STATE OF MICHIGAN

COURT OF APPEALS

COLOMA EMERGENCY MEDICAL SERVICE, INC.,	UNPUBLISHED March 6, 2012
Plaintiff-Appellee,	
v	Nos. 300416 & 300599 Ingham Circuit Court
DEPARTMENT OF COMMUNITY HEALTH,	LC No. 10-000538-AW
Defendant-Appellant.	

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

In this consolidated appeal, defendant appeals both as of right and by leave granted the trial court's order granting in part and denying in part defendant's motion for summary disposition. For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is a non-profit ambulance company that provides life-support services in Berrien County. In April of 2009, plaintiff submitted an application to the Berrien County Medical Control Authority ("BCMCA"). Plaintiff sought approval to expand its medical services from certain municipalities within the county to the entire county. The BCMCA medical director refused to provide his signature for plaintiff's application. This refusal effectively resulted in a denial of plaintiff's application and plaintiff subsequently requested that defendant conduct a denial justification review pursuant to Michigan Administrative Code Rule 325.22205(2).[1]

[1] Rule 325.22205(2) provides:

> The medical director shall ensure the provision of medical control. The medical director's signature on a life support agency's application for licensure or relicensure affirms that the medical control authority intends to provide medical control to the life support agency. If the medical director refuses to sign the life support agency application for licensure or relicensure, then the medical director shall notify the department in writing, within 5 business days, providing justification for denial. Refusal of a medical director to sign a life support agency

Plaintiff later submitted a second, more limited application to the BCMCA. Again, the BCMCA medical director refused to sign the application.

Defendant failed to conduct the required denial justification review of plaintiff's applications for several months. In May 2010, plaintiff filed its complaint in Ingham Circuit Court requesting a writ of mandamus compelling defendant to conduct the denial justification review and money damages for defendant's delay. Plaintiff claimed that it suffered lost profits while waiting for defendant to conduct the denial justification review.

Exactly three weeks after plaintiff filed its complaint, defendant sent a letter to plaintiff indicating that defendant had conducted the denial justification review. Defendant's review affirmed the BCMCA's rejection of plaintiff's applications. Defendant then moved for summary disposition under MCR 2.116(C)(4) and (C)(7) on the grounds of (1) governmental immunity, (2) mootness, and (3) subject-matter jurisdiction. The trial court dismissed plaintiff's request for a writ of mandamus as moot because defendant voluntarily conducted the denial justification review. The trial court, applying our decision in *Mercer v City of Lansing*, 274 Mich App 329; 733 NW2d 89 (2007), refused to dismiss plaintiff's money-damages claim. This consolidated appeal then ensued.

II. STANDARDS OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). Under MCR 2.116(C)(7), a defendant is entitled to summary disposition if the plaintiff's claim is "barred because of immunity granted by law . . . ." *Id*. (quotation marks and citation omitted). "In determining whether a plaintiff's claim is barred by immunity granted by law under MCR 2.116(C)(7) . . . [t]he court accepts well-pleaded allegations as true and construes them in a light most favorable to the non-moving party." *Tryc*, 451 Mich at 133-134. Once a defendant has raised the defense of governmental immunity, "the plaintiff must allege facts justifying application of an exception to governmental immunity in order to survive a motion for summary disposition." *Id.* at 134.

Under MCR 2.116(C)(4), a party is entitled to summary disposition if "[t]he court lacks jurisdiction of the subject matter." We review de novo whether a court has jurisdiction over a particular claim. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005).

We also review de novo both a trial court's decision on the defense of governmental immunity, *Co Rd Ass'n of Mich v Governor*, 287 Mich App 95, 117-118; 782 NW2d 784 (2010), as well as the legal questions of "[w]hether the defendant had a clear legal duty to perform and whether the plaintiff had a clear legal right to the performance of that duty" that arise in mandamus actions. *Mich Civil Rights Initiative v Bd of State Canvassers*, 268 Mich App 506, 514; 708 NW2d 139 (2005). However, "[t]his Court reviews a trial court's grant or denial of a writ of mandamus for an abuse of discretion." *White-Bey v Dep't of Corrections*, 239 Mich App 221, 223; 608 NW2d 833 (1999).

> application shall result in denial justification review by the department. [2004 ACCS R 325.2205(2).]

Finally, statutory interpretation is a question of law reviewed de novo. *In re MCI*, 460 Mich 396, 413; 596 NW2d 164 (1999).

