition,[4] the requirements of EMTALA are inapplicable and summary disposition of her EMTALA claim is required.[5]

Reversed and remanded for entry of an order granting defendant's motion for summary disposition. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff

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[4] We acknowledge that decedent was transferred to another hospital that was better equipped to treat his physical condition resulting from the fact that he stopped breathing during the struggle with defendant's staff members. However, plaintiff does not complain of a lack of stabilization relative to decedent not breathing prior to the transfer. Rather, she alleges a failure "to stabilize . . . or prevent his [psychiatric] condition from deteriorating further to the point that he became a danger to others as well as himself." Consequently, the transfer after the struggle is immaterial to whether plaintiff may maintain her EMTALA claim.

[5] Because we find plaintiff's EMTALA claim to be factually untenable, we need not consider defendant's claim of governmental immunity.