STATE OF MICHIGAN

COURT OF APPEALS

ROBERT LEWIS, Plaintiff-Appellee/ Cross-Appellant,	UNPUBLISHED December 1, 2009
v	No. 283741 St. Joseph Circuit Court
ST JOSEPH COUNTY MEDICAL CONTROL AUTHORITY, Defendant-Appellant/ Cross-Appellee.	LC No. 07-001-CZ

Before: Owens, P.J., and Talbot and Gleicher, JJ.

PER CURIAM.

In this summary disposition case, defendant/appellant/cross-appellee ("defendant"), St. Joseph County Medical Control Authority (SJCMCA) appeals by leave granted from St. Joseph Circuit Court Judge Paul Stutesman's failure to grant summary disposition in favor of defendant on a Freedom of Information Act (FOIA) issue. Plaintiff/appellee/cross-appellant ("plaintiff"), Robert Lewis, cross appeals the rulings of the trial court that defendant came within an exception to the Open Meetings Act (OMA). He also argues that the trial court erred in its FOIA ruling, and erred in its failure to grant summary disposition to plaintiff on his due process claim. We affirm in part and reverse in part.

I. Facts

Plaintiff is a licensed Medical First Responder (MFR) and a firefighter. It is alleged that on May 31, 2006 plaintiff failed to defer to the authority of a paramedic on the scene of a personal injury accident.

Following this incident, the Fire Chief of the Sturgis Fire Department requested that SJCMCA conduct a review of the situation. On August 29, 2006 plaintiff and his supervisor were required to attend a meeting before the SJCMCA. At the meeting, plaintiff requested that any discussion of disciplinary measures against him be held in an open meeting. Defendant denied that request and went into a closed session. Immediately thereafter, defendant suspended the MFR privileges of plaintiff to practice pre-hospital care in St. Joseph County for six months. It also required plaintiff to complete an anger management course and NIMS (National Incident Management Systems) training. The suspension was based on plaintiff's violation of MCL

333.20967(1)[1] because plaintiff refused the command of a higher medical authority at a scene where emergency medical care was being administered.

Following this suspension, an article appeared in the newspaper, the Sturgis Journal. The article mentioned the suspension and anger management classes. Plaintiff exhausted his administrative appeals of the suspension to the SJCMCA and to the Michigan Department of Public Health, Emergency Medical Services Coordinating Committee. Plaintiff then filed the present lawsuit alleging three counts: 1) violation of the OMA with respect to two confidential, deliberative review meetings of the SJCMCA that were closed to the public 2) violation of the FOIA regarding SJCMCA's refusal to provide Plaintiff with copies of the minutes of the closed, deliberative portions of its review meetings; and 3) procedural and substantive violations of the Federal Civil Rights Statute, 42 USC 1983.

Both parties filed motions for summary disposition. On August 28, 2007, in an opinion and order, the trial court granted partial summary disposition in favor of defendant on the issue of the OMA (holding that SJCMCA had properly met in closed sessions), but held that SJCMCA had waived the FOIA exemption for the written minutes of closed meetings by disclosing the results of their findings to the Sturgis Journal. The trial court also held that defendant is a local entity under 42 USC 1983 and that questions of fact remained as to whether SJCMCA violated 42 USC 1983.[2] Both parties moved for reconsideration and the court denied both motions.

II. Closed Sessions Under OMA and FOIA

Plaintiff argues on cross appeal that the trial court erred in granting defendant's motion for summary disposition on the OMA claim. We agree.

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[1] MCL 333.20967(1) states:

> Authority for the management of a patient in an emergency is vested in the licensed health professional or licensed emergency medical services personnel at the scene of the emergency who has the most training specific to the provision of emergency medical care. If a licensed health professional or licensed emergency medical services personnel is not available, the authority is vested in the most appropriately trained representative of a public safety agency at the scene of the emergency.

[2] SJCMCA argued unsuccessfully at the trial court level that it was an "arm or instrumentality" of the State of Michigan, and as such, was immune from suit under 42 USC 1983. The trial court followed Attorney General Opinion No. 6727 of August 21, 1999 and held that a local medical control authority is not a state agency as a matter of law. This is not an issue on appeal. However, on cross appeal plaintiff argues that he established that defendant violated 42 USC 1983 and that there is no genuine issue of material fact and plaintiff should have been granted summary disposition on that matter.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Whether a public record is exempt from disclosure under the FOIA is a mixed question of fact and law, and we review the trial court's factual findings for clear error and review questions of law de novo. *Detroit Free Press, Inc v City of Warren*, 250 Mich App 164, 166; 645 NW2d 71 (2002). Our Supreme Court has held that "the application of exemptions [under the FOIA] requiring legal determinations are reviewed under a de novo standard, while application of exemptions requiring determinations of a discretionary nature . . . are reviewed under a clearly erroneous standard." *Federated Publications, Inc v Lansing*, 467 Mich 98, 101; 649 NW2d 383 (2002). Further, the proper interpretation of a statute is a question of law subject to review de novo. *Brown v Genesee Co Bd of Comm'rs (After Remand)*, 464 Mich 430, 433; 628 NW2d 471 (2001).

In count one of the amended complaint, plaintiff alleges that defendant violated the OMA when it went into closed session to discuss the possibility of disciplinary measures against him and when it went into closed session to consider his appeal. He claims defendant violated MCL 15.268(a). However, the trial court concluded that defendant was a "review entity" that is afforded specific confidentiality under MCL 331.533 based upon the confidential material that was being considered.

Plaintiff also alleges that defendant violated FOIA when it refused to permit access and copying of the minutes of its closed sessions during the hearing and appeal of the administrative complaint against him.

Subsection 3(1) of the Open Meetings Act (OMA), MCL 15.261 *et seq*., mandates that "[a]ll meetings of a public body shall be open to the public and shall be held in a place available to the general public. All persons shall be permitted to attend any meeting except as otherwise provided in this act." MCL 15.263(1). Subsection 3(2) of the OMA further requires that "[a]ll decisions of a public body shall be made at a meeting open to the public," and subsection 3(3) provides that "[a]ll deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public except as provided in this section and sections 7 and 8."[3]

This Court has recognized that "the purpose of the OMA is to promote governmental accountability by facilitating public access to official decision making and to provide a means through which the general public may better understand issues and decisions of public concern." *Kitchen v Ferndale City Council*, 253 Mich App 115, 125; 654 NW2d 918 (2002). Consistent with the Legislature's expressed preference for transparency in government, the OMA substantially limits the purposes for which a public body may meet in a closed session. "[T]he OMA should be construed broadly in favor of openness; exceptions should be construed narrowly, with the public body bearing the burden of proving the applicability of an exemption." *Manning v City of East Tawas*, 234 Mich App 244, 250; 593 NW2d 649 (1999).

According to the pertinent portions of MCL 15.268,

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[3] The exceptions in MCL 15.263(7)-(11) and MCL 15.267 do not apply to this case.

> A public body may meet in a closed session only for the following purposes:
>
> (a) To consider the dismissal, suspension, or disciplining of, or to hear complaints or charges brought against, or to consider a periodic personnel evaluation of, a public officer, employee, staff member, or individual agent, if the named person requests a closed hearing. . . .
>
> * * *
>
> (h) To consider material exempt from discussion or disclosure by state or federal statute.

Plaintiff here did not request a closed hearing, rendering subsection (a) inapplicable. The trial court concluded that subsection (h) authorized the closed session meeting because it expressly allowed the medical control authority to go into closed session when discussing confidential information about the treatment of a specific patient. We find that MCL 331.533 does not supply the statutory authority envisioned under subsection (h) to justify a closed meeting.

Pursuant to MCL 331.533,

> The identity of a person whose condition or treatment has been studied under this act is confidential and *a review entity* shall remove the person's name and address from the record before *the review entity* releases or publishes a record of its proceedings, or its reports, findings, and conclusions. Except as otherwise provided in section 2, the record of a proceeding and the reports, findings, and conclusions of *a review entity* and data collected by or for *a review entity* under this act are confidential, are not public records, and are not discoverable and shall not be used as evidence in a civil action or administrative proceeding. [Emphasis added.]

This statute did not permit defendant to meet in closed session. Because defendant does not qualify as "a review entity," MCL 331.533 does not render the material discussed at the meeting "exempt from discussion or disclosure by state … statute" under MCL 15.268(h). Furthermore, even if defendant constituted a peer review entity, the second sentence of MCL 331.533, referencing "section 2," carves out an applicable exception to the confidentiality rule.

In 1967 PA 270, as amended, MCL 331.531 *et seq*., the Legislature enacted three statutes, including MCL 331.533, "commonly referred to as Michigan's peer review immunity statute." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 666; 719 NW2d 1 (2006). In *Attorney Gen v Bruce*, 422 Mich 157, 171-172; 369 NW2d 826 (1985), our Supreme Court explained that 1967 PA 270 "protects persons, organizations, and entities that *choose* to disclose information to a review entity," potentially immunizing those persons from liability. (Emphasis in original). The act commences as follows with MCL 331.531(1): "A person, organization, or entity may provide to a review entity information or data relating to the physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider." The balance of the act

defines the term "review entity," sets forth the manner in which information given to a review entity may be used, and establishes the parameters for peer review immunity.

In MCL 331.531(2), the Legislature defined a "review entity" to mean "1 of the following":

> (a) A duly appointed peer review committee of 1 of the following:
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> (*i*) The state.
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> (*ii*) A state or county association of health care professionals.
>
> (*iii*) A health facility or agency licensed under article 17 of the public health code, 1978 PA 368, MCL 333.20101 to 333.22260.
>
> (*iv*) A health care association.
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> (*v*) A health care network, a health care organization, or a health care delivery system composed of health professionals licensed under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838, or composed of health facilities licensed under article 17 of the public health code, 1978 PA 368, MCL 333.20101 to 333.22260, or both.
>
> (*vi*) A health plan qualified under the program for medical assistance administered by the department of human services under the social welfare act, 1939 PA 280, MCL 400.1 to 400.119b.
>
> (b) A professional standards review organization qualified under federal or state law.
>
> (c) A foundation or organization acting pursuant to the approval of a state or county association of health care professionals.
>
> (d) A state department or agency whose jurisdiction encompasses the information described in subsection (1).
>
> (e) An organization established by a state association of hospitals or physicians, or both, that collects and verifies the authenticity of documents and other data concerning the qualifications, competence, or performance of licensed health care professionals and that acts as a health facility's agent pursuant to the health care quality improvement act of 1986, title IV of Public Law 99-660, 42 USC 11101 to 11152. . . .

Defendant is a local medical control authority (MCA), and not a "duly appointed peer review committee," a "professional standards review organization," an organization "acting pursuant to the approval of a state or county association of health care professionals," a state department or agency, or an "organization established by a state association of hospitals or physicians . . . ." Rather, MCAs supervise and coordinate countywide emergency medical services, and are administered by participating hospitals. MCL 333.20906(5)-(6), MCL

333.20918. This Court described MCAs in *DenBoer v Lakola Medical Control Auth*, 240 Mich App 498, 500-501; 618 NW2d 8 (2000), as follows:

> The statewide emergency medical services system is governed by local MCAs, which are organized and administered by local hospitals within each geographic region. … Each person licensed under the emergency medical services act … is accountable to their local MCA in the provision of emergency medical services. … The MCAs have statutory power and authority to supervise emergency medical services … and to govern the practice of licensed medical services personnel . . . ." [Citations omitted.]

The above descriptions of the nature of MCAs do not support the trial court's conclusion that defendant qualifies as a "review entity," as our Legislature defined that term in MCL 331.531(2). And no record evidence exists showing that defendant appointed its own peer review committee.

Defendant contends that MCL 333.20919(1)(g) establishes its status as a review entity. Subsection 20919(1)(g) requires that an MCA "establish written protocols" that "ensure a quality improvement program is in place" and "provide[] data protection as provided in 1967 PA 270, MCL 331.531 to 331.533." Defendant's "quality improvement program" protocol includes the following "confidentiality assurance" provision:

> All information obtained for the purpose of Quality Review will be used solely to determine if the current protocols in the Medical Control Authority are being followed. Under no circumstances will patient names be disclosed during this review or in any reporting process related to this review. Data is protected under P.A. 270 of 1967, MCL 331.531 to 331.533.

MCL 333.20919(1)(g) does not envision the creation of a "review entity" otherwise unmentioned in MCL 331.531(2). No authority supports that defendant's establishment of a quality improvement program duly protecting patient privacy operates as an impenetrable shield against application of the OMA. Logically, defendant could have conducted an open meeting to discuss plaintiff's discipline, while requiring that, in accordance with its quality improvement protocol, participants make no mention of patient names. This course of action would have comported with MCL 331.533, which directs that a review entity must remove a patient's name and address before releasing a record of its proceedings.

Moreover, even if MCL 333.20919(1)(g) or another statutory provision *did* establish defendant as a review entity, MCL 331.532(d) would mandate the disclosure of the meeting's minutes. In MCL 331.532, the Legislature provided, in pertinent part:

> The release or publication of a record of the proceedings or of the reports, findings, and conclusions of a review entity shall be for 1 or more of the following purposes:
>
> * * *
>
> (d) To provide evidence relating to the ethics or discipline of a health care provider, entity, or practitioner.

And although MCL 331.533 envisions that a review entity's proceedings qualify as confidential and "not public records," this statute also specifically *exempts* the provisions of MCL 331.532:

> *Except as otherwise provided in section 2*, the record of a proceeding and the reports, findings, and conclusions of a review entity and data collected by or for a review entity under this act are confidential, are not public records, and are not discoverable and shall not be used as evidence in a civil action or administrative proceeding. [Emphasis added.]

When discerning legislative intent, this Court gives effect to every word, phrase, and clause in a statute. *People v Hill*, 269 Mich App 505, 515; 715 NW2d 301 (2006). The Court must avoid construing a statute in a manner that renders statutory language nugatory or surplusage. *Id*. "'We construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature.'" *Id*., quoting *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159-160; 627 NW2d 247 (2001). Plainly, the unambiguous exemption created by the Legislature in MCL 331.532(d) signifies that "evidence relating to the ethics or discipline of a health care provider, entity, or practitioner" falls outside the confidentiality strictures of MCL 331.533.

The August 29, 2006 meeting minutes establish that defendant held the special meeting "for the purpose of concluding a complaint against Tri-Township MFR, Robert Lewis by Sturgis Fire Ambulance." This expressed purpose negates that the meeting fell within any exception to the OMA. The OMA permits a public body to conduct a closed meeting to "hear complaints or charges brought against" a public officer, employee or individual agent only "*if the named person* requests a closed hearing." MCL 15.268(a) (emphasis added). The OMA further allows a person who has requested a closed hearing to rescind the request "at any time, in which case the matter at issue shall be considered after the recission only in open sessions." *Id*. In this case, however, plaintiff requested an open meeting. The OMA provisions governing meetings convened to hear charges against a public officer plainly reflect the Legislature's intent that the *officer*, rather than the public body, controls whether a meeting will be open or closed. No authority tends to support that absent plaintiff's request for a closed meeting, defendant could lawfully conduct a closed meeting to "hear complaints or charges brought against" one of its agents.

MCL 15.268(a) affords a publicly employed health care agent or employee the right to insist on an open meeting. And pursuant to the same logic, we further hold that because defendant improperly closed its August 29, 2006 meeting to the public, the minutes of that meeting are subject to disclosure. See *Manning*, *supra* at 249-250. We reverse the trial court's grant of summary disposition regarding plaintiff's OMA claim, and affirm its ruling regarding plaintiff's FOIA allegation.

III. Protocol Violations

This issue is not framed as one of trial court error and the trial court did not discuss this issue in terms of violation of protocol in its opinion. Plaintiff brought a claim based on violations of the OMA, FOIA and his right to due process. Plaintiff argues that defendant unlawfully violated its protocol, yet we are not sure under which of his claims he is raising this argument. The best fit would probably be within the due process argument; however, the trial court determined that genuine issues of material fact remain on that count. Therefore, for this

Court to step in and make a fact-dependent determination about whether defendant violated protocol would be improper at this stage. This issue is not properly before this court.

IV. Due Process

Plaintiff argues that the trial court erred in declining to grant his motion for summary disposition on the issue of due process. We disagree. Summary disposition in favor of plaintiff is not appropriate where genuine issues of material fact exist.

The trial court determined that "whether or not defendant violated 42 USC 1983 is a question of fact and will go to trial." Plaintiff argues that there is not genuine issue of fact that defendant violated his procedural due process rights as a matter of law. No person may be deprived of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17; *Tolksdorf v Grifith*, 464 Mich 1, 7; 626 NW2d 163 (2001). 42 USC 1983 provides in relevant part:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [42 USC 1983].

In this case, the alleged constitutional violation is in the form of an alleged due process violation. Plaintiff was suspended on August 29, 2006. He claims he did not receive notice of what he was charged with until over 30 days after his suspension.

"Due process requires fundamental fairness, which is determined in a particular situation first by 'considering any relevant precedents and then by assessing the several interests that are at stake.' " *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993), quoting *Lassiter v Durham Co Dep't of Social Services*, 452 US 18, 25; 101 S Ct 2153; 68 L Ed 2d 640 (1981). Under *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976), three factors are generally considered to determine what due process requires in a particular case:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See also *In re Brock*, 442 Mich at 111, 499 NW2d 752, quoting *Mathews.* In re Rood, 483 Mich 73, 92-93, 763 NW2d 587 (2009)

The opportunity to be heard does not mean a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence." *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 606; 683 NW2d 759 (2004), quoting *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). "Administrative procedures must provide the affected party with an opportunity to explain its

position and rebut adverse evidence." *Westland Convalescent Ctr. v Blue Cross & Blue Shield of Mich*, 414 Mich 247, 272; 324 NW2d 851 (1982). "The critical element provided by a judicial trial or an administrative hearing is the opportunity for a party to present arguments and evidence in support of its position before a decision is rendered, the chance to respond before final action is taken." *Id.* at 268.

According to defendant, on June 26, 2006 Scott Hopkins, Deputy Chief of the Sturgis Fire Department, filed a formal complaint about this incident with the SJCMCA under its Complaint Investigation & Resolution protocol. The complaint did not specifically identify plaintiff, but it described his conduct at the scene. Defendant contends that there were multiple e-mail exchanges between plaintiff and Hopkins that indicate that plaintiff was aware that the complaint had been filed against him. In one e-mail message to Hopkins, plaintiff requested a formal complaint so that he would receive "due process." According to the SJCMCA Pre-Hospital Care Incident Report, the complaint was served on plaintiff and his supervisor on June 26, 2006. Their reply was requested by July 10, 2006.

Defendant also claims that pursuant to the SJCMCA Complaint Investigation & Resolution protocol, the complaint and all of the documentation, including plaintiff's own statements were reviewed by the MCA Professional Standards Review Organization (PSRO) on July 27, 2006. Thereafter, a formal quality review was scheduled before the SJCMCA on August 11, 2006 and notice of the review was provided to plaintiff and his supervisor.

Plaintiff claims that he did not receive notice of what he was charged with until 30 days after he had already been suspended. Plaintiff claims he had no notice that the August 29, 2006 meeting was actually a disciplinary hearing and that he thought it was just a meeting to discuss what happened. He also claims that at the hearing he was not allowed to refute or cross-examine his accusers. He claims that the facts admitted by defendant in the pleadings establish due process violations and that there are no genuine issues of material fact.

Based on these conflicting versions of events, we find that there remains a genuine issue of material fact and that the trial court correctly determined that summary disposition was not appropriate on this issue.

V. Waiver

On appeal, defendant argues that the trial court erred in holding that defendant had waived the exemption from FOIA by disclosing the results of their findings to the Sturgis Journal. We agree.

This Court reviews the trial court's findings of fact under the clearly erroneous standard. MCR 3.977(J). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *McTaggart v Lindsey*, 202 Mich App 612, 616; 509 NW2d 881 (1993).

The trial court reasoned that, "the Court feels that for Defendant to disclose information to the public and then deny further access to Plaintiff would not be consistent with the intent of FOIA." The trial court's finding that defendant disclosed the closed meeting minutes, or at least their substance, to the Sturgis Journal is clearly erroneous. The newspaper article, the reporter's

affidavit and the attachments thereto are the only evidence on the matter. They clearly indicate that the reporter was not present in the closed meeting and that the minutes were never disclosed to the newspaper. Indeed, the article itself reflects exactly the substance of the motion to suspend plaintiff's license, which was made in open session. And it does not indicate that anyone other than plaintiff was interviewed for the article. There is no record evidence whatsoever that would support the trial court's finding. And without that factual finding, there is no basis for the trial court's conclusion that defendant waived its exemption from disclosure. However, since defendant violated the OMA by going into closed session, the minutes were subject to disclosure under FOIA.

Thus the trial court correctly denied defendant's motion for summary disposition of the FOIA claim, albeit for a different reason.

Affirmed in part and reversed in part for proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher