SUPREME COURT
APR 2002
TERM

STATE OF MICHIGAN

IN THE SUPREME COURT

JEANNE and KRISTIN OMELENCHUK,
Co-Personal Representatives of
the Estate of George Omelenchuk,

Plaintiffs-Appellees,

v.

THE CITY OF WARREN, and the
WARREN FIRE DEPARTMENT,

Defendants-Appellants.

Supreme Court Case No: 117252
(After Remand)

Former Supreme Court
Case No.: 114782

Court of Appeals
Case No.: 204098

Macomb Circuit Court
Case No.: 96-5448-NH

PLAINTIFFS-APPELLEES' BRIEF ON APPEAL

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TABLE OF CONTENTS

Index of Authorities ii

Statement of Question Presented for Review iv

Statement of Facts 1

Statement Regarding Standard of Review 4

Summary of Argument 5

Argument 6

I. THE LEGISLATURE IN ENACTING THE EMERGENCY MEDICAL SERVICES ACT, SPECIFICALLY MCL 333.20965, INTENDED TO CREATE A STATUTORY EXCEPTION TO THE GOVERNMENTAL TORT LIABILITY ACT WHEREBY AN "AUTHORITATIVE GOVERNMENTAL UNIT" SUCH AS THE CITY OF WARREN WOULD BE VICARIOUSLY LIABLE FOR THE ACTS OF GROSS NEGLIGENCE OF ITS EMPLOYEE PARAMEDICS. 6

II. THE LEGISLATURE IN ENACTING MCL 333.20965(2), AT THE SAME TIME IT ENACTED SUBSECTION (1), DID NOT INTEND SUBSECTION (2) TO REFER TO THE GENERAL IMMUNITY PROVIDED TO GOVERNMENTAL UNITS IN MCL 691.1407(1) SO AS TO NOW REVOKE THE STATUTORY EXCEPTION IT HAD SO CLEARLY CREATED WHEN IT CONCURRENTLY ENACTED SUBSECTION (1). 11

III. THE LEGISLATURE IN ENACTING MCL 333.20965(2) IN 1990 INTENDED THAT SUBSECTION (2) REFER TO MCL 691.1407(2) SO AS TO ENSURE THAT A GOVERNMENTAL EMPLOYEE PARAMEDIC AND THE EMPLOYER AUTHORITATIVE GOVERNMENTAL UNIT AS A RESULT OF VICARIOUS LIABILITY WERE HELD TO THE SAME STANDARD OF IMMUNITY GRANTED TO ALL OTHER GOVERNMENTAL EMPLOYEES. 16

Request for Relief 19

INDEX OF AUTHORITIES

Cases **Pages**

Ballard v. Ypsilanti Township,
457 Mich 564, 577 NW2d 890 (1998) 10, 11

Brown v. Genesee County Board of Commissioners,
464 Mich 430, 437; 628 NW2d 471 (2001) 12

Coleman v. Gurwin,
443 Mich 59, 65; 503 NW2d 435 (1993) 4

Crawford v. School District No. 6,
342 Mich 574; 70 NW2d 789 (1955) 12

Dussia v. Merman,
486 Mich 244; 191 NW2d 307 (1971) 12

Dye v. St. John Hospital and Medical Center,
230 Mich App 661; 584 NW2d 747 (1998) 4

Finkler v. Zimmer,
258 Mich 336; 241 NW 851 (1932) 16

Gibbard v. Cursan,
225 Mich 311; 196 NW 398 (1923) 16, 17

Harsha v. Detroit,
261 Mich 586, 246 NW 849 (1933) 11

Hasty v. Broughton,
133 MichApp 107, 348 NW2d 299, 302 (1984) 10

Malcolm v. City of East Detroit,
180 MichApp 633, 447 NW2d 806 (1989) 6, 7, 8, 10, 14, 15

Malcolm v. City of East Detroit,
437 Mich 132, 468 NW2d 479 (1991) 6, 8, 9, 10, 11, 13, 14

Massey v. Mandell,
462 Mich 375; 614 NW2d 70 (2000) 4

Omelenchuk v. City of Warren,
461 Mich 567; 609 NW2d 177 (2000) 2, 8

Simmons v. Board of Education of Marlette Community Schools,
73 Mich App 1; 250 NW2d 777 (1976) 13

Stowers v. Wolodzko,
486 Mich 119; 191 NW2d 355 (1975) 12

Sun Valley Foods CO v. Ward,
460 Mich 230; 596 NW2d 119 (1999) 12

Tomes v. General Motors Corporation,
318 Mich 168; 27 NW2d 520 (1947) 13

Transamerican Freight Lines, Inc. v. Quimby,
381 Mich 149; 160 NW2d 865 (1968) 14

Turner v. Auto Club Ins Ass'n,
448 Mich 22; 528 NW 2d 681 (1995) 4

White v. Ann Arbor,
406 Mich 554; 281 NW2d 283 (1979) 4

Statutes/Court Rules/Other Authorities

MCL 8.3a 4

MCL 8.3-1 17

MCL 333.20706(2) 9

MCL 333.20737 ..... 6, 7, 8, 9, 10

MCL 333.20901, *et seq* 1

MCL 333.20965 ..... 7, 13, 14, 18

MCL 333.20965(1) ..... iv, 3, 6, 10, 11, 13

MCL 333.20965(1)(f) 5, 14, 15, 16

MCL 333.20965(2) ..... iv, 3, 5, 11, 13, 15, 16

MCL 333.20965(4) 3

MCL 691.1407(1) ..... iv, 3, 5, 7, 11, 13, 14, 15, 16, 18

MCL 691.1407(2) 5, 12, 16, 17, 18, 19

MCL 691.1407(2)(c) 7

1990 P.A. 179 ..... 7, 10

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

DID THE LEGISLATURE INTEND MCL 333.20965(2) TO IMPLICITLY REFER TO MCL 691.1407(1) SO AS TO REVOKE THE STATUTORY EXCEPTION PERMITTING A GOVERNMENTAL UNIT SUCH AS THE CITY OF WARREN TO BE VICARIOUSLY LIABLE FOR THE GROSS NEGLIGENCE OF ITS EMPLOYEES THAT THE LEGISLATURE HAD CLEARLY AND EXPLICITLY CREATED IN CONCURRENTLY ENACTED MCL 333.20965(1)?

Plaintiffs-Appellees say: "No".

Defendants-Appellants say: "Yes".

The Court of Appeals said: "No".

The Macomb County Circuit Court said: "Yes".

STATEMENT OF FACTS

Plaintiffs' decedent, George, Omelenchuk, died on February 13, 1994, after collapsing at work. On July 19, 1996 suit was commenced in the Macomb County Circuit Court against the City of Warren and the Warren Fire Department, alleging liability under the Emergency Medical Services Act (EMSA) [MCL 333.20901, *et seq*].

According to the allegations of the Complaint, George Omelenchuk was discovered on the floor of his business on February 13, 1994, by Jeanne Omelenchuk. (Complaint, ¶¶ 10, 11; Apx, p 5a) Jeanne Omelenchuk called the Warren Police Department, which responded by sending an EMS Unit whose crew members were the agents or employees of the Fire Department. (Complaint, ¶¶ 13, 27; Apx, pp 5a, 7a) These individuals attempted to place an endotracheal tube into Mr. Omelenchuk's trachea, but succeeded only in placing it into his esophagus. (Complaint, ¶¶ 15-16, 19; Apx, pp 5a, 6a) After insertion of the endotracheal tube, Mr. Omelenchuk was transported to Detroit Osteopathic Hospital, where the emergency room physician discovered that the tube had been inserted into the esophagus. (Complaint, ¶¶ 18-19; Apx, p 6a). Efforts to resuscitate Mr. Omelenchuk were unsuccessful. (Complaint, ¶¶ 19-20; Apx, p 6a)

Plaintiffs alleged that the conduct of the EMS crew members in their treatment of George Omelenchuk constituted gross negligence which was the proximate cause of Mr. Omelenchuk's death and which substantially decreased his chance of survival. (Complaint, ¶¶ 31-36; Apx, pp 9a-12a) It was further alleged that the City of Warren was vicariously liable for the gross negligence of its employees/agents. (Complaint, ¶¶ 29, 33; Apx, pp 7a, 11a)

On March 31, 1997, the City of Warren filed a motion for summary disposition, contending that it was entitled to a dismissal of the complaint on the bases of governmental immunity and the running of the statute of limitations. (Apx, pp 29a, *et seq*) Plaintiffs responded to this motion (Apx, pp 87a, *et seq*), and a hearing was held on May 12, 1997, at which time the circuit court granted Defendant's motion on the basis of governmental immunity.

(Tr 5/12/97, pp 10-11; Apx, pp 135a-136a) An order granting summary disposition was entered on May 23, 1997. (Order, 5/23/97; Apx, pp 138a-139a)

Plaintiffs filed a claim of appeal to the Michigan Court of Appeals on June 13, 1997, raising issues as to both the governmental immunity and statute of limitations defenses. Both issues were briefed by the parties. On April 6, 1999, the Court of Appeals affirmed, premised on the running of the statue of limitations. (Opinion, 4/6/99; Apx pp 140a-142a) On or about April 29, 1999, Plaintiffs filed a Motion for Rehearing with the Michigan Court of Appeals. The motion was not accepted by the Court and returned to Plaintiff's counsel by correspondence dated May 11, 1999. Plaintiffs filed a Delayed Application for Leave to Appeal to the Michigan Supreme Court on May 28, 1999, seeking review of the appellate ruling regarding the statute of limitations. Defendants thereafter filed a cross-application for leave to appeal, seeking review and affirmance of the circuit court's ruling on the basis of governmental immunity.

