Docket No. 124610

IN THE ILLINOIS SUPREME COURT

ROBERTO HERNANDEZ, **Plaintiff-Appellee,** **v.** **LIFELINE AMBULANCE, LLC, and JOSHUA M. NICHOLAS, individually and as an agent and/or employee of LIFELINE AMBULANCE, LLC,** **Defendants-Appellants.**	**On Appeal from the Illinois Appellate Court, First Judicial District** **Appellate Docket No. 1-18-0696** **There Heard on Appeal From the Circuit Court of Cook County, Illinois, County Department, Law Division** **Case No. 2017-L-2553** ***Consolidated with* Case No. 2017-M1-11458** **The Honorable Allen Price Walker, Judge Presiding**

BRIEF AND ARGUMENT OF PLAINTIFF – APPELLEE ROBTERTO HERNANDEZ

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Plaintiff, Roberto Hernandez, suffered bodily injuries when a private ambulance owned by Lifeline Ambulance, LLC ("Lifeline"), driven by its employee, Joshua M. Nicholas, ran a red light and collided with the Plaintiff's minivan. Plaintiff's First Amended Complaint asserts claims for damages based on negligence by the driver (Count I), willful and wanton conduct by the driver (Count II), and *respondeat superior* against Lifeline (Count III).

After the trial court dismissed Counts I and III of the First Amended Complaint, the appellate court reversed, finding that the statutory immunity provision of the Emergency Medical Services Systems Act (the "Act" or the "EMS Act"), 210 ILCS 50/1, *et seq*., did not apply to the operation of an ambulance dispatched to pick up a patient for a non-emergency transport.

ISSUES FOR REVIEW

Whether the appellate court properly held that the EMS Act does not immunize an ambulance owner and driver from liability while the ambulance is *en route* to pick up a patient for a non-emergency transport?

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Illinois Supreme Court Rule 315(a). On March 7, 2018, the Circuit Court of Cook County, Illinois, entered an order dismissing Counts I and III of Plaintiff's First Amended Complaint with prejudice pursuant to Section 5/2-619. (R. C 138 - C 139). On March 19, 2018, the Circuit Court granted Plaintiff's request for a finding pursuant to Illinois Supreme Court Rule 304(a). (R. C 144). On March 29, 2018, Plaintiff filed his timely Notice of Appeal. (R. C145-149). The Illinois Appellate

Court, First Judicial District, Fifth Decision, issued its opinion reversing the trial court's decision on February 1, 2019. Defendants filed their petition for leave to appeal within thirty-five days, which this Court allowed on May 22, 2019.

STATUTES INVOLVED

The appeal involves the interpretation of the EMS Act, 210 ILCS 50/1, *et seq*. Specifically, the appeal involves the Scope of Services covered or excluded by the EMS Act and the immunity provision of the EMS Act. The relevant portions of the Scope of Services include sub-parts (g) and (h), which state:

> (g) "Non-emergency medical services" means medical care, clinical observation, or medical monitoring rendered to patients whose conditions do not meet this Act's definition of emergency, before or during transportation of such patients to or from health care facilities visited for the purpose of obtaining medical or health care services which are not emergency in nature, using a vehicle regulated by this Act.
> . . . .
>
> (h) The provisions of this Act shall not apply to the use of an ambulance or SEMSV, unless and until emergency or non-emergency medical services are needed during the use of the ambulance or SEMSV.

210 ILCS 50/3.10(g) and (h) (LexisNexis 2019).

The immunity provision of the EMS Act states:

> Any person, agency or governmental body certified, licensed or authorized pursuant to this Act or rules thereunder, who in good faith provides emergency or non-emergency medical services during a Department approved training course, in the normal course of conducting their duties, or in an emergency, shall not be civilly liable as a result of their acts or omissions in providing such services unless such acts or omissions, including the bypassing of nearby hospitals or medical facilities in accordance with the protocols developed pursuant to this Act, constitute willful and wanton misconduct.

