*STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL BESTE,

Plaintiff-Appellants,

v

TERENCE ANTONIO NEWELL,

Defendant-Appellees.

UNPUBLISHED
July 16, 2002

No. 230657
Wayne County Circuit Court
LC No. 00-005409-NI

Before: Kelly, P.J., Murphy and Murray, JJ.

PER CURIAM.

Plaintiffs Michael Beste ("Beste") and Kathryn Succarde ("Succarde") appeal as of right the separate decisions of the circuit court which granted defendant City of Detroit's motions for summary disposition under MCR 2.116(C)(7), (8), and (10). We affirm.

I. Facts and Proceedings

On May 23, 1997, Detroit police officer Shonte White was assigned to a patrol car with her partner, Joseph Biggers. At one point during the course of the day Officer White received information over the police radio about a vehicle occupied by several men with weapons. Almost immediately after receiving that transmission, Officer White testified that her vehicle was nearly sideswiped by a 1985 Chevrolet, which she believed could have been the car described over the radio. According to Officer White, Biggers turned their vehicle around to follow the car and attempted to catch up with the vehicle which, at this point, was increasing its speed. Officer White could not recall whether they ever turned on the lights or siren, but she was certain that the lights or siren were not on when the suspicious vehicle was in their view. Shortly thereafter, the pursued vehicle was outside the view of Officers White and Biggers. Soon, however, Officer White and Biggers were informed by radio that the subject vehicle was closer to another police car but, then, the second police car also lost sight of the vehicle. According to Officer White it was only seconds later that she heard over the radio that a suspicious car had been involved in an accident at least two blocks away.

According to Succarde, she was driving her vehicle when she saw Beste, an acquaintance, and signaled for him to pull over. Beste indicated that he walked over to Succarde's parked vehicle while Succarde turned off the engine and rolled down her window to speak with Beste. Succarde indicated that she heard sirens and saw flashing lights while she spoke with Beste. According to Succarde, Beste was standing outside her door when a vehicle

hit him and her car. In an affidavit dated September 13, 2000, Succarde testified that she saw "a police vehicle driving close to and next to the vehicle that struck Mr. Beste and my vehicle." Succarde also averred that a helicopter was shining a bright light on the vehicle prior to it hitting Beste. Beste testified that he saw blue flashing lights before he was hit.

Defendant first moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), claiming that Succarde could not recover damages for her injuries because she was an uninsured motorist. The circuit court agreed with defendant and granted summary disposition. During the hearing on that motion, the court also held one of plaintiff's attorneys in contempt and fined him $100.00. Thereafter, defendant filed another motion for summary disposition, this time addressing the claims brought by Beste. Defendant moved pursuant to MCR 2.116(C)(7) and (8), arguing that its statutory governmental immunity barred Beste's claims. The circuit court granted defendant's motion on this ground. Both plaintiffs now appeal the separate orders dismissing their claims.

II. Analysis[1]

As noted, the trial court dismissed plaintiff Beste's claim based upon statutory governmental immunity and, therefore, the motion was granted under MCR 2.116(C)(7)(immunity granted by law). In *Regan v Washtenaw Co Bd of Road Comm'rs*, 249 Mich App 153; 641 NW2d 285 (2002), this Court set forth the standard of review of a motion for summary disposition decided under that subrule:

> This Court reviews de novo motions for summary disposition brought pursuant to MCR 2.116(C)(7). Summary disposition is proper when a claim is barred because of the immunity granted by law. To survive a motion for summary disposition based on governmental immunity, the plaintiff must allege facts giving rise to an exception to governmental immunity. This Court considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. [*Id.* at 157 (citations omitted).]

Since 1964 the Michigan Legislature has set forth the standards as to when a municipality such as defendant can be subject to tort liability. The general rule, embodied in MCL 691.1407(1), is that except as otherwise provided within the Governmental Tort Liability Act, MCL 691.1401 *et. seq.*, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). Neither party in this case has disputed that the operation of a police department is a governmental function, and this Court has previously found such police operations to clearly be a governmental function. See *Isabella Co v Michigan*, 181 Mich App 99, 105; 449 NW2d 111 (1989); *Moore v City of Detroit*, 128 Mich App 491, 496-497; 340 NW2d 640 (1983).

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[1] Plaintiffs have appended to their appeal brief copies of medical records and color photos of the injury suffered by Beste. However, the issues presented on appeal are purely legal ones, which do not necessitate consideration of the injuries plaintiffs received. The medical records and photos are therefore irrelevant to the issues presented.

Because defendant was engaging in the exercise or discharge of a governmental function, there can only be liability for the alleged torts committed in this case if one of the statutory exceptions provided for in the statute apply. *Pohutski v City of Allen Park,* 465 Mich 675, 689; 641 NW2d 219 (2002). The specific question presented in the instant case is the applicability of the motor vehicle exception to governmental immunity. MCL 691.1405.

As in all cases involving the issue of statutory governmental immunity, "[t]here is one basic principle that must guide our decision today: the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Pohutski, supra* at 689-690, quoting *Nawrocki v Macomb Co Road Comm,* 463 Mich 143, 158; 615 NW2d 702 (2000) (emphasis in original). With these tenants in mind, we now turn to the issue as to whether the motor vehicle exception to the immunity otherwise provided to defendant is applicable under the facts presented.

The motor vehicle exception to governmental immunity provides in relevant part as follows:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . . [MCL 691.1405.]

The trial court held that the Supreme Court decision in *Robinson v City of Detroit,* 462 Mich 439; 613 NW2d 307 (2000) was dispositive of Beste's claims. In *Robinson*, the Court held that in the context of police chases, the motor vehicle exception requirement that a plaintiff's injuries "result from" the operation of a government vehicle required proof that the pursuing police vehicle hit the fleeing car or otherwise physically forced it off the road or into another vehicle or object. *Id.* at 457.

Plaintiff raises two issues with respect to the *Robinson* decision. First, plaintiff argues that *Robinson* should only be applied prospectively,[2] and therefore, should have no impact upon this case. Second, plaintiff argues that even if *Robinson* is applied retroactively, he has submitted a genuine issue of material fact based upon the statements contained in Succarde's affidavit.

Generally, judicial decisions are retroactive, unless they overrule clear and uncontradicted case law. *Lincoln v General Motors Corp,* 461 Mich 483, 491; 607 NW2d 73 (2000). When determining whether a decision should apply retroactively, we take a flexible approach designed to achieve the greatest justice. *Lindsey v Harper Hospital*, 455 Mich 56, 68; 564 NW2d 861 (1997). There are three basic considerations in determining this issue: (1) the purpose of the new rule, (2) the existence of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *Michigan Educational Employees Mut Ins Co v Morris*, 460 Mich 180, 190; 596 NW2d 142 (1999).

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[2] The cases plaintiff relies upon in making this argument are inapplicable as they involve the question of the retroactivity of statutes, not case law.

In *Robinson*, *supra* at 444-445, the Supreme Court expressly overruled its decisions in *Fiser v Ann Arbor*, 417 Mich 461; 339 NW2d 413 (1983), and *Rogers v Detroit*, 457 Mich 125; 579 NW2d 840 (1998). However, shortly after the *Rogers* decision, the Supreme Court foreshadowed its reconsideration of the "police chase" issue when it requested briefs addressing the issue in the two cases that were consolidated in *Robinson*. *Cooper v Wade*, 461 Mich 1201; 597 NW2d 837 (1999).[3] Further, it is unlikely that the parties took any action in reliance on the old law, see *Robinson*, *supra* at 466-467, and the Supreme Court expressed strong public policy supporting the protection of police officers pursuing criminals, *id.* at 447. Therefore, retroactive application of *Robinson*, *supra* at 445, is appropriate. Plaintiffs were properly required to meet the standard set forth in that decision.

Beste next argues that the affidavit submitted by Succarde in the trial court is sufficient to meet the *Robinson* standard. In that affidavit Succarde indicates that, in her opinion, a police helicopter forced the fleeing vehicle into her car and Beste because of a bright light it was shining on the vehicle. Additionally, Succarde states in that same affidavit that she saw a police car "next to" the fleeing vehicle, and that in her opinion it "physically forced" the fleeing vehicle into Beste and her. Succarde's affidavit does not, in our view, create a genuine issue of material fact on either issue.

Although Succarde claimed that the police car physically forced the fleeing car into her own, she failed to explain the factual basis for this knowledge. It appears only to have been a guess based on hearing sirens and seeing police lights and seeing the police car "next to" the fleeing vehicle. Lay opinions must be based on rational perceptions. MRE 701; *Lamson v Martin (After Remand)*, 216 Mich App 452, 459; 549 NW2d 878 (1996). In this case, her opinion was mere speculation. See *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). The affidavit contained no facts which could establish that a police vehicle physically forced the fleeing vehicle into her car and Beste. Hence, the affidavit was insufficient to meet plaintiffs' burden on summary disposition to allege facts that would justify the application of a statutory exception to governmental immunity. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

We also reject plaintiff's argument that Succarde's affidavit creates a genuine issue of material fact with respect to the helicopter lights. Because a light from a helicopter cannot "physically force" an object to do anything, and simple cause and effect is insufficient to establish liability, Succarde's affidavit does not create a genuine issue of material fact on this issue. See *Robinson*, *supra* at 445. Additionally, for the motor vehicle exception to apply, one must be operating a "motor vehicle." MCL 691.1405. A "motor vehicle" is defined as a self-propelled vehicle, MCL 257.33, while a "vehicle" is defined as a device in which a person is transported on a highway. MCL 257.79. *Recchia v Turner*, 197 Mich App 432, 434; 495 NW2d 807 (1992). Because there is no dispute that a helicopter is not a device in which a person is transported on a highway, even if the helicopter had physically forced the vehicle into Beste and

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[3] We also note that in 1996, a year before the accident in this case, our Court had expressed significant dissatisfaction with *Fiser* and at least one Judge suggested a holding somewhat similar to that adopted by the *Rogers* Court. See *Cooper v Wade*, 218 Mich App 649; 584 NW2d 919 (1996), rev'd *Robinson, supra,* 462 Mich at 439.

Succarde's car, liability could not fall within MCL 691.1405 because the helicopter is not a "motor vehicle."

Succarde challenges the trial court's dismissal of her claims which was made on the basis that because Succarde was an uninsured motorist operating her vehicle when the injury occurred, she was not entitled to recover damages as a matter of law. However, we need not address this issue because our holding with respect to the motor vehicle exception applies with equal force to Succarde's claims against defendant. Hence, even assuming that Succarde is correct on the no-fault issue, we would still affirm the lower court for reaching the correct result, albeit for the wrong reason. *Phinney v Perlmutter,* 222 Mich App 513, 532; 564 NW2d 532 (1997).

Plaintiffs also argue that defendant cannot assert any defense, including the standard set forth in *Robinson*, *supra* at 445, because it has unclean hands. The authority plaintiffs cite applies only to equity cases. *Precision Instrument Mfg Co v Automotive Maintenance Machining Co*, 324 US 806, 814; 65 S Ct 993; 89 L Ed 1381 (1945). Although this Court has recognized the clean hands doctrine, see, e.g., *Royce v Duthler*, 209 Mich App 682, 689-690; 531 NW2d 817 (1995), it applies only to parties seeking equity. Plaintiffs fail to cite any authority that applies that doctrine to a case involving pure legal issues, and we will not search for authority to support plaintiffs' argument. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Next, plaintiffs appeal the finding of contempt against one of plaintiffs' attorneys. We will overturn a contempt finding only if it is an abuse of discretion. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 714; 624 NW2d 443 (2000). Contempt is warranted when an attorney engages in any willful act, omission, or statement that interferes with the court's handling of a case. *In re Contempt of Robertson*, 209 Mich App 433, 436; 531 NW2d 763 (1995). Although this is a close case, we find that the trial court did not commit an abuse of discretion when it held counsel in contempt. The transcript from the June 30, 2001 hearing revealed that before the finding of contempt the trial court had twice requested counsel to not recite the facts, with counsel complying after the second request. After attempting to address the legal issues, the following exchange took place between the court and counsel:

> THE COURT: All right. Mr. Fisher, just a minute. I've heard enough.
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> MR. FISHER: Judge, I'm sure you're capable of making a perfectly good decision in this case. Put your gamble down for the --
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> THE COURT: I've heard enough.
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> MR. FISHER: -- for the plaintiff.
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> THE COURT: I've heard enough, Mr. Fisher. If you say another word, I'm going to find you in contempt.
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> MR. FISHER: I couldn't imagine that.
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> THE COURT: All right. Mr. Fisher, I'm going to impose a fine and I'm going to find you in contempt of court and I'm fining you a hundred dollars.

Towards the end of the hearing the court found that counsel had "deliberately and intentionally ignored" his request to stop speaking. We recognize the limitations we have on review because of our inability to discern the tone of voice used or other gestures that may have existed at the time; thus, the deferential standard of review. However, in light of the trial court's finding that counsel's contrived statements to the court after being told that if he spoke further, he would be held in contempt, we cannot find that the court abused its discretion. The trial court's directive was clear, counsel had already been told that the court had heard enough to decide the motion, but nevertheless, counsel continued to speak.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray