

STATE OF MICHIGAN
COURT OF APPEALS

WOOD CARE X, INC. d/b/a CARETEL INNS OF
LINDEN,

Plaintiff-Appellee,

v

DEPARTMENT OF COMMUNITY HEALTH,

Defendant-Appellant,

and

JANET OLSEWSKI,

Defendant.

UNPUBLISHED
January 25, 2011

No. 294480
Genesee Circuit Court
LC No. 08-089784-CZ

WOOD CARE X, INC. d/b/a CARETEL INNS OF
LINDEN,

Plaintiff-Appellee,

v

DEPARTMENT OF COMMUNITY HEALTH,

Defendant-Appellant,

and

JANET OLSEWSKI

Defendant.

No. 294824
Court of Claims
LC No. 2008-000132-MK

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

PER CURIAM.

Defendant, Department of Community Health, appeals as of right an order granting plaintiff's request for mandamus and orders denying defendant's motions for summary disposition in these consolidated appeals. We affirm in part and reverse in part.

Prior to October 1, 1988, plaintiff along with several sister corporations sought Certificates of Need (CON) to construct and operate nursing homes in various Michigan counties. Defendant denied those requests. Administrative appeals of those denials resulted in a settlement agreement being reached in March of 1993 between plaintiff and defendant. Some of plaintiff's sister corporations made similar settlement agreements and some withdrew their CON applications.

In March of 2008, after plaintiff built its nursing home, plaintiff requested that defendant perform a survey of its nursing home for Medicare certification. Defendant refused. Plaintiff sued, bringing a complaint for mandamus in the Genesee Circuit Court. Plaintiff argued that defendant had a statutory, nondiscretionary duty to perform the survey. Plaintiff also brought a breach of contract case against defendant, premised on the settlement agreement, in the Court of Claims. Plaintiff argued that defendant agreed to perform the Medicare survey when it settled the CON matter. The contract case was transferred to the circuit court where the cases were joined.

In both cases defendant primarily argued that, as a contractor of the federal government, it was not authorized to complete a Medicare-only survey of plaintiff's facility at the time of plaintiff's request because there was a moratorium on such surveys. Defendant also argued that it did not breach the settlement agreement by failing to perform the requested Medicare survey because defendant never agreed to perform a Medicare survey and it had no authority to make such an agreement. After various motions for summary disposition were filed, the trial court granted plaintiff's request for mandamus holding that, under its own administrative regulations, defendant was required to perform the survey, i.e., defendant had a nondiscretionary duty to perform the survey. Thus, defendant was ordered to complete the survey process and, after it was completed, the mandamus action was dismissed. Defendant sought leave to appeal the order granting mandamus, but leave was denied. *Wood Care X, Inc v Dep't of Community Health*, unpublished order of the Court of Appeals, entered June 12, 2009 (Docket No. 292000). Defendant once again appeals the order and the appeal is assigned docket number 294480.

The contract action, however, was not dismissed by motion because the trial court held that the contract was ambiguous as to whether defendant agreed to perform the Medicare survey. The court also held that plaintiff's action was not a tort action; thus, defendant was not entitled to governmental immunity and the matter was scheduled for trial. Defendant appealed the order denying its claim of immunity and the appeal is assigned docket number 294824. See MCR 7.202(6)(a)(v); MCR 7.203(A)(1). This Court consolidated the appeals. *Wood Care X, Inc v Dep't of Community Health*, unpublished order of the Court of Appeals, entered November 4, 2009 (Docket Nos. 294480, 294824).

Docket No. 294480

Defendant argues that the circuit court abused its discretion in issuing the writ of mandamus compelling defendant to perform a Medicare survey of plaintiff's nursing home because plaintiff did not establish that it had a right to this extraordinary remedy. We disagree.

First, we consider plaintiff's argument that this issue should not be decided on the ground that it is moot because defendant already performed the survey at issue. Generally, an appellate court will not review a moot issue. *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 493; 608 NW2d 531 (2000). An issue is moot if an event has occurred which renders it impossible for the court to grant relief. *Id.* However, a court will review a moot issue if it is publicly significant and is likely to recur but yet is likely to evade judicial review. *Attorney General v Mich Pub Serv Comm*, 269 Mich App 473, 485; 713 NW2d 290 (2005). We note that defendant did seek leave to appeal the order granting mandamus, but leave was denied and the survey was completed. Because we conclude that the issue presented in this case has public significance and is likely to recur yet evade judicial review, we will review it.

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). As a general rule, this Court reviews de novo the interpretation and application of unambiguous statutes and administrative rules. *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 64; 678 NW2d 444 (2003). A trial court's determination of the existence and extent of a duty is also subject to de novo review on appeal. *Mich Civil Rights Initiative v Bd of State Canvassers*, 268 Mich App 506, 514; 708 NW2d 139 (2005). A decision to grant a writ of mandamus is reviewed for an abuse of discretion. *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005).

In *State Bd of Ed v Houghton Lake Community Sch*, 430 Mich 658; 425 NW2d 80 (1988), our Supreme Court explained that:

The primary purpose of the writ of mandamus is to enforce duties created by law, where the law has established no specific remedy and where, in justice and good government, there should be one. [*Id.* at 667 (citation omitted).]

A writ of mandamus may not be issued unless the plaintiff has carried its burden of proving that the plaintiff had a clear legal right to the performance of the specific duty sought to be compelled and the defendant had a clear legal duty to perform it. *Casco Twp*, 472 Mich at 577; *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 492; 688 NW2d 538 (2004) (citation omitted). Further, the duty sought to be ordered must be ministerial, involving no exercise of discretion or judgment, and the plaintiff must be without an adequate legal remedy. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 438; 722 NW2d 243 (2006).

Here, plaintiff claimed that defendant had a clear legal duty to perform the requested survey of its nursing home and plaintiff had a clear legal right to the performance of that specific duty. The duty to perform and the right to the performance allegedly arose from statute and administrative rules. First, plaintiff argued, MCL 333.20131(1) of the Public Health Code mandates that defendant establish a licensing and certification system for health care facilities,

including plaintiff's nursing home. Second, plaintiff argued, it requested Medicare certification consistent with the meaning of "certification" provided in MCL 333.20104(1), which requires that a survey be conducted. And, third, plaintiff argued, the Michigan Administrative Code (AC) Rule 325.21506(1) specifically commands defendant to conduct such a survey within three months of a request.

To the contrary, defendant argued that it did not have a duty to conduct a Medicare-only certification survey. First, Medicare is a federal program under the control of Center for Medicare and Medicaid Services (CMS) which is an agency within the federal department of Health and Human Services (HHS); thus, defendant must be authorized by CMS to perform such a survey. Second, Rule 325.21506 only imposes upon defendant a duty to perform Medicaid certification surveys for the State, not Medicare surveys for the federal government. Third, according to Rule 325.21504, nursing homes in Michigan may be Medicaid-only facilities or dual certified facilities, not Medicare-only facilities; thus, defendant had no duty to perform a Medicare-only certification survey. We turn to the applicable statutes and administrative rules.

Plaintiff is a "nursing home" under MCL 333.20106(1)(h) that sought certification as a Medicare skilled nursing facility, 42 USCA Sec. 1395i-3(a). MCL 333.20131 provides that defendant "shall establish a comprehensive system of licensure and certification for health facilities or agencies" MCL 333.20131(2) states that defendant "may certify a health facility or agency, or part thereof, defined in section [MCL 333.20106] or under section [MCL 333.20115] when certification is required by state or federal law, rule, or regulation." Thus defendant is the entity charged with the certification process. MCL 333.20104 defines "certification" as follows:

- (1) "Certification" means the issuance of a document by the department to a health facility or agency attesting to the fact that the facility or agency meets both of the following:
 - (a) It complies with applicable statutory and regulatory requirements and standards.
 - (b) It is eligible to participate as a provider of care and services in a specific federal or state health program.

Defendant's regulations are set forth at 1999 AC, R 325.20101 *et seq.*

To begin the certification process, plaintiff submitted an application for certification pursuant to Rule 325.21501, which states:

A nursing home or nursing care facility, or distinct part thereof, shall not be eligible to participate in a federal or state health program requiring certification . . . unless certified as such by the department in accordance with this code, these rules, and applicable federal and state law and regulations or unless certified by the U.S. secretary of health and human services.

With regard to the timing of the application, Rule 325.21502 provides, in pertinent part:

Applications for initial certification may be made at any time by a currently licensed nursing care facility.

With regard to the processing of the certification application, Rule 325.21504 provides:

(1) The department shall determine whether an application for initial or renewed certification is complete and shall notify the applicant in writing if additional information is required to complete the application or determine compliance with the code, these rules, and applicable federal law and regulations. The department shall consider each completed application and make a determination in the matter.

(2) By applying for or accepting certification, a facility authorizes the department and its representatives to conduct the surveys, inspections, and investigations necessary to determine compliance with applicable certification standards.

(3) On the basis of the information supplied to it by the applicant and any other information available to it, including the facility survey and evaluation, the department may take any of the following actions with respect to the application for certification:

(a) Issue or renew the certification, except as provided in subdivision (c) of this subrule.

(b) Deny or limit the certification, except as provided in subdivision (c) of this subrule.

(c) In the case of a skilled nursing facility which has applied for certification for purposes of participating in both the medicare and medicaid programs, recommend to the U.S. secretary of health and human services that certification be issued, renewed, limited, or denied.

(4) Except as otherwise provided by federal law and regulation, action by the department pursuant to subrule (3)(b) of this rule shall be preceded by a notice of intent to deny, suspend, limit, or revoke the certification and opportunity for a hearing in accordance with part 19 of these rules. The department's final decisions with respect to the granting, suspension, limitation, or revocation of a certification shall be sent simultaneously to the facility and to the department of health and human services and to the department of social services as required.

With regard to the necessary surveys and investigations, Rule 325.21506(1) states:

The department shall conduct a survey and investigation of a facility applying for initial or renewed certification within the 3-month period following receipt of the application and, in the case of renewals, within the 3-month period before the

expiration date of the current certification. The department shall not issue or renew a certification until the completion of such a survey and investigation.

And, under Rule 325.21510(1):

A licensed nursing care facility shall, at the facility's request, be certified by the department . . . as a skilled nursing facility when it is determined by the director of the department . . ., on the basis of facility survey, inspection, investigation, and evaluation, that the facility complies with applicable state and federal statutes, rules, and other standards for skilled nursing facilities.

Further, Rule 325.21514(1) provides that defendant “may deny, limit, suspend, or revoke a certification for failure to comply with the code, these rules, or applicable provisions of federal law and regulation.”

In construing administrative rules, the rules of statutory construction apply. *Attorney General v Lake States Wood Preserving, Inc*, 199 Mich App 149, 155; 501 NW2d 213 (1993). We first turn to the language of the rule and, if it is unambiguous, the rule must be enforced as written. *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010). The fair and natural import of the terms employed, in view of the subject matter of the law, governs. *In re Wirsing*, 456 Mich 467, 474; 573 NW2d 51 (1998) (citation omitted). After considered review of the applicable provisions, we agree with the trial court and conclude that defendant had a duty to conduct the requested survey.

It is clear that defendant is responsible for the certification process and that an application for initial certification “may be made at any time.” See Rule 325.21502. Rule 325.21506(1) mandates, through the use of the word “shall,” that defendant conduct a survey and investigation within three months following receipt of the application. The administrative rules clearly provide that certification of an entity depends solely upon an applicant's compliance with the requirements of the public health code, the rules, and applicable federal and state law and regulations, i.e., particular certification standards. We could find no reference in the administrative rules or elsewhere that the certification process, or an applicant's eligibility for certification, depends upon whether CMS authorized defendant to conduct the requested survey. For example, Rule 325.21510(1) provides that a licensed nursing care facility *shall* be certified when it is determined “on the basis of facility survey, inspection, investigation, and evaluation, that the facility complies” with the applicable certification standards. Neither this administrative rule nor any other references the purported role, as claimed by defendant, of CMS in authorizing certification surveys. Although we agree with defendant that an administrative agency's interpretation of its own rule is entitled to deference, *Reiss v Pepsi Cola Metro Bottling Co, Inc*, 249 Mich App 631, 637; 643 NW2d 271 (2002), principles of statutory construction are applied in construing administrative rules. *In re Complaint of Consumers Energy Co*, 255 Mich App 496, 503-504; 660 NW2d 785 (2003). An agency's interpretation of a rule cannot overcome its plain meaning. *Id.* at 504. Clearly defendant may only certify to CMS that plaintiff's nursing home is a skilled nursing facility—CMS is not obligated to act in any particular way with regard to that certification, including entering into a provider agreement with plaintiff. Thus, we reject defendant's argument that conducting the requested survey would have constituted an act of encroachment on “CMS's preemption of this field.” Accordingly, we conclude that defendant

had a duty to perform the requested survey and that plaintiff had a right to the performance of that duty.

Defendant next argues that its certification survey involves the exercise of discretion and therefore is not ministerial in nature because Rule 325.21506(1) does not identify which type of survey defendant must perform. We cannot agree. An act is ministerial if it is “prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” *Carter*, 271 Mich App at 439 (citation omitted). Here, according to Rule 325.21504(1), after a completed application is submitted, defendant “shall consider each completed application and make a determination in the matter.” In that regard, defendant “shall conduct a survey and investigation of a facility applying for initial or renewed certification within the 3-month period following receipt of the application” Rule 325.21506(1). The administrative rules do not distinguish between particular types of surveys or limit defendant’s mandatory duty to a particular type of survey. Defendant has failed to offer any authority for its position that it may engraft a word onto its own rules. See, e.g., *People v Jahner*, 433 Mich 490, 504; 446 NW2d 151 (1989) (citation omitted). Thus, we conclude that defendant’s duty to perform the survey was ministerial in nature.

Finally, defendant argues that plaintiff failed to avail itself of any of its remedies, precluding mandamus. We disagree. Again, the primary purpose of mandamus is to enforce duties created by law, where the law has established no specific remedy. *State Bd of Ed*, 430 Mich at 667. Here, when defendant refuses to perform a requested survey, the applicant is placed in a position of no recourse or remedy. Defendant’s regulations, as set forth at Rule 325.20101 *et seq.*, do not provide an appeal process in regard to the refusal. Defendant does not direct us to any statutory or regulatory provision that provides a remedy. Defendant merely argues that plaintiff could have sought a remedy against CMS, a federal agency. We disagree. Defendant alone is charged with the duty of implementing this State’s certification process. According to Rule 325.21501, an applicant is not “eligible to participate in a federal *or* state health program requiring certification . . . unless certified as such by” defendant. An applicant that is refused the necessary survey and investigation with regard to certification is completely foreclosed from even attempting to participate in either a federal or state health program that requires such certification.

In summary, we conclude that the trial court properly granted plaintiff’s motion for summary disposition with regard to its mandamus action. Plaintiff had a clear legal right to the performance of the requested survey, and defendant had a clear legal duty to perform the requested survey. Further, the act was ministerial in nature and, upon defendant’s refusal to perform the survey, plaintiff was left without another adequate legal or equitable remedy. See *Citizens for Protection of Marriage*, 263 Mich App at 492. Thus, the issuance of the writ of mandamus did not constitute an abuse of discretion and is affirmed. See *Casco Twp*, 472 Mich at 571.

Docket No. 294824

Defendant argues that plaintiff’s contract claim—premised on the CON that was issued in settlement of plaintiff’s administrative appeals following defendant’s initial denial of plaintiff’s request for a CON—should have been summarily dismissed by the trial court. Defendant,

however, seeks appellate review of an order other than the order denying governmental immunity. See MCR 7.202(6)(a)(v). Pursuant to MCR 7.203(A)(1), “[a]n appeal from an order described in MCR 7.202(6)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right.” Consequently, this Court lacks jurisdiction to consider the order denying defendant’s motion for summary disposition premised on grounds other than governmental immunity. Nevertheless, in the interest of judicial economy, we will consider the issue whether the CON agreement required defendant to perform a Medicare survey as on leave granted. See *Pierce v City of Lansing*, 265 Mich App 174, 182-183; 694 NW2d 65 (2005).

Plaintiff filed this contract matter seeking damages, specific performance, and a declaratory judgment based on defendant’s purported breach of the 1993 CON settlement agreement. Plaintiff contended that in the settlement, it was agreed between the parties that plaintiff’s nursing home would accept Medicare, but not Medicaid, in payment for its services, and that defendant would perform the necessary survey and certify the results to CMS. However, after the nursing home was built, defendant refused to perform the necessary survey and investigation for Medicare certification. Therefore, plaintiff claimed, defendant breached the settlement agreement. In its motion for summary disposition, defendant argued that the settlement agreement was unambiguous and clearly illustrated that defendant never agreed to conduct a Medicare-only survey of plaintiff’s nursing home. Further, defendant argued, because the settlement agreement contained an integration clause, it was conclusive and parol evidence was not admissible to contradict or vary the terms of the written contract.

The trial court denied defendant’s motion for summary disposition. The court held that the CON settlement agreement was ambiguous, holding that “the Settlement Agreement is completely silent on the issue of whether the facilities would be Medicare, Medicaid, or a combination of both. And Medicare and Medicaid facilities . . . are different, so the agreement’s ambiguous.” The court also noted that the “analysis of cost is different” and “the provision for future negotiations contributes to ambiguity.” Thus, the court held that parol evidence would be admissible in a trial related to plaintiff’s damages, if any, for defendant’s failure to perform the requested survey. After de novo review of this issue of contract interpretation, we disagree with the trial court’s conclusion. See *DaimlerChrysler Corp v G-Tech Prof Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

“The primary goal in the construction or interpretation of any contract is to honor the intent of the parties.” *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994). The intent of the parties is gleaned from the words used in the instrument. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998) (citation omitted). “This court does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning.” *Id.* (citations omitted.) Whether contract language is ambiguous is a question of law. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999). When a contract is unambiguous, it must be enforced according to its terms. *DaimlerChrysler*, 260 Mich App at 185. According to the parol evidence rule, “parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous.” *UAW-GM Human Resource Center*, 228 Mich App at 492 (citation omitted.)

Here, however, plaintiff argued—and the trial court agreed—that parol evidence was admissible on the threshold question whether the written settlement agreement was an integrated instrument that was a complete expression of the parties’ agreement. The settlement agreement, however, included an integration clause which provided:

13. Entire Agreement. The parties declare and represent that they fully understand the terms of this Agreement; that no promises, inducements, or agreements not herein expressed have been made between the parties; that this Agreement contains the entire agreement between the parties and may not be modified, except by subsequent written agreement; and that the terms of the Agreement are contractual and not a mere recital.

Despite the plain and clear language of this integration clause, plaintiff argued in the trial court, and continues to argue on appeal, that defendant agreed to perform a Medicare-only survey of plaintiff’s nursing home after it was built. Plaintiff claims that this promise is a missing essential term that was not reduced to writing, thereby illustrating that the agreement was only partially integrated and permitting the admission of parol evidence. We do not agree.

As this Court held in *UAW-GM Human Resource Center*, 228 Mich App at 495-496: “When the parties choose to include an integration clause, they clearly indicate that the written agreement is integrated; accordingly, there is no longer any ‘threshold issue’ whether the agreement is integrated and, correspondingly, no need to resort to parol evidence to resolve this issue.” Stated another way, “when the parties include an integration clause in their written contract, it is conclusive and parol evidence is not admissible to show that the agreement is not integrated except in cases of fraud that invalidate the integration clause or where an agreement is obviously incomplete ‘on its face’ and, therefore, parol evidence is necessary for the ‘filling of gaps.’” *Id.* at 502. There is no allegation of fraud in this case and, after review of the settlement agreement, it is not “obviously incomplete.” Therefore, defendant’s motion for summary disposition of this breach of contract action should have been granted. In light of our resolution of this issue, we need not consider defendant’s argument that it was entitled to governmental immunity.

Affirmed in part, reversed in part, and remanded to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

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