STATE OF MICHIGAN

COURT OF APPEALS

Estate of ANDREW BALL, JR.

KAREN ELAINE KEYWORTH, Personal Representative for the Estate of ANDREW BALL, JR, and ELAINE PULLEN BALL

Plaintiffs-Appellees,

v

STATE OF MICHIGAN, DEPARTMENT OF MILITARY AND VETERANS' AFFAIRS, and GRAND RAPIDS HOME FOR VETERANS

Defendants-Appellants.

UNPUBLISHED
August 26, 2014

No. 314861
Court of Claims
LC No. 12-000128-MH

Before: STEPHENS, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Defendants appeal an order of the Court of Claims denying their motion for summary disposition under MCR 2.116(C)(7) (immunity granted by law). We affirm.

The decedent, Andrew Ball, Jr., was an honorably discharged World War II veteran. The decedent was admitted to the Grand Rapids Home for Veterans (GRHV), a 758-bed nursing home for veterans that includes two 35-bed nursing centers for the care of Alzheimer's dementia, because of his worsening Alzheimer's dementia. His wife, Elaine Ball, was also admitted to the GRHV. Apparently, the decedent would rise during the night and leave the home. This behavior led to his placement in a secured dementia unit. The complaint alleges that, at some point, Mrs. Ball requested to reside in the same unit with the decedent, who was then transferred out of the secure unit and back to the open unit because Elaine could not be moved to the secure unit.

On May 3, 2011, following the transfer, the decedent wandered out of his unit and got into bed with another resident, and the decedent was returned to the secure dementia unit. Apparently, the decedent was often observed with bruising and was also observed wandering into other rooms. On April 13, 2012, the decedent again wandered into another room, whose resident, according to the complaint, "assaulted Mr. Ball, striking him several times in the face and head." Because of these injuries, the decedent was transferred to Metro Hospital on April

14, 2012. His condition worsened and he passed away on April 17, 2012, from "[m]edical complications of blunt force injuries of head"; his death was ruled a homicide.

Plaintiffs alleged ordinary negligence with respect to the decedent, and negligent infliction of emotional distress and general negligence with respect to Mrs. Ball. Defendants motioned for summary disposition under MCR 2.116(C)(7), arguing that plaintiffs' claims "fail to abrogate the governmental immunity afforded the State by the Governmental Tort Liability Act, MCL 691.1407(1)." The Court of Claims denied the motion. Defendant argues that this was error.

Whether governmental immunity applies is a question of law reviewed de novo, as is the grant or denial of a motion for summary disposition. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). The interpretation of a statute is also a question of law reviewed de novo. *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998), overruled in part on other grounds by *Rafferty v Markovitz*, 461 Mich 265, 272 n 6; 602 NW2d 367 (1999).

The foremost rule of statutory construction is to discern and give effect to the intent of the Legislature. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). Effect should be given to "every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory." *Id*. at 311-312. Each word or phrase of a statute is given its commonly accepted meaning, unless otherwise expressly defined. *McAuley*, 457 Mich at 518. "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

The statutory section at issue provides:

> This act does not grant immunity to a governmental agency or an employee or agent of a governmental agency with respect to providing medical care or treatment to a patient, except medical care or treatment provided to a patient in a hospital owned or operated by the department of community health or a hospital owned or operated by the department of corrections and except care or treatment provided by an uncompensated search and rescue operation medical assistant or tactical operation medical assistant. [MCL 691.1407(4).]

Quoting from *Stedman's Medical Dictionary* (26th ed), this Court has defined a "patient" as "'[o]ne who is suffering from any disease or behavioral disorder and is under treatment for it.'" *McLean v McElhaney*, 289 Mich App 592, 602; 798 NW2d 29 (2010) (alteration by *McLean* Court). The *McLean* panel also concluded that "medical care or treatment" is not limited to physical illness, but extends to mental illness as well. *Id*. at 599-600, 604. That the decedent suffered from Alzheimer's disease is not contested. It is also clear that the decedent was admitted to the GRHV because of his Alzheimer's and was placed in the secured dementia unit due to its effects on his behavior. Although the staff attempted to bring Mr. and Mrs. Ball into closer proximity, this was impossible due to his behavior and he was again placed in the secured dementia unit. Defendant does not contest that if the claims sounded in medical malpractice, then MCL 691.1407(4) would abrogate sovereign immunity. However, plaintiff has not pleaded medical malpractice, but only various forms of ordinary negligence.

Generally, "a governmental agency is immune from tort liability" when exercising a governmental function. MCL 691.1407(1). Further, exceptions to governmental immunity should be narrowly tailored. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003).

The Michigan Supreme Court has indicated that not all negligence in a medical context is medical malpractice. See *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 421-422; 684 NW2d 864 (2004). Two elements are necessary for a medical-malpractice claim. *Id*. at 422. First, such malpractice "can occur only within the course of a professional relationship." *Id*. (internal quotation marks and citations omitted). Second, "claims of medical malpractice necessarily raise questions involving medical judgment." *Id*. (internal quotation marks and citation omitted). In *Bryant*, the Court noted that because an "employee of a licensed health care facility was engaging in medical care at the time the alleged negligence occurred[,] . . . the plaintiff's claim may *possibly* sound in medical malpractice; it does not mean that the plaintiff's claim *certainly* sounds in medical malpractice." *Id*. at 421. Because ordinary negligence raises "issues that are within the common knowledge and experience of the [fact-finder]," *id*. at 423-424 (internal quotation marks and citation omitted), if the "reasonableness of the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence," *id*. at 423. Under the facts of *Bryant*, where a patient became tangled in her bedding and thus the risk of asphyxiation was known, the Court found it was ordinary negligence to not take "*some* sort of corrective action to prevent future harm after learning of the hazard." *Id*. at 430-431. The fact-finder did not need expert testimony but could "rely on common knowledge and experience in determining whether defendant ought to have made an attempt to reduce a known risk of imminent harm to one of its charges." *Id*. at 431.

MCL 691.1407(4) employs the phrases "medical care" and "medical treatment" and grants an exception to governmental immunity in both circumstances. The conjunction "or" signals alternatives, and, significantly, those alternatives are consistent with the distinction drawn in *Bryant* between the exercise of medical judgment and the exercise of care that is within common knowledge and experience. Thus, MCL 691.1407(4) creates a broad category of behavior that is subject to the exception. Defendant focuses on the meaning of the phrase "with respect to." Defendant argues that "a claim 'with respect to' medical care or treatment would necessarily arise in the course of a professional relationship and raise questions involving medical judgment." Plaintiff contends that the phrase simply means "relating to," which results in a broader interpretation than the one urged by defendant.

Webster's New World Dictionary (1984) defines "respect," in part, to mean "to concern; relate to." Thus, immunity is waived when the claim arises from facts relating to medical care or treatment. Mr. Ball was admitted to the GRHV to receive supervised care for his Alzheimer's dementia, and his death was related to the behavioral symptom of "wandering." Accordingly, it is clear that there was a sufficient nexus for the statute to apply. The trial court did not err in denying defendants' motion for summary disposition.

Affirmed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Patrick M. Meter