III. ANALYSIS

A. GOVERNMENTAL IMMUNITY

Defendant first argues that plaintiff's damages claim is barred under the doctrine of governmental immunity. Under MCL 691.1407 of the Government Tort Liability Act (GTLA), "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The term "governmental agency" includes departments of the state of Michigan. MCL 691.1401(c), (d). Therefore, "defendant state agencies are immune from tort liability if they are 'engaged in the exercise or discharge of a governmental function' at the time the tort occurs." *Harrison v Corrections Dep't Dir*, 194 Mich App 446, 450; 487 NW2d 799 (1992). The immunity extends to all tort liability, including intentional torts. *Id.* at 450-451.

Chapter 44 of the Revised Judicature Act of 1961 (RJA) governs mandamus actions. Relevant to this discussion are four statutes, MCL 600.4401(1), 600.4411, 600.4421 and 600.4431. MCL 600.4401(1) provides, in relevant part, "An action for mandamus against a state officer shall be commenced in the court of appeals, or in the circuit court in the county in which venue is proper or in Ingham county, at the option of the party commencing the action." MCL 600.4411 provides further:

> Whenever mandamus is directed to any public officer, body or board, corporation or corporate officer, commanding them to perform any duty, specially enjoined upon them by any provisions of law, in addition to ordering the performance of such duty, if it appears to the court that such officer, or any member of such body or board, has, without just excuse, refused or neglected to perform the duty so enjoined, the court may impose a fine not exceeding $250.00 upon every such officer or member of such board or body.

MCL 600.4421 discusses fines further and provides that "[t]he payment of such fine shall be a bar to any action for any penalty incurred by such officer, or member of such body or board, by reason of his refusal or neglect to perform the duty so enjoined." Finally, MCL 600.4431 provides that "[d]amages and costs may be awarded in an action for mandamus. No damages may be allowed in mandamus against a public officer who, in good faith, acted erroneously."

Defendant contends that the RJA subsections, when read together, only allow for damages when a writ of mandamus is granted. However, our comparison of subsections 4411, 4421, and 4431 compels the opposite conclusion.

When interpreting a statute, the primary goal of this Court is to give effect to the intent of the Legislature. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW 2d 705 (2003), as cited in *McNeil v Charlevoix County*, 484 Mich 69, 75; 772 NW2d 18 (2009). "In general, where statutes relate to the same subject matter, they should be read, construed, and applied together to distill the Legislature's intent." *In re MCI*, 460 Mich at 412.

Subsection 4411 uses the language "[w]henever mandamus is directed," but subsection 4431 uses the language "in an action for mandamus." The fact that the Legislature used different terms in these two subsections indicates an intent by the Legislature to distinguish imposition of a $250 fine from damages and costs. See *id*. The imposition of a fine is conditioned on the writ of mandamus, whereas a damage award is not conditioned on the writ of mandamus. If the Legislature had intended to condition an award of damages on the issuance of a writ of mandamus, the Legislature could have so stated in subsection 4431.

Defendant also contends that plaintiff's claim for money damages sounds in tort and is, therefore, barred by governmental immunity. However this contention is contrary to this Court's holding in *Mercer*, 274 Mich App 329. In *Mercer*, this Court expressly held that the defendants were "not immune from an award of damages under MCL 600.4431," *id.* at 334, because "the statutory grant of damages in mandamus actions is not subject to the GTLA." *Id* at 332. We explained that a mandamus claim addresses "governmental inaction," while tort immunity under the GTLA addresses the discharge of a governmental function, i.e., "governmental action." *Id* at 333-334.

> In short, if a plaintiff prevails in a mandamus proceeding, then it cannot be said that the defendant was acting in the discharge of a governmental function. Rather, of necessity, the defendant must have been failing to act and failing to act was not within any discretion granted to the defendant. And, by the express and unambiguous terms of MCL 691.1407, governmental tort immunity applies to governmental action and is, therefore, inapplicable to any suit in which mandamus may be granted. And, by extension, immunity does not bar the recovery of damages under MCL 600.4431. [*Id.*]

Furthermore, "a mandamus action is an equitable action. Therefore, it is not a tort action and falls outside the provisions of governmental tort immunity." *Id.* at 334.

In the present case, plaintiff sought damages under a mandamus action, not a tort action. According to our holding in *Mercer*, defendant was not entitled to summary disposition of the damages claim under governmental immunity.

Defendant challenges the validity of *Mercer* and requests that we reconsider our decision. We decline plaintiff's invitation to do so based, in part, on the fact that our Supreme Court denied leave to appeal from our decision in *Mercer*, 480 Mich 858 (2007). Furthermore, we are not persuaded by the arguments presented by plaintiff that the basis for our decision in *Mercer* was flawed or that our decision in *Mercer* is contrary to legislative intent relative to the proper application of the GTLA.

B. MOOTNESS

Defendant next argues that plaintiff's claim for damages should be dismissed as moot. Courts do not have the judicial authority to decide moot cases. *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187, amended by 486 Mich 1041 (2010). "An issue is moot if an event has occurred that renders it impossible for the court to grant relief. We will review a moot issue only

if it is publicly significant and is likely to recur, yet is likely to evade judicial review." *Attorney General v Pub Serv Comm*, 269 Mich App 473, 485; 713 NW2d 290 (2005).

Although plaintiff's alleged damages are not fully specified in the record, there is a basis for concluding that plaintiff may have suffered damages by defendant's delay.[2] Plaintiff asserts that it was damaged for the following reasons: (1) plaintiff was forced to file this lawsuit to force action, thereby incurring costs and fees; and (2) plaintiff was prevented from taking other action to challenge the BCMCA's denial of its application while it waited for the denial justification review. In particular, plaintiff asserts that it could have filed suit against BCMCA directly to challenge the BCMCA's procedures.

This Court has previously held that damages for past failure to comply with a statute may be awarded in a mandamus action. *Mercer*, 274 Mich App at 330. Further, our Supreme Court has held that the mooting of a request for mandamus does not moot a claim for damages. *East Grand Rapids Sch Dist v Kent Co Tax Allocation Bd*, 415 Mich 381, 391; 330 NW2d 7 (1982). See also *UAW v Governor*, 388 Mich 578, 584-585; 202 NW2d 290 (1972) (holding that the inability to obtain mandamus did not render a damages claim moot). Consequently, plaintiff's damages claim is not moot. The trial court correctly declined to dismiss plaintiff's damages claim.

C. SUBJECT-MATTER JURISDICTION

Defendant finally argues that the circuit court lacks jurisdiction to hear plaintiff's claim for damages, contending that the claim should have been brought in the Court of Claims. However, this argument is contrary to the plain language of MCL 600.4401(1) which provides that "[a]n action for mandamus against a state officer[3] shall be commenced in the court of appeals, or in the circuit court in the county in which venue is proper or in Ingham county, at the option of the party commencing the action." The word "shall" is mandatory language. *Ligons v Ctirrenton Hosp*, 490 Mich 61, 73; 803 NW2d 271 (2011). Nothing in the statute provides that jurisdiction is appropriate in the Court of Claims. See also *People v Young*, 220 Mich App 420, 434; 559 NW2d 670 (1996) ("[A] complaint for mandamus can be brought *only* in the Court of Appeals, the circuit court in the county where venue is proper, or in the Ingham Circuit Court" [emphasis added]).

Furthermore, even if we were to construe this mandamus action as a tort claim, MCL 600.6419(4) clarifies that MCL 600.6419(1)(a)

[2] We express no opinion as to whether plaintiff actually suffered damages.

[3] Although MCL 600.4401(1) uses the qualifier "against a state officer," we have held that jurisdiction over a mandamus action against the state is provided by MCL 600.4401(1). *Behnke, Inc v Michigan*, 278 Mich App 114, 119; 748 NW2d 253 (2008). Thus, MCL 600.4401(1) applies to all mandamus actions, not only mandamus actions against an individual state officer.

> shall not deprive the circuit court of this state of jurisdiction over . . . proceedings for declaratory or equitable relief, or any other actions against state agencies based upon the statutes of this state in such case made and provided, which expressly confer jurisdiction thereof upon the circuit court.

Thus, because MCL 600.4401(1) expressly vests jurisdiction of mandamus claims in "the court of appeals, or in the circuit court in the county in which venue is proper or in Ingham county," MCL 600.6419(1)(a) prevents the Court of Claims from depriving the circuit court of that jurisdiction. Accordingly, we hold that the trial court properly determined that it had jurisdiction over these claims.

III. CONCLUSION

The trial court properly denied summary disposition to defendant on the basis of governmental immunity, mootness, and lack of jurisdiction.

Affirmed. Plaintiff having prevailed, may tax costs. MCR 7.219(A).

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello