STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA LANMAN, Personal Representative of the Estate of EUGENE H. LAMNAN, Deceased, Plaintiff-Appellee,	UNPUBLISHED January 12, 2006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

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

DAVIS, J. (*concurring in part and dissenting in part*).

I agree with my colleagues' disposition of plaintiff's contract claims. However, I respectfully disagree with their disposition of plaintiff's EMTALA claim.

EMTALA requires any hospital with an emergency department to screen any patient for emergency medical conditions and either to provide stabilizing treatment to the extent the hospital can or to transfer the patient to another hospital. 42 USC 1395dd(a)-(b); see also *In re AMB*, 248 Mich App 144, 187; 640 NW2d 262 (2001). EMTALA was enacted for the "'sole purpose [of dealing] with the problem of patients being turned away from emergency rooms for non-medical reasons.'" *Id.*, 144-145, quoting *Bryan v Rectors & Visitors of Univ of Virginia*, 95 F3d 349, 351 (CA 4, 1996). Accord, *Cleland v Bronson Health Care Group, Inc*, 917 F2d 266, 268 (CA 6, 1990).

The federal circuit courts have unanimously[1] held that EMTALA is not intended as a federal malpractice statute. *Gatewood v Washington Healthcare Corp*, 933 F2d 1037, 1041 (CA DC, 1991); *Correa v Hospital San Francisco*, 69 F3d 1184, 1192 (CA 1, 1995); *Hardy v New York City Health & Hosp Corp*, 164 F3d 789, 792 (CA 2, 1999); *Bryan*, *supra* at 351 [Fourth Circuit]; *Marshall v East Carroll Parish Hosp Service Dist*, 134 F3d 319, 322 (CA 5, 1998); *Cleland*, *supra* at 272 [Sixth Circuit]; *Summers v Baptist Medical Ctr Arkadelphia*, 91 F3d 1132,

[1] The Seventh Circuit impliedly held that EMTALA is not a malpractice cause of action, but did not directly address the issue. *Thomas v Christ Hosp and Medical Ctr*, 328 F3d 890, 893-894 (CA 7, 2003). The Third Circuit has not addressed the issue.

(CA 8, 1996); *Eberhardt v City of Los Angeles*, 62 F3d 1253, 1258 (CA 9, 1995); *Urban v King*, 43 F3d 523, 525 (CA 10, 1994); *Harry v Marchant*, 291 F3d 767, 770 (CA 11, 2002). This Court is bound by an interpretation of federal law that is undisputed between the circuits. *Young v Young*, 211 Mich App 446, 450; 536 NW2d 254 (1995). However, federal circuit court decisions construing state law are not binding, although this Court may choose to adopt them as persuasive. *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 402; 571 NW2d 530 (1997).

The majority concludes that EMTALA is not implicated under the facts of this case because defendant admitted plaintiff's decedent instead of transferring him or discharging him. I would parse the statute differently. In relevant part, it imposes the following obligation:

> (b)(1) If any individual (whether or not eligible for benefits under this subchapter) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either –
>
> (A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or
>
> (B) for transfer of the individual to another medical facility in accordance with subsection (c) of this section.

The majority accepts the presumption that plaintiff's decedent came to the hospital and that the hospital determined that he had an emergency medical condition within the definition provided by 42 USC 1395dd(e)(1)(A). Thus, defendant was required *either* to provide stabilizing medical treatment *or* to transfer plaintiff's decedent elsewhere.

EMTALA defines "stabilize" as follows:

> (e)(3)(A) The term "to stabilize" means, with respect to an emergency medical condition described in paragraph (1)(A), to 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 from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), to deliver (including the placenta).

The majority concludes that "stabilization" under EMTALA applies only when contemplating transferring an admitted patient elsewhere. Logically, under that scenario, if no transfer is contemplated, no "stabilization" is required after a patient is admitted.

I cannot reconcile such a reading with § (b)(1), which requires stabilizing treatment *or* a transfer. A more harmonious reading of EMTALA's definition of "stabilization" does not require that a transfer actually be contemplated. Rather, it must merely be possible to do safely. In other words, EMTALA provides a benchmark for treating medical personnel: the statute is

satisfied if the hospital *could* transfer a given patient without risking deterioration of that patient's condition. If a patient could be transferred safely, the patient is "stable" under EMTALA, irrespective of whether anyone in fact *intends* to transfer the patient. Although inartfully worded, this would be a standard applicable to all patients, and would not generate any conflict between different statutory provisions.

My colleagues rely on *Harry*, *supra*, and they accurately summarize the case. However, I do not believe *Harry* is as entirely uncontested as the majority suggests. The Ninth Circuit reached the same holding, "that EMTALA's stabilization requirement ends when an individual is admitted for inpatient care," but it simultaneously noted a conflict between the Sixth and Fourth Circuits on that point. *Bryant v Adventist Health Systems/West*, 289 F3d 1162, 1168 (CA 9, 2002). Thus, we are not necessarily bound by it. *Young*, *supra* at 450. Even presuming *Harry*'s holding was uncontested, *Bryant* provided a more expansive and, I believe, more persuasive discussion of that issue. Specifically, the Ninth Circuit additionally explained that admission for inpatient care will *not* terminate EMTALA liability if that admission is not done in good faith. *Bryant*, *supra* at 1169. This is more consistent with 42 CFR 489.24(a)(1)(ii), which provides that "[i]f the hospital admits the individual as an inpatient *for further treatment*, the hospital's obligation under this section ends. . . ." (emphasis added). The pertinent allegation here is that defendant admitted plaintiff's decedent and provided no mental health treatment whatsoever. Taking this allegation as true, as we must for purposes of summary disposition, this raises, at a minimum, a question whether the admission was in sufficiently good faith to terminate defendant's EMTALA obligations.

From plaintiff's perspective in this case, *Harry* is irrelevant under circumstances where defendant neither treated, transferred, nor discharged plaintiff's decedent. The dispositive question presented by this appeal is whether an EMTALA claim can *ever* be brought against a state-operated hospital in light of the Governmental Immunity Act, MCL 691.1401 *et seq*., and the Eleventh Amendment. This case is only here at this stage as a result of defendant's assertion of a governmental immunity defense. MCR 7.202(6)(a)(v).

It is well established that governmental immunity "'may not be held to have been waived or abrogated except that result has been accomplished by an express statutory enactment or by necessary inference from a statute.'" *Ballard v Ypsilanti Twp*, 457 Mich 564, 574; 577 NW2d 890 (1998), quoting *Mead v State*, 303 Mich 168, 173; 5 NW2d 740 (1942). Under the Eleventh Amendment Congress may not compel states to entertain suits against themselves in their own courts for federal claims to which the states would be immune in federal court. *Alden v Maine*, 527 US 706, 736, 754-755; 119 S Ct 2240; 144 L Ed 2d 636 (1999). However, states may "without derogating from their sovereignty" generally "assent to conditions" imposed by Congress in exchange for receipt of federal funds. *Charles C Steward Machine Co v Davis*, 301 US 548, 597-598; 57 S Ct 883; 81 L Ed 1279 (1937). The federal government possesses "the authority or means to seek the States' voluntary consent to private suits." *Alden*, *supra* at 755.

EMTALA is part of the Social Security Act. "Hospitals that execute Medicare provider agreements with the federal government pursuant to 42 USC 1395cc must treat all human beings who enter their emergency departments in accordance with" EMTALA. *Burditt v United States Dep't of Health and Human Services*, 934 F2d 1362, 1366 (CA 5, 1991). The text of 42 USC 1395cc requires service providers that are hospitals to file an *agreement* to, among other things, "adopt and enforce a policy to ensure compliance with the requirements of section 1395dd of this

title and to meet the requirements of such section." 42 USC 1395cc(1)(I)(i). As the majority points out, there is no dispute that defendant is a participating hospital. One can reasonably conclude that, through its action as a participating hospital, defendant Hospital *agreed* to the terms of EMTALA, one of which is the civil action provided by 42 USC 1395dd(d)(2)(A). Accordingly, defendant would be amenable to suit despite the GIA and despite the Eleventh Amendment.

I acknowledge that the United States Supreme Court has stated that "the 'mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts." *Florida Dep't of Health and Rehabilitative Services v Florida Nursing Home Ass'n*, 450 US 147, 150; 101 S Ct 1032; 67 L Ed 2d 132 (1981), quoting *Edelman v Jordan*, 415 US 651, 673; 94 S Ct 1347; 39 L Ed 2d 662 (1974). A waiver of Eleventh Amendment immunity to suit in federal courts may only be found by explicit language to that effect or by a necessary and inescapable implication therefrom. *Id*. Even where the defendant in *Florida Nursing Home Ass'n* "agreed explicitly to obey federal law in administering the program," this "customary condition for any participation in a federal program by the State" is insufficient "to waive the protection of the Eleventh Amendment." *Id*.

I presume defendant complied with 42 USC 1395cc(1)(I)(i), as is required of defendant to participate in Medicare. However, that agreement is not to be found in the record. There is apparently no case law discussing 42 USC 1395cc(1)(I)(i), nor is there any case law discussing the interplay between 42 USC 1395cc and the Eleventh Amendment. In light of the absence of the actual agreement or case law specifically on point, and in light of *Florida Nursing Home Ass'n*, *supra*, I would not say as a matter of law or as a matter of fact that defendant has actually waived its immunity to an EMTALA claim by explicit agreement or by inescapable implication.

An agreement to "adopt and enforce a policy to ensure compliance with the requirements of [42 USC 1395dd] and to meet the requirements of such section" is a precondition to the receipt of federal Medicare funding. 42 USC 1395cc(1)(I)(i). Further, MCR 2.116(C)(7) requires this Court to view the evidence in a light most favorable to plaintiff as the nonmoving party. *Lavey v Mills*, 248 Mich App 244, 250; 639 NW2d 261 (2001). Proper statutory interpretation requires this Court to give effect to all words in a statute and reasonably construe them to best accomplish the overall purpose the statute intends. *Ross v Michigan*, 255 Mich App 51, 55; 662 NW2d 36 (2003). The Social Security Act unambiguously intends to condition receipt of funds on compliance with EMTALA. Under the procedural posture of this case, I am unwilling dispositionally to conclude that defendant has not waived its immunity to an EMTALA claim.

The trial court is in a superior position to make the necessary inquiry into the existence and scope of any agreement that defendant executed with the federal government pursuant to its participation in the Medicare reimbursement program. Likewise, the trial court is in a superior position to inquire into the circumstances of defendant's admission of plaintiff's decedent for inpatient care. On the existing record and under our standard of review, I would not hold that an EMTALA claim is factually unsupportable, and I would neither confirm nor rule out a waiver of defendant's immunity.

I agree that the trial court's denial of summary disposition as to plaintiff's breach of contract claim should be reversed. However, I would merely vacate the trial court's denial of summary disposition as to plaintiff's EMTALA claim, and I would remand for further development of the factual record.

/s/ Alton T. Davis