STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON

VICKY HERDUS,

Plaintiff,

vs.

READING EMERGENCY UNIT #1, INC.,

Defendant.
_____/

File No. 09-1637-NI

Honorable Chad C. Schmucker

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_____/

OPINION & ORDER
GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

For the reasons stated in this Opinion, I am GRANTING Defendant's Motion for Summary Disposition.

Facts

This case arises from a collision at an intersection between an ambulance and another vehicle. The ambulance, transporting a patient from Hillsdale Hospital to University of Michigan Hospital in Ann Arbor, with lights and sirens on, slowed down and went through a red light. Vicky Herdus drove into the intersection on a green light and struck the ambulance.

Immunity

Defendant claims immunity under MCL 333.20965. Plaintiff claims that Act does not apply, for several reasons. First, Plaintiff claims that the Act only applies to the patient in the ambulance. Second, Plaintiff questions whether this was an emergency transport. And, third, Plaintiff claims Defendants were grossly negligent.

The statute is not very clearly written and there are no cases, published or unpublished, which discuss the application to a Third Party motor vehicle accident. The language does not expressly include 3rd parties or limit the application to the person being transported

The statute states:

> (1) Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of a medical first responder, emergency medical technician, emergency medical technician specialist, paramedic, medical director of a medical control authority or his or her designee, or, subject to subsection (5), an individual acting as a clinical preceptor of a department-approved education program sponsor while providing services to a patient outside a hospital, in a hospital before transferring patient care to hospital personnel, or in a clinical setting that are consistent with the individual's licensure or additional training required by the medical control authority including, but not limited to, services described in subsection (2), or consistent with an approved procedure for that particular education program do not impose liability in the treatment of a patient on those individuals or any of the following persons:...(emphasis supplied)

Defendants argument can be restated as follows: This was an emergency, Defendants were providing services to a patient by driving the patient, the driving can not result in liability unless they were grossly negligent, and since they were not grossly negligent, plaintiff claim must fail.

The statute uses the word patient twice. First it states... *while providing services to a patient* ... But this language does not limit the immunity. The language simply states what the defendant must be doing in order to have immunity. Next it states..... *(the acts) do not impose liability in the treatment of a patient on those individuals* ... But this language is not really helpful in answering the question. Defendant suggests this means: Your negligent driving of this emergency patient will not result in liability. Plaintiff suggests it means: Your negligent driving of this emergency patient will not result in liability to the patient.

For whatever it is worth, the legislative history of Public Act 375 of 2000 is not helpful in deciding this issue.

Defendant has cited Castle v. Battle Creek Ambulance #277068 which applies the immunity to a bystander claim. But just as the claim in Castle was based on the negligent treatment of the patient Herdus's claim is based on the negligent driving of a patient.

The Defendant argues that transporting is treatment, so their driving was "treatment". The accident arises from allegedly negligent driving so it must be dismissed. Defendant claims it does not matter if the plaintiff is the ambulance patient or a third party. Other courts have held the transporting an emergency patient is "treatment". See Lee V Dowagiac (#289605).

I recognize this is an issue of first impression, it will arise again in other cases and as such, this may be an appropriate issue for a published opinion by the Court of Appeals. But, I find the statute applicable. Plaintiff's claim arises from the negligent driving of an emergency patient.

Emergency?

The Hillsdale Emergency Room contacted Reading Emergency and advised they had a patient that needs to go to the U of M Emergency Room Priority One. The Hillsdale ER's preference was to fly the patient, but air transport was not available.

Based on this information, Defendant claims this was unquestionably an emergency. Plaintiff questions whether it is. Five hours earlier, the patient was transported from home to Hillsdale ER without lights and sirens. After the accident with Ms. Herdus, another ambulance company assessed the patient and transported him without lights and sirens from the automobile accident scene to U of M ER. Plaintiff also relies on the findings at U of M which do not suggest that the patient was in an emergency. Finally, Plaintiff notes one of the insurance forms the Hillsdale doctor signed has language which suggests this may have been a non-emergency transfer. However, the doctor affirmed that it was his instruction in an affidavit, and his hospital dictation at the time confirms that he wanted an emergency transport.