On March 28, 2000, in lieu of either granting or denying leave to appeal, the Michigan Supreme Court issued a per curiam opinion, vacating the judgment of the Court of Appeals based on the running of the statue of limitations, and remanding the case to the Court of Appeals for consideration of the immunity issue. Omelenchuk v. City of Warren, 461 Mich 567; 609 NW2d 177 (2000). (Apx, pp 143a-155a) On remand, and without further briefing or argument, the Michigan Court of Appeals reversed the circuit court's grant of summary disposition to the City of Warren. (Opinion, 6/23/00; Apx, pp 156a-157a) In a memorandum opinion dated June 23, 2000, the Court held that vicarious liability could be imposed on the City of Warren for the gross negligence of its employees. It rejected the City's contention that the Legislature's 1990 amendment to the EMSA, and specifically its addition of subsection (2), restored to the City the statutory governmental immunity defense of the Governmental Tort Liability Act. In a footnote, the Court of Appeals explained its ruling:

> Defendants argue that MCL 333.20965(2); MSA 14.15(20965(2) of the Emergency Medical Services Act (EMSA) refers to the Governmental Tort Liability Act (GTLA), and therefore summary disposition was proper pursuant to MCL 691.1407; MSA 3.996 (107). MCL 333.20965(2); MSA 14.15(20965)(2) provides that the provision governing gross negligence "does not limit immunity from liability otherwise provided by law for any of the persons listed in subsection (1)." However, review of the legislative intent underlying the Emergency Medical Services Act reveals that the legislation was reenacted with changes because it was scheduled to laps on September 30, 1989. House Bill Analysis HB 4952, Second Analysis, January 11, 1990. There is no evidence or expressed intention in the legislative analysis to eliminate vicarious liability by incorporating the provisions of the GLTA. *Id.* Defendants' contention is not supported by the legislative history.
>
> (Opinion, 6/23/00, p 2, n1; Apx, p 157a)

Defendants sought leave to appeal from the Michigan Supreme Court on July 14, 2000. That application was granted by Order dated December 18, 2001. The Court directed the parties to address a specific issue:

> On order of the Court, the application for leave to appeal from the June 23, 2000 decisions of the Court of Appeals is considered and is GRANTED. The parties are directed to address the issue of statutory interpretation posed by the interaction between MCL 691.1407(1) and MCL 333.20965(1): Does MCL 333.20965(4) refer to the general immunity provided to governmental units in MCL 691.1407(1) so as to require a reading of MCL 333.20965(1) that effectively reinstates the immunity that §20965(1) purported to *eliminate for acts or omissions of emergency medical personnel* resulting from gross negligence or willful misconduct?
>
> (Order, 12/18/01; Apx, p 158a)

STATEMENT REGARDING STANDARD OF REVIEW

The issue presented by this case concerns statutory interpretation, and is reviewed *de novo*. Dye v. St. John Hospital and Medical Center, 230 Mich App 661, 665; 584 NW2d 747 (1998). Moreover, the Michigan Supreme Court succinctly stated the principal rule of statutory construction in Massey v. Mandell, 462 Mich 375, 379-380; 614 NW2d 70 (2000) as follows:

> In examining a statue, it is our obligation to discern the legislative intent that may reasonably be inferred from the words expressed in the statute. White v. Ann Arbor, 406 Mich 554, 562; 281 NW2d 283 (1979). One fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation". Coleman v. Gurwin, 443 Mich 59, 65; 503 NW2d 435 (1993). Thus, when the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need of judicial construction; the proper role of a court is to apply the terms of the statute to the circumstances in a particular case. Turner v. Auto Club Ins Ass'n, 448 Mich 22, 27; 528 NW 2d 681 (1995). Concomitantly, it is our task to give the words used by the Legislature their common, ordinary meaning. MCL 8.3a; MSA 2.212(1).

SUMMARY OF ARGUMENT

The Legislature in enacting MCL 333.20965(1)(f) clearly and explicitly intended to create a statutory exception to the Governmental Tort Liability Act whereby an "authoritative governmental unit" such as the City of Warren could be vicariously liable for the acts of gross negligence of its employee paramedics. The Legislature when it enacted MCL 333.20965(2) did not intend MCL 333.20965(2) to refer to MCL 691.1407(1) so as to revoke implicitly what it so clearly and explicitly had created when it enacted MCL 333.20965(1)(f). What the Legislature did intend was to give effect to MCL 333.20965(1)(f). It did so by intending MCL 333.20965(2) to refer to MCL 691.1407(2) which ensured that a governmental unit such as the City of Warren could be held vicariously liable for the acts of an employee paramedic only if such employee paramedic satisfied the criteria set forth in MCL 691.1407(2). This reading of MCL 333.20965(2) gives effect to MCL 333.20965(1)(f) and ensures that governmental employees who are paramedics and the governmental units who are vicariously liable for those paramedics are afforded the same immunity protections as is provided to governmental employees who are not paramedics under MCL 691.1407(2).

ARGUMENT

I. THE LEGISLATURE IN ENACTING THE EMERGENCY MEDICAL SERVICES ACT, SPECIFICALLY MCL 333.20965, INTENDED TO CREATE A STATUTORY EXCEPTION TO THE GOVERNMENTAL TORT LIABILITY ACT WHEREBY AN "AUTHORITATIVE GOVERNMENTAL UNIT" SUCH AS THE CITY OF WARREN WOULD BE VICARIOUSLY LIABLE FOR THE ACTS OF GROSS NEGLIGENCE OF ITS EMPLOYEE PARAMEDICS.

The Legislature in enacting MCL 333.20965(1) created a statutory exception to the Governmental Tort Liability Act whereby an "authoritative governmental unit" such as the City of Warren is vicariously liable for the acts of gross negligence of its employee paramedics. Malcolm v. City of East Detroit, 437 Mich 132, 468 NW2d 479 (1991); Malcolm v. City of East Detroit, 180 MichApp 633, 447 NW2d 806 (1989). The Legislature initially enacted the Emergency Medical Services Act in 1978. MCL 333.20737; MSA 14.15(20737), the precursor to MCL 333.20965, provided that "all persons named in this section...are protected from liability unless the act of omission was the result of gross negligence or willful misconduct":

> When performing services consistent with the individuals' training, acts, or omissions of an ambulance attendant, emergency medical technician, emergency medical technician specialist, or advanced emergency medical technician do not impose liability on those individuals in the treatment of a patient when the service is performed outside a hospital. Such acts or omissions also do not impose liability on the authorizing physician or physician's designee, the person providing communication services or lawfully operating or utilizing supportive electronic communication devices, the ambulance operation, the hospital or an officer, member of the staff, nurse, or other employee of the hospital, or the authoritative or governmental unit or units. All persons named in this section, and emergency personnel from outside the state, are protected from liability unless the act or omission was the result of gross negligence or willful misconduct. MCL 333.20737; MSA 14.15 (20737).

The Legislature did not define the term "gross negligence". As written, the Legislature intended the Emergency Medical Services Act to apply to both governmental and nongovernmental paramedics and to governmental and nongovernmental ambulance services.

In 1986 the Legislature enacted the Governmental Tort Liability Act. Specifically, the Legislature enacted MCL 691.1407(1) which stated as follows:

> Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

The Legislature went on to define "gross negligence" to mean "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results". MCL 691.1407(2)(c).

With this statutory scheme in place, the Michigan Court of Appeals in Malcolm v. East Detroit, 180 MichApp 633, 447 NW2d 806 (1989) was confronted with the issue of whether or not the Emergency Medical Services Act, specifically MCL 333.20737; MSA 14.15(20737), set forth a statutory exception to the Governmental Tort Liability Act. The Court looked specifically at the Legislature's use of the word "person" in the Emergency Medical Services Act. The Court went on to find that "since no contrary definition or intent is clearly manifested in §20737, all persons must, by express statutory definition and construction, include governmental units". The Court then held that MCL 333.20737, MSA 14.15 (20737) provided a limited statutory exception to governmental immunity whereby an authoritative governmental unit would be vicariously liable for the gross negligence of its employee paramedics.

The Legislature repealed the entire Emergency Medical Services Act effective July 2, 1990. The Legislature then went on to reenact the Emergency Medical Services Act in substantially similar form as 1990 P.A. 179. This public act was immediately effective as of July 2, 1990. MCL 333.20737, MSA 14.15 (20737) was amended and renumbered. The new statute that was effective July 2, 1990 is MCL 333.20965, MSA 14.15 (10965). The Legislature enacted subsection (1) of the new statute which is essentially similar to the previous statute. The Legislature also added subsection (2). The portions of MCL 333.20965 that are pertinent to the present case are set forth below:

(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 or medical director of a medical control authority...while providing services to a patient outside a hospital, or in a hospital before transferring patient care to hospital personnel, that are consistent with the individual's licensure, or individual training required by the local medical control authority, do not impose liability in the treatment of a patient on those individuals or any of the following persons:

* * *

(f) The authoritative governmental units or units;

(2) Subsection (1) does not limit immunity from liability otherwise provided by law for any of the persons listed in subsection (1).

The Court of Appeals in Omelenchuk v. City of Warren (on remand), 6/23/00 page 2, NL; Apx page 175(a) pointed out that the 1990 Emergency Medical Services Act legislation was reenacted with changes because it was scheduled to lapse. The Court also pointed out that there was "no evidence or expressed intention in the legislative analysis to eliminate vicarious liability by incorporating the provisions of the GTLA".

The Defendant in Malcolm appealed to the Michigan Supreme Court. Although the EMSA had been amended by the Legislature following the release of the Malcolm Court of Appeals Opinion, the Michigan Supreme Court construed only the pre-amendment provisions contained in MCL 333.20737. The Michigan Supreme Court held that the EMSA did modify the GTLA so as to allow suit against a governmental agency, but only as to its vicarious liability and not as to any allegations of direct liability. The Supreme Court, paying strict attention to the language chosen by the Legislature, found in MCL 333.20737 a specific legislative intent for the EMSA to modify the GTLA and thereby create a statutory exception to governmental immunity. The Court's analysis began with the distinction drawn in the legislation between use of the words "persons" and "individuals":

> The definition of "person" in the EMSA explicitly stated that the term included governmental entities other than an agency of the United States. MCL 333.20706(2); MSA 14.15 (20706)(2). Additionally, a differentiation between governmental entities and human persons was made by use of the term "individuals" in §20737 where such a differentiation was desired. Therefore, the City of East Detroit is a "person" as that term was used in §20737 of the EMSA. Malcolm, 437 Mich at 138.

Since the last sentence of the pertinent section provided that "all persons named in this section...are protected from liability unless the act or omission was the result of gross negligence or willful misconduct", the Michigan Supreme Court in Malcolm concluded that governmental entities were "persons" who were protected from liability under the EMSA, "unless the act or omission was the result of gross negligence or willful misconduct". Insofar as such liability was allowed under the EMSA, an exception to governmental immunity existed. However, this exception to immunity was limited to the governmental agency's potential vicarious liability:

> In essence, the third sentence in §20737 stated that an person named in the section was granted immunity unless the act or omission of the "individuals" enumerated in the first sentence constituted gross negligence or willful misconduct. The gross negligence and willful misconduct standard set forth in the third sentence would indicate that the "individuals" listed in the first sentence were directly liable for gross negligence and willful misconduct and that the authoritative governmental units listed in the second sentence were vicariously liable for the same acts or omissions that constituted gross negligence or willful misconduct by such "individuals". Malcolm, 437 Mich at 145.

Thus, the Michigan Supreme Court, considering rules of statutory construction in scrutinizing the language of the statute, found an exception to governmental immunity which had not been specifically set forth by the Legislature in the GTLA. That is, the EMSA modified the GTLA so as to allow suit against a governmental agency, but only as to its vicarious liability and not as to any allegations of direct liability.

The Michigan Supreme Court in Malcolm interpreted MCL 333.20737. The Court did point out in footnote 11 that there had been several amendments to the EMSA since it was

initially created. The Court specifically mentioned 1990 P.A. 179. The Court went on to point out that the "provisions we find relevant to the decision of this case have not been materially altered". That is, the Court acknowledged that MCL 333.20737 and MCL 20965(1) were essentially identical. The Michigan Supreme Court's opinion in Malcolm that MCL 333.20737 created a statutory exception to the GTLA is therefore equally applicable to MCL 333.20965(1) which was not "materially altered" by the 1990 reenactment. That is, MCL 333.20965(1) modified the GTLA so as to allow suit against a governmental agency, but only as to its vicarious liability and not as to any allegations of direct liability. Under MCL 333.20965(1) the City of Warren is vicariously liable for the acts or omissions of gross negligence of its employee paramedics.

The Legislature in originally enacting MCL 333.20737 specifically intended to create a statutory exception to the GTLA. This is exactly what the Michigan Court of Appeals in Malcolm decided in 1989. The Legislature, following the Malcolm Court of Appeals decision, amended the EMSA. The Legislature took MCL 333.20737 and reenacted it as MCL 333.20965(1). As the Michigan Supreme Court in Malcolm pointed out in footnote 11 of its opinion, the changes made by the Legislature in MCL 333.20965(1) did not materially alter the language of MCL 333.20737. As such, the Legislature acquiesced to the Court of Appeals' opinion in Malcolm that the EMSA created a statutory exception to the GTLA to permit a governmental unit to be vicariously liable for the acts of its employee paramedics. Where the Legislature amends a statute without significantly changing the language which has been interpreted by the courts, the Legislature is presumed to have acquiesced in the interpretation. Hasty v. Broughton, 133 MichApp 107, 348 NW2d 299, 302 (1984). The Legislature intended MCL 333.20965(1) to create a statutory exception to the GTLA just as MCL 333.20737 did.

And finally, the Michigan Supreme Court continues to recognize the rule that the Legislature can create statutory exceptions outside of the GTLA. Ballard v. Ypsilanti Township, 457 Mich 564, 577 NW2d 890 (1998). The Ballard Court stated that it was possible for the

Legislature to create other exceptions to immunity outside the GTLA, citing the Michigan Supreme Court's Malcolm decision and Harsha v. Detroit, 261 Mich 586, 246 NW 849 (1933) for the proposition that one Legislature cannot bind future Legislatures, which remain "free to amend or abolish governmental immunity by creating exceptions to it, either within the GTLA or in the context of another statute". Ballard, 457 Mich at 569. The Ballard Court specifically mentioned Malcolm and the EMSA as an example of the Legislature's explicit and express waiver of immunity. The Defendants-Appellants' argument that the Legislature does not have the authority to create a statutory exception or waiver to the GTLA is completely without merit in light of Ballard.

Focusing for the moment just on MCL 333.20965(1), it is clear from the language used by the Legislature that it intended to create a statutory exception to the GTLA. The Michigan Supreme Court recognizes that the Legislature has the power to create such statutory exceptions. The Michigan Supreme Court in Malcolm held that the predecessor statute to MCL 333.20965(1) indeed did create such as statutory exception. Therefore, MCL 333.20965(1) which did not "materially alter" the prior statute also creates a statutory exception to the GTLA to the extent that it allows suit against a governmental agency, but only as to its vicarious liability and not to any allegations of direct liability. Taking just MCL 333.20965(1) the City of Warren would be vicariously liable for the acts of gross negligence of its employee paramedics.

II. THE LEGISLATURE IN ENACTING MCL 333.20965(2), AT THE SAME TIME IT ENACTED SUBSECTION (1), DID NOT INTEND SUBSECTION (2) TO REFER TO THE GENERAL IMMUNITY PROVIDED TO GOVERNMENTAL UNITS IN MCL 691.1407(1) SO AS TO NOW REVOKE THE STATUTORY EXCEPTION IT HAD SO CLEARLY CREATED WHEN IT CONCURRENTLY ENACTED SUBSECTION (1).

The Michigan Supreme Court must ascertain the intent of the Legislature in enacting MCL 333.20965(2). Did the Legislature intend subsection (2) to refer to MCL 691.1407(1) so as to revoke the subsection (1) statutory exception that it had created to impose vicarious liability on governmental units? Plaintiff – Appellee contends that the answer to this

question is "no". Rather, Plaintiff – Appellee contends that the Legislature intended subsection (2) to refer to MCL 691.1407(2) so as to ensure that employee-paramedics employed by a governmental unit and ultimately the governmental unit itself because of the vicarious liability imposed by subsection (1) had the same protection with regards to immunity as did governmental employees who were not paramedics. Specifically, the Legislature wanted to make it clear that the authoritative governmental unit could only be vicariously liable and not directly liable and that the authoritative governmental unit was vicariously liable only if the underlying individual for whom the governmental unit was potentially liable met the liability requirements of MCL 691.1407(2).

The above conclusion is supported by the plain language of the statute and the rules of statutory construction. The primary and cardinal rule, purpose and object in the interpretation and construction of statutes is to ascertain and give effect to the intention of the Legislature. Brown v. Genesee County Board of Commissioners, 464 Mich 430, 437; 628 NW2d 471 (2001); Sun Valley Foods CO v. Ward, 460 Mich 230, 236; 596 NW2d 119 (1999). A statute should be construed to give full force and effect to all of its parts or provisions, and to every word, sentence, and section, where this can be done without destroying the sense or effect of the law. Dussia v. Merman, 486 Mich 244; 191 NW2d 307 (1971). To this end, the entire statute must be read and the interpretation to be given to a particular word in one section must be arrived at only after due consideration of every other section so as to produce, if possible, "a harmonious and consistent enactment as a whole". Dussia v. Merman, 486 Mich 244; 191 NW2d 307, 309 (1971); Stowers v. Wolodzko, 486 Mich 119; 191 NW2d 355 (1975). A Court's determination of Legislative intent may be drawn from an examination of the language of the act, the subject matter under consideration, the scope and purpose of the act, and other statutes which may have proceeded it or which relate to the same subject. Once again, the statute should be construed so that all of its provisions are harmonious. Crawford v. School District No. 6, 342 Mich 574; 70 NW2d 789 (1955).

Various rules of statutory interpretation support the Plaintiff – Appellee's position that MCL 333.20965(2) does not refer to the "general immunity provided to governmental units" language set forth in MCL 691.1407(1). One rule of statutory interpretation is that a court's determination of the Legislative intent must be arrived at by a consideration of the statute in its entirety. For example, where one part of a statute is equivocal or ambiguous, Legislative intent may be found by clear and express language found in other sections. Simmons v. Board of Education of Marlette Community Schools, 73 Mich App 1; 250 NW2d 777, 779 (1976). Subsection (2) is ambiguous because there is no express reference to MCL 691.1407(1). It is subject to various interpretations. Subsection (1) can serve as a guide to determine whether or not it was indeed the legislative intent for subsection (2) to refer to MCL 691.1407(1) so as to effectively revoke vicarious liability. The Michigan Supreme Court has already looked at subsection (1). The Court in Malcolm specifically held that the precursor statute of MCL 333.20965(1) created a clear and express statutory exception so as to allow suit against a governmental agency as to its vicarious liability. Using subsection (1) as a guide, it is clear that the Legislature in enacting subsection (2) did not intend to refer to MCL 691.1407(1) since such a reading would revoke the statutory exception it had so definitively granted in subsection (1).

There is a corollary to the above rule of statutory interpretation. This rule states that where an amendment or reenactment contains an ambiguous provision or section, some light on the proper construction of the new provision or section can be arrived at by considering the statute before its amendment or reenactment. Tomes v. General Motors Corporation, 318 Mich 168; 27 NW2d 520 (1947). Subsection (2) is ambiguous since it is unclear whether or not the statutory language refers to the general immunity provided to governmental units in MCL 691.1407(1). The Legislature's intent in enacting subsection (2) can thus be discerned by considering what the statute stated before its amendment. MCL 333.20965 before its reenactment in 1990 consisted of one section that is essentially identical to subsection (1). There was no subsection (2). The Malcolm Court in interpreting the precursor to MCL

333.20965 held that the Legislature intended to create a statutory exception to governmental immunity so as to allow vicarious liability of authoritative governmental units such as the City of Warren. The Legislature's reenactment of subsection (1) without any material alterations is strong evidence that the Legislature in enacting subsection (2) did not intend that section to refer to MCL 691.1407(1) so as to revoke what it had so clearly granted in subsection (1).

This argument leads to yet another rule of statutory interpretation. A statute and its amendments are to be read as one act so as to avoid a construction of one section in such a manner as to render another section of no effect. Transamerican Freight Lines, Inc. v. Quimby, 381 Mich 149; 160 NW2d 865 (1968). Construing subsection (2) so as to hold that it refers to MCL 691.1407(1) would, by revoking the statutory exception imposing vicarious liability on a governmental unit, render MCL 20965(1)(f) of no effect. It is highly unlikely that the Legislature intended to do this since at the same time it enacted subsection (2) it also enacted subsection (1), specifically keeping in the words "authoritative governmental units" which had also appeared in the EMSA as interpreted by the Courts in Malcolm. The only way that MCL 333.20965(1)(f) can be given effect is to hold that subsection (2) does not refer to MCL 691.1407(1).

Still further, another rule of construction is that the sections of a statute must, if at all possible, be read so as to create "harmony". "Disharmony" is not looked on with favor since it created chaos and uncertainty. The adoption of the Defendant – Appellant's argument that subsection (2) somehow refers to MCL 691.1407(1) would result in the implicit revocation of a statutory exception to the GTLA that the Legislature had so explicitly created in subsection (1). This reading creates "disharmony" not harmony. It creates chaos as opposed to certainty. It is a reading the Legislature never intended.

The legislative history as to the enactment of the Emergency Medical Services Act in 1990 is silent as to the Legislature's intent with regards to subsection (2). The Court of Appeals in Omelemchuk, supra, examined the legislative analysis and found that "there is no

evidence or expressed intention in the legislative analysis to eliminate vicarious liability by incorporating the provisions of the GTLA". Defendant – Appellant attacks the Court of Appeals' findings with regards to the legislative history on the grounds that the courts must determine the Legislature's intent from its words, not from its silence. What the Defendant – Appellant cannot overcome in this case is that the words of subsection (2) are in and of themselves silent with regards to whether or not MCL 333.20965(2) refers to MCL 691.1407(1). Because section (2) is silent it is ambiguous – does it refer to MCL 691.1407(1) so as to revoke the statutory exception created in section (1) or does it refer to some other statute so as to give effect to the statutory exception the Legislature created in subsection (1). The lack of any language in the Legislative history on which to decipher the Legislature's intent is evidence that the Legislature did not intend to create a statutory exception with its right hand and simultaneously revoke the exception with its left hand. The Legislature intended to impose vicarious liability on the authoritative governmental unit.

That brings us back again to the rules of statutory construction. Had the Legislature intended on revoking the statutory exception of vicarious liability it could have done so explicitly and affirmatively either by removing mention of "authoritative governmental units" in subsection (1) or by adding the words MCL 691.1407(1) to subsection (2). The Legislature did neither. Rather, the Legislature made express mention of "authoritative governmental units" in subsection (1) and no mention of MCL 691.1407(1) in subsection (2). The Legislature did not intend to make reference to MCL 691.1401(1) because had it done so it would have created disharmony as opposed to harmony and it would have given no effect to MCL 333.20965(1)(f) which it had concurrently enacted with the knowledge that the Court of Appeals in Malcolm had interpreted similar language in the precursor statute in such a way as to impose vicarious liability on an "authoritative governmental unit".

III. THE LEGISLATURE IN ENACTING MCL 333.20965(2) IN 1990 INTENDED THAT SUBSECTION (2) REFER TO MCL 691.1407(2) SO AS TO ENSURE THAT A GOVERNMENTAL EMPLOYEE PARAMEDIC AND THE EMPLOYER AUTHORITATIVE GOVERNMENTAL UNIT AS A RESULT OF VICARIOUS LIABILITY WERE HELD TO THE SAME STANDARD OF IMMUNITY GRANTED TO ALL OTHER GOVERNMENTAL EMPLOYEES.