210 ILCS 50/3.150(a) (LexisNexis, 2019).

STATEMENT OF FACTS

A. Lifeline's Ambulance Runs a Red Light, Colliding with Plaintiff's Minivan.

On March 11, 2016, Johsua Nicholas was driving an ambulance, owned and operated by Lifeline Ambulance, LLC, south on Lakeshore Drive. (R. C 53). Eric Hagman, Mr. Nicholas' co-worker and a passenger in the ambulance, says he received a dispatch call from Lifeline to pick up a patient in the western suburbs for a non-emergency transport to a second location. (R. C 54).

Mr. Nicholas and Mr. Hagman then exited Lakeshore Drive at Grand Avenue to proceed to pick up the patient. (R. C 54). Mr. Nicholas did not activate the lights and siren. (R. C. 54). Before the ambulance entered the intersection, Plaintiff, Roberto Hernandez, was driving his minivan westbound on Grand Avenue, approaching the intersection with the south bound off ramp of Lake Shore Drive. (R. C 56 – C 57). Plaintiff had the green light. (R. C 57). As he drove through the intersection, the Lifeline ambulance ran the red light and collided with his minivan. (R. C 57), causing severe physical injuries to Plaintiff (R. C 59).

A witness driving behind the Defendants' ambulance on Lakeshore Drive observed that the driver of the ambulance never applied the brakes as it approached the red light, continuing toward the intersection at the same rate of speed that the ambulance was traveling on Lakeshore Drive. (R. C 57, C 114). The witness observed that Nicholas entered the intersection against the red light and that there was no patient in the ambulance at the time of the collision. (R. C 57, C 115). He also overheard Mr. Nicholas tell a firefighter that the ambulance was not in service (R. C 115), though Mr. Nicholas has a different recollection of this conversation. (R. C 136).

B. Lifeline's Non-Emergency Transports on March 11 Involved Four Different Ambulances Driving for Extended Periods of Time to Pick up the Patient.

Lifeline's Dispatch Log shows that the non-emergency transport at issue in this case called for a patient to be transported between Aria Post Acute Care in Hillside for a a dialysis appointment at Villa Park Home Dialysis in Villa Park on the day of the collision. (R. C 128-129). That morning, the first Lifeline ambulance drove forty-five minutes to pick up the patient in Hillside to transport him to his dialysis appointment at 9:30 a.m. (R. C 130).

The patient was scheduled to be picked up from the dialysis center in Villa Park between 11:59 pm and 1:45 pm. (R. C 130). At 12:22 p.m. on March 11, twenty-two minutes into the scheduled pick-up window, Lifeline assigned an ambulance crewed by Wade Overton and Samantha Robledo to pick up the patient. (R. C 130). Then, at 12:30 p.m., the pick-up was re-assigned to Eric Hagman and Joshua Nicholas. (R. C 130-131). Nicholas and Hagman were to drive approximately twenty miles from downtown to Chicago to Villa Park. (*See* R. C 54, C 130). Instead, Nicholas ran the red light within minutes of being dispatched. (*See* R. C 54, C 131).

After Nicholas collided with Plaintiff's minivan, Lifeline re-assigned the transport to David Vo and "B. Commuzie." (R. C 131). The fourth ambulance ultimately drove for fifty-two minutes until it arrived to pick up the patient from the dialysis center in Villa Park. (R. C 131).

In total, four different, empty Lifeline Ambulances drove for one hour and fifty-three minutes to pick up a patient for non-emergency transports to and from health care facilities in the suburbs. (See R. C 130). Those facilities in Hillside and Villa Park are no more than five to six miles apart.

STANDARD OF REVIEW

This appeal arises from the Circuit Court's dismissal of Plaintiff's claims pursuant to Section 5/2-619(a)(9) and is subject to *de novo* review.

> Because a dismissal under section 2-619(a)(9) resembles the grant of a motion for summary judgment, an appeal from a section 2-619(a)(9) dismissal is the same in nature as an appeal following a grant of summary judgment, and is likewise afforded *de novo* review. The reviewing court must consider whether "'the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.'"

Van Meter v. Darien Park Dist., 207 Ill. 2d 359, 377-78 (2003) (internal citations omitted).

In ruling on a 2-619 Motion to Dismiss:

> The moving party thus admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter to defeat the plaintiff's claim. [Statutory] Immunity . . . is an affirmative matter properly raised in a section 2-619(a)(9) motion to dismiss. When a court rules on a section 2-619 motion to dismiss, it "must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party."

Van Meter v. Darien Park Dist., 207 Ill. 2d 359, 367-68 (2003).

ARGUMENT

I. The Appellate Court Ruled Correctly That the EMS Act Does Not Immunize an Ambulance and Driver *En Route* to Pick Up a Passenger for Non-Emergency Transport.

The decision of the appellate court to reverse the dismissal of Plaintiff's claims for negligence against the Defendants should be affirmed, if not in its analysis, then at least in its result. The EMS Act provides immunity for those providing certain services within the scope of the Act as follows:

> Any person, agency or governmental body certified, licensed or authorized pursuant to this Act or rules thereunder, who in good faith provides emergency or non-emergency medical ***services*** during a Department approved training course, in the normal course of conducting their duties, or in an emergency, shall not be civilly

> liable as a result of their acts or omissions in providing such ***services*** unless such acts or omissions, including the bypassing of nearby hospitals or medical facilities in accordance with the protocols developed pursuant to this Act, constitute willful and wanton misconduct.

210 ILCS 50/3.150(a) (LexisNexis 2019) (emphasis added). Nicholas, the driver of the ambulance, received a dispatch from Lifeline directing him to drive his ambulance from downtown Chicago to the suburb of Villa Park to pick up a patient for a non-emergency transport. The appellate court ruled correctly that Nicholas was not otherwise engaged in providing "non-emergency medical services" when he ran a red light and collided with the Plaintiff's minivan.

A. EMTs Are Not Immune under the Act Unless They Are Providing Emergency or Non-Emergency Medical Services.

"It is clear that section 3.150(a) immunity extends only to those providing emergency or nonemergency medical services, which would not include driving to and from work." *Wilkins v. Williams*, 2013 IL 114310, ¶ 58. In *Wilkins*, this Court ruled that driving an ambulance with a patient on board for a non-emergency transport fell within the scope of non-emergency medical services. *Id*. Here, the appellate court ruled that driving an ambulance to pick up a patient for non-emergency transport did not fall within the scope of non-emergency medical services. While some of the language in the appellate court decision may be overbroad, the appellate court reached the right result under the facts of this case.

B. Defendants Did Not Render Any Services in the Nature of Medical Care, Clinical Observation, or Medical Monitoring.

"The immunity set forth in section 3.150(a) looks to the nature of the services rendered, and not to the recipient of those services." *Wilkins v. Williams*, 2013 IL 114310, ¶ 23. Non-emergency medical services under Section 50/3.10(g) include "medical care,

clinical observation, or medical monitoring rendered to patients whose conditions do not meet this Act's definition of emergency, before or during transportation of such patients to or from health care facilities . . . using a vehicle regulated by this Act " 210 ILCS 50/3.10(g) (LexisNexis 2019). Whether Defendants are immune depends on whether they were engaged in providing any services in the nature of medical care, medical observation or medical monitoring of a patient.

At the time of the accident, Nicholas was driving an empty ambulance in downtown Chicago, twenty miles away from the patient in Villa Park. Nicholas and his partner were incapable of providing any type of care, monitoring, or observation of the patient.

The only activity performed by Nicholas at the time of the accident was the operation of a vehicle, unrelated and independent of any scope of medical services described under the Act. As an EMT, Nicholas must be licensed to provide non-emergency medical services under the Act. *See* 210 ILCS 50/3.55(a). Standards for an EMT's education, training and licensing are prescribed by the Illinois Department of Public Health. 210 ILCS 50/3.50(d). However, there is no special license required to drive an empty ambulance on Illinois roads. Any Lifeline employee with a driver's license could have driven the ambulance to the Villa Park Dialysis Center, and that person or employee would not be accused of practicing as an unlicensed EMT. Driving an ambulance to a health care facility, by itself, does not fall within the scope of non-emergency medical services and the Act.

Additionally, the patient in this case was already under the care of a "health care facility" at the time of the accident. Under the Act, a "health care facility" is defined as a "physician's office or other fixed location at which medical and health care services are

performed." 210 ILCS 50/3.5 (LexisNexis 2019). The dialysis center meets the definition of a health care facility. The Defendants could not be providing services under the Act where the patient was already under the care of a facility in an entirely different town.

C. The Appellate Court Ruled that Defendants Did Not Provide EMS Services Before or During a Non-Emergency Transportation.

The scope of "non-emergency medical services" in the Act includes services rendered to patients both before and during transportation. 210 ILCS 50/3.10(g) (LexisNexis, 2019). In their appeal, Defendants rely heavily on the appellate court's omission of the word "before" from its quotation of the statute. *See* ¶¶ 13,17. The implication is that the appellate court either mistakenly or deliberately ignored the language of the EMS Act. This argument is somewhat disingenuous. To reach its decision, the appellate clearly contemplated whether the act of driving the ambulance to the dialysis center constituted a "non-emergency medical service" rendered before transportation of the patient. Lifeline's driver did not provide services "during" transportation because the patient was twenty miles away at the time of the collision. The appellate court ruled that the act of driving to a facility for a non-emergency transport did not fall within the scope of non-emergency medical services rendered before transportation.

D. Section 3.150(h) Expressly Excludes the Use of an Ambulance from the Application of the Act.

In its ruling, the majority reasons that the legislature failed to include the act of driving an ambulance to pick up a patient for transport within the scope of non-emergency medical services. ¶ 18. The dissent contends that this interpretation reads an exclusion or limitation into section 3.150(a) of the Act where one did not previously exist. ¶ 18. However, the dissent, and the Defendants, fail to address the legislature's express exclusion

of the use of an ambulance from the Act. Section 50/3.10(h) states: "The provisions of this Act shall not apply to the use of an ambulance or SEMSV, unless and until emergency or non-emergency medical services are needed ***during*** the use of the ambulance or SEMSV." 210 ILCS 50/3.10(h) (emphasis added). Under this provision, the legislature distinguished the use of an ambulance from the provision of non-emergency medical services.

This Court must read the Act's immunity provision in conjunction with the scope of non-emergency medical services under Section 3.10(h) and the exclusion of ambulances under Section 3.10(g). "The statute should be evaluated as a whole; each provision should be construed in connection with every other section." *Abrahamson v. Ill. Dep't of Prof'l Regulation*, 153 Ill. 2d 76, 91 (1992). "We are to interpret the words and phrases of the statute in relation to the entire act at issue, and no word or provision is to be rendered meaningless due to our interpretation." *Nissan N. Am., Inc. v. Motor Vehicle Review Bd.*, 2014 IL App (1st) 123795, ¶ 17. Under Section 3.10(h), the use of an ambulance is outside the scope of the Act "unless or until" non-emergency medical services are provided "during" its use. Non-emergency medical services are not needed "during" the use of the ambulance until the patient is on board.

Defendants and the dissent argue that, as soon as Lifeline dispatched the ambulance to the suburbs, the driver was providing non-emergency services under the Act. This interpretation simply ignores the nature of services described in Section 3.10(h), as well as the description of any of the EMS Services listed in Section 3.10. It also disregards the Act's specific exclusion of the use of an ambulance from the Act without a contemporaneous need for EMS services during its use. If the legislature intended the EMS Act to apply to an ambulance *en route* to pick up a non-emergency transport, it could have

clearly included such a use within the scope for services. This Court should find that there is no immunity for the use of an ambulance until the patient for non-emergency transport is on board.

E. Expanding Immunity to Preparatory Conduct to For All EMS Services Does Not Immunize Defendants.

Defendants rely on a series of cases interpreting the immunity provision to argue that immunity for non-emergency services should be expanded to mirror immunity for emergency services under existing caselaw. Even if correct, such an expansion should not change the result of the appellate court's decision. The facts of the case still require the claims against Defendants to be reinstated regardless of the analysis used to reach a decision.

In *Wilkins*, this Court stated that "the EMS Act's immunity provision 'has been interpreted broadly to include ***preparatory actions integral*** to providing emergency treatment.'" *Wilkins v. Williams*, 2013 IL 114310, ¶ 29 (emphasis added); *see also Abruzzo v. City of Park Ridge,* 231 Ill. 2d 324, 343 (2008). Under the Act, an "emergency" is defined as "a medical condition of recent onset and severity that would lead a prudent layperson, possessing an average knowledge of medicine and health, to believe that urgent or unscheduled medical care is required." 210 ILCS 50/3.5 (LexisNexis 2019). Preparatory actions integral to providing emergency treatment are, by definition, vastly different from preparatory actions integral to providing a non-emergency transport.

In *Abruzzo v. City of Park Ridge*, paramedics were immune where they arrived at the scene but failed to properly assess and evaluate the patient. 231 Ill. 2d 324, 345 (2008). In *Am. Nat'l Bank & Tr. Co. v. City of Chicago*, paramedics were immune where they arrived at the scene but failed to locate the patient. 192 Ill. 2d 274, 282 (2000). Both

fact patterns involved patients in need of urgent care; both fact patterns involved paramedics called to assist a patient at a residence. *Abruzzo*, 231 Ill. 2d at 328; *Am. Nat'l Bank & Tr. Co*, 192 Ill. 2d at 276. Neither case involved the operation of an ambulance *en route* to the scene, but both cases involve the failure to render EMS services to a patient. These fact patterns are markedly distinct from the facts of this case.

F. Driving an Ambulance from Downtown Chicago to Villa Park is Neither Preparatory nor Integral to the Non-Emergency Transport of the Patient.

If this Court determines that Defendants' use of the ambulance falls within the scope of the Act, and that the immunity provision includes preparatory conduct integral to the non-emergency transport of a patient, Defendants are not entitled to immunity.

None of the driver's actions in this case were "integral" to the non-emergency transport. The patient in this case was already at a health care facility for his dialysis appointment, and Lifeline's Dispatch Log scheduled his return trip to Hillside to occur at any time between 11:59 pm and 1:45 pm. The assignment of the ambulance was always subject to change, and Lifeline originally assigned the transport to one ambulance before it was re-assigned to Mr. Nicholas and Mr. Hagman. Mr. Nicholas would have to drive at least twenty miles to Villa Park. After the collision, the transport was immediately re-assigned to a third ambulance. Under the facts of this case, time was never a factor in the assignment of a specific ambulance, and the Defendant's ambulance was in no way essential to the non-emergency transport of the patient. Accordingly, the dispatch of the ambulance driven by Mr. Nicholas was not integral to the non-emergency medical transport of the patient.

None of the pleadings or affidavits in this matter identify any "preparatory" actions taken by the ambulance or Mr. Nicholas once it was dispatched to Villa Park. The Affidavits and dispatch log show that only a few minutes passed between the dispatch and collision. Defendants cannot credibly argue that Nicholas took any preparatory actions or omissions in the minutes before the collision that would bring them within the scope of the Act and its immunity provision. Even under the broadest interpretation of the EMS Act's immunity provision, Defendants are not immune from liability under the facts presented.

CONCLUSION

The appellate court properly reversed the circuit court's dismissal of Counts I and III of Plaintiff's First Amended Complaint. As a matter of law, Defendants are not entitled to immunity.

The judgment of the Appellate Court should be affirmed.

Respectfully Submitted,

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By: /s/ Michael W. Kelly
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, is 12 pages.

/s/ Michael W. Kelly

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned, Michael W. Kelly, an attorney, certifies that he caused to be served an authentic photocopy of the above Appellant's Brief on those parties listed below by electronic mail through the Clerk of the Circuit Court's electronic filing system and by separate email to the address listed below on July 31, 2019, before 11:59 p.m.

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