Plaintiff argues that it is up to the emergency personnel to make the assessment, and that they have the authority to upgrade or downgrade depending on the situation. But, Plaintiff does not claim that the patient's condition changed during transport. In essence, Plaintiff claims that this never should have been an emergency transport.

The statute , MCL 333.20904(9) defines an emergency patient:

(9) "Emergency patient" means an individual with a physical or mental condition that manifests itself by acute symptoms of sufficient severity, including, but not limited to, pain such that a prudent layperson, possessing average knowledge of health and medicine, could reasonably expect to result in 1 or all of the following:

(a) Placing the health of the individual or, in the case of a pregnant woman, the health of the patient or the unborn child, or both, in serious jeopardy.

(b) Serious impairment of bodily function.

(c) Serious dysfunction of a body organ or part. (emphasis supplied)

See also MCL 333.20938 which refers to " *..a reasonable belief that an emergency condition exists..* "

The issue is not whether this *should* have been an emergency transport. A person could be transported to the hospital believing it was an emergency, but get to the hospital and find out that it was not. The question is whether the emergency personnel reasonably believed this was an emergency. Since the patient was examined by emergency room physician at the Hillsdale Hospital, and the doctor initially wanted him transported by air ambulance but since they were not flying requested an emergency ground transfer, I find there is no material issue of fact regarding Reading's reasonable belief of an emergency.

Gross Negligence

Plaintiff also argues that even if the statute applied, that the ambulance was being operated in a grossly negligent way so that immunity would still not apply. Indeed, the Act accepts gross negligence or willful misconduct. But, once again, most of the facts are uncontested. Taking the facts in a light most favorable to the Plaintiff, the ambulance had its lights and sirens activated. An air horn was activated before they entered the intersection. The ambulance slowed considerably before entering the intersection and entered the intersection at probably 25-35 miles per hour; perhaps even as much as 40 miles per hour. The speed limit was 50 mph. But, the ambulance entered the intersection on a red light.

Ambulances with lights and sirens operating are allowed to go through red lights if they slow down as may be necessary for safe operation, MCL 257.603(3)(b).. Plaintiff claims that they obviously did not slow down enough because the driver did not see Mrs. Herdus. Emergency vehicles must still be driven with due regard for the safety of others, *Terry v City of Detroit*, 226 Mich App 418, 429(1997). However, Ms. Herdus is required to yield to ambulances with emergency lights and sirens, MCL 257.653

In Lee, # 289605 the court explained the meaning of "gross negligence" as follows:

> The EMSA's "gross negligence" language requires evidence of "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Jennings, 446 Mich at 136-137. Thus, "a plaintiff must adduce proof of conduct 'so reckless as to demonstrate a substantial lack of concern for whether an injury results.'" Maiden v Rozwood, 461 Mich 109, 123; 597 NW2d 817 (1999). Significantly, "the content or substance of the evidence proffered must be admissible in evidence." Id. "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence." Id. at 122-123.

We know that the lights and sirens were operating and the air horn had been used, the ambulance had slowed down, and the ambulance was not speeding when it entered the intersection. Looking only one way, but not the other, or looking and somehow missing the vehicle, in these circumstances, can only amount to negligence, not gross negligence.

I find no material issue of fact as to whether regarding gross negligence.

Defendant's Motion for Summary Disposition is GRANTED.

IT IS SO ORDERED. This case is dismissed.

This is a final order which closes this case.

Dated: February 9, 2011

/s/
Chad C. Schmucker, Circuit Court Judge

The undersigned certifies that a copy of the above document was served upon attorneys of record by first class mail on the 9th day of February, 2011.

/s/
Patricia Clark, Judicial Secretary