As discussed above, MCL 333.20965(1)(f) modified MCL 691.1407(1) of the GTLA so as to allow a governmental unit to be vicariously liable for the acts or omissions of gross negligence of its employee paramedics. A governmental employee who is a paramedic is subject to the EMSA. This act provided that the government employee/paramedic was immune from liability except for acts of "gross negligence". The term "gross negligence" has not, however, ever been defined in the EMSA. The common law definition of gross negligence as *set forth in* Gibbard *v.* Cursan, *225 Mich 311; 196 NW 398 (1923) would therefore apply. The* Gibbard standard for gross negligence is different from the GTLA standard. The Gibbard standard is really nothing more than a negligence standard. Finkler v. Zimmer, 258 Mich 336; 241 NW 851 (1932). The EMSA in reality offered no immunity to a paramedic and thus to the authoritative governmental unit which was vicariously liable for the acts of its employer if the common law definition of gross negligence was applied.

The Michigan Legislature resolved the conflict between the statutory and common law definitions of "gross negligence" when it amended the Emergency Medical Services Act in 1990. The Legislature specifically added section (2) which states that:

> Subsection (1) does not limit immunity from liability otherwise provided by law for any of the persons listed in subsection (1).

The Legislature resolved in subsection (2) the conflict between the Gibbard gross negligence standard and the GTLA gross negligence standard by using language which incorporates MCL 691.1407(2). The definition of "gross negligence" for the purpose of the EMSA is now the same as the GTLA definition. That is, gross negligence for the purpose of the EMSA is "*conduct so* reckless as to demonstrate a substantial lack of concern for whether an injury results".

A close reading of subsection (2) shows that this is indeed the case. Subsection (1) imposes liability on an individual if the acts or omissions of such individual constitute "gross negligence". Further, a person such as an "authoritative governmental unit" is vicariously liable for the acts or omissions of gross negligence of individuals such as paramedics which the authoritative governmental unit employs. Now the Legislature in section (2) used the term "persons" in the phrase "persons listed in subsection (1)". The term "persons" is defined in MCL 8.3-1; MSA 2.212(12) as follows: "The word 'person' may extend and be applied to bodies politic and corporate as well as to individuals". The term "person" in section (2) thus refers to the individuals and persons listed in subsection (1).

The Legislature is referring to MCL 691.1407(2) when it uses the phrase "does not limit immunity from liability otherwise provided by law". It is this law that defined the parameters of immunity which protect individuals who are governmental employees. The Legislature, by incorporating MCL 691.1407(2), thereby also defined the immunity standards for an authoritative governmental unit who is vicariously liable for the acts or omissions of an employee paramedic. The Legislature by enacting subsection (2) made it clear that a governmental employee paramedic and the authoritative governmental unit via vicarious liability were liable only if the individual [a person listed in subsection (1)] was acting within the scope of his authority, the governmental agency was engaged in the exercise of a governmental function, and the individual's conduct amounted to gross negligence which was defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results". What the Legislature was trying to do is make sure governmental employee paramedics and their employers who were subject to the EMSA were not to be judged by the Gibbard standard of gross negligence but were to be judged by the same gross negligence standard as were governmental employees who were not subject to the EMSA.

The phrase "does not limit immunity from liability otherwise provided by law" in subsection (2) refers to MCL 691.1407(2) and not MCL 691.1407(1). Constructing subsection (2) in this manner is consistent with the various rules of statutory construction discussed above. First, such a reading of subsection (2) brings the entire MCL 333.20965 statute into harmony. It gives effect to the Legislature's clear intent of imposing vicarious liability on authoritative governmental units which is set forth in subsection (1). Second, such a reading of subsection (2) harmonizes the EMSA with the GTLA in the sense that the acts or omissions of governmental employees who are paramedics are judged by the same standards as all other governmental employees. That is, an authoritative governmental unit such as the City of Warren is vicariously liable only if the governmental employee paramedic was acting within the scope of his authority, the governmental agency was engaged in the exercise of a governmental function, and the employee's conduct was "so reckless as to demonstrate a substantial lack of concern for whether an injury results".

REQUEST FOR RELIEF

The Legislature intended to create an exception to the GTLA when it enacted the EMSA in 1990. Under the EMSA, an "authoritative governmental unit" such as the City of Warren is vicariously liable for the acts of the individual paramedics it employs provided the criteria for an individual's liability as imposed by MCL 691.1407(2) are met. Wherefore, Plaintiffs-Appellees, Jeanne and Kristen Omelenchuk, respectfully request that this Court affirm the June 23, 2000 Opinion of the Michigan Court of Appeals.

Respectfully submitted,

Dated: 3/14/02

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