STATE OF MICHIGAN

COURT OF APPEALS

JACQUELINE IVORY,

Plaintiff-Appellee,

v

WAYNE COUNTY,

Defendant-Appellant,

and

ETONYA GAY WILLIAMS,

Defendant.

UNPUBLISHED
May 25, 2010

No. 290938
Wayne Circuit Court
LC No. 08-111128-NI

Before: MURPHY, C.J., and K.F. KELLY and STEPHENS, JJ.

PER CURIAM.

Defendant Wayne County appeals as of right the trial court's order that denied its motion for summary disposition in this action arising out of a motor vehicle accident involving a county police cruiser and a car driven by plaintiff. The trial court rejected defendant's argument that, as a matter of law, it was a governmental agency immune from any liability associated with the accident. The central issue in this case concerns, for purposes of the motor vehicle exception to governmental immunity, MCL 691.1405, whether there was an agency relationship between the operator of the police car, Detroit Police Officer Etonya Gay Williams,[1] and defendant. We affirm the denial of defendant's motion for summary disposition.

On June 15, 2007, Officer Williams was driving a semi-marked Wayne County police cruiser while assigned to a Fugitive Apprehension Service Team (FAST). The FAST was created out of a joint cooperative effort between five law enforcement agencies that included the

[1] Williams was also named as a defendant in the suit, but this appeal does not entail the claim against Williams. For purposes of this opinion, we shall refer to Wayne County as "defendant" or the "county."

Detroit Police Department (DPD), the Wayne County Sheriff's Department (WCS), the Livonia Police Department, the Taylor Police Department, and the United States Marshal (USM). Riding in the front passenger seat of the cruiser was Wayne County Deputy Sheriff James Poma, and in the back seat sat two other DPD officers who were also FAST members. There is no dispute that Williams ran a red light and, as a result, the police cruiser was struck by a car driven by plaintiff, allegedly causing plaintiff to suffer closed-head, neck, and back injuries.

A Memorandum of Understanding [MOU] pursuant to which the FAST was created provided in pertinent part:

> I. PURPOSE
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> This MOU establishes and delineates the mission of the [FAST] as a joint cooperative effort. Additionally, the MOU formalizes the relationships between and among the participating agencies in order to foster an efficient and cohesive unit capable of addressing the apprehension of fugitives within Wayne County. It is the desire of the participating agencies to achieve maximum inter-agency cooperation in a combined law enforcement effort aimed at removing wanted felons within the community served.
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> III. ORGANIZATION STRUCTURE
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> B. Direction:
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> All signatories acknowledge that the FAST is a joint operation in which all agencies act as partners in the operation of the task force. The DPD, in conjunction with the WCS and USM, will be responsible for the policy and direction of the FAST.
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> C. Supervision:
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> The day-to-day operation and administrative control of the FAST will be the responsibility of the Lieutenant of the DPD.
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> V. ADMINISTRATIVE
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> D. Investigative Exclusivity:
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> * * *

There will be no unilateral action taken on the part of any participating agency relating to the FAST investigations. All law enforcement action will be coordinated and conducted in a cooperative manner.

* * *

VII. EQUIPMENT

A. Vehicles:

The DPD and the WCS agree to provide vehicles as needed for local and county enforcement officers. All equipment expenditures by the DPD and WCS are subject to available funding limitations.

* * *

VIII. FORFEITURE

In any FAST investigation and/or arrest, property and proceeds realized from items seized and forfeited for violating any Federal or State law shall be shared on an equitable basis by the participating agencies.

* * *

X. LIABILITY

Unless specifically addressed by the terms of this MOU, the parties agree to be responsible for the negligent or wrongful acts or omissions of their respective employees. Liability for any negligent or willful act of FAST employees, undertaken outside the terms of this MOU, will be the sole responsibility of the respective employee and agency involved.

Defendant filed a motion for summary disposition, arguing that it was protected by governmental immunity. It asserted that MCL 691.1405 provided an exception to governmental immunity for the negligent operation of a government-owned motor vehicle but only where the vehicle was operated by an "officer, agent, or employee of the governmental agency" that owned the vehicle. And Williams was an officer and employee of the DPD, not the county. Defendant further maintained that Williams was not its agent.

In support of the motion, defendant presented an affidavit by John Underwood, the Director of Wayne County Risk Management. While conceding that the police cruiser was owned and insured by defendant and used by WCS, he also averred that "[o]nly Wayne County employees [were] authorized to operate Wayne County-owned vehicles." He further attested that Wayne County Deputy Sheriff Poma, who was a passenger in the vehicle and authorized to operate the cruiser, "did not have the authority to permit a non-county employee to drive it." Underwood additionally averred that "[u]nder no circumstance was . . . Williams authorized by Wayne County to operate the Wayne County vehicle involved in this accident." Defendant also submitted a road patrol policy manual, which provided that county law enforcement personnel could not authorize non-county personnel to operate a county vehicle. Thus, in addition to the

undisputed fact that Williams was not defendant's employee or officer, she could not properly be characterized as defendant's agent.

The trial court concluded in a cursory manner that when Williams became a member of the FAST and started driving the county police vehicle, she became an agent for the county. This ruling from the bench could be interpreted as a finding that plaintiff was entitled to summary disposition on the issue of agency; however, the order that was subsequently entered simply indicated that defendant's motion for summary disposition was denied. Defendant appeals as of right. MCR 7.203(A)(1); MCR 7.202(6)(a)(v).

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Further, the determination regarding the applicability of a statutory exception to governmental immunity is a question of law subject to de novo review, and a "plaintiff must allege facts warranting the application of an exception to governmental immunity." *Robinson v Lansing*, 282 Mich App 610, 613; 765 NW2d 25 (2009). Under MCR 2.116(C)(7), an order granting a motion for summary disposition in favor of a defendant is proper when the plaintiff's claim is "barred because of . . . immunity granted by law." See *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Id.* The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Id.* This Court must consider the documentary evidence submitted for purposes of a motion brought under MCR 2.116(C)(7) relative to governmental immunity in a light most favorable to the nonmoving party. *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). If there is no relevant factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995). If a pertinent factual dispute exists, however, summary disposition is not appropriate. *Id.* In general, "[i]t is well settled . . . that the existence and scope of an agency relationship are questions of fact for the jury." *Whitmore v Fabi*, 155 Mich App 333, 338; 399 NW2d 520 (1986).

The governmental tort liability act (GTLA), MCL 691.1401 *et seq*., broadly shields governmental agencies from tort liability when an agency is engaged in the exercise or discharge of a governmental function. *Grimes v Dep't of Transp*, 475 Mich 72, 76-77; 715 NW2d 275 (2006), citing MCL 691.1407(1). The GTLA does enumerate several exceptions to governmental immunity, including the motor vehicle exception, MCL 691.1405, which permit a plaintiff to commence an action against a governmental agency. *Grimes*, 475 Mich at 77. MCL 691.1405 provides that "[g]overnmental 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[.]" (Emphasis added.) The grant of immunity under the GTLA is to be construed broadly, whereas the exceptions to immunity are to be construed narrowly. *Grimes*, 475 Mich at 91 n 54.

On appeal, defendant contends that Williams was not an employee or officer of the county; therefore, this case turns on whether she was operating the police vehicle as defendant's agent for purposes of MCL 691.1405. Defendant maintains that it never consented to the creation of a principal-agent relationship between itself and Williams. Rather, each participating member of the FAST agreed to be responsible for the negligent acts of its own employees.

Moreover, the DPD controlled the day-to-day operations of the FAST and, thus, defendant was not a principal with the right to control Williams. Furthermore, according to defendant, Williams was not performing an act for Wayne County when operating the vehicle, and she always remained a DPD officer, working on a task force comprised of four other agencies that did not act as agents for each other. Accordingly, defendant was entitled to immunity granted by law.

Plaintiff argues that any issue regarding the existence or scope of an agency relationship is a question of fact. Accordingly, the trial court correctly concluded that the motion for summary disposition could not be decided as a matter of law. Plaintiff asserts that an agency relationship can be express or implied, and although it must be an agency in fact, it can be implied based on deductions or inferences arising from facts and circumstances. Further, an agency relationship can arise from acts and events that take place over a span of time that reflect acquiescence to or recognition of an agency relationship. Plaintiff argues that, despite defendant's affidavit representing that only Wayne County employees could drive its vehicles, the MOU provided that WCS would provide vehicles "as needed" for local and county officers. Thus, Williams was authorized to drive the county police cruiser that was involved in the accident. Moreover, according to plaintiff, apparent authority was traceable to the principal–defendant–given the execution of the MOU. Plaintiff additionally contends that the law enforcement agencies comprising the FAST were involved in a joint enterprise, and Williams was furthering the interests of Wayne County as well as the DPD. This was another factor that would allow a trier of fact to conclude that there existed an agency relationship. Finally, plaintiff maintains that under defendant's argument, defendant and the city of Detroit would be immune from liability for accidents caused by their cars being negligently driven by FAST officers who were not specifically employed by the particular vehicle-owning agency. This would constitute an inequitable and inappropriate result, violating public policy.

Defendant does not dispute that it is the owner of the police vehicle at issue, which fact is also supported by an affidavit submitted by defendant. And there is no dispute that Williams was not defendant's employee or officer at the time of the accident. Defendant's framing of the issue reflects an acceptance of the proposition that if Williams operated the vehicle as defendant's agent, it could be held liable under the motor vehicle exception to governmental immunity, MCL 691.1405. Accordingly, our focus is on the law of agency.

Generally speaking, "[i]n agency law, the principal and his agent share a legal identity; it is a fundamental rule that the principal is bound, and liable for, the acts of his agent done with the actual or apparent authority of the principal." *People v Konrad*, 449 Mich 263, 280-281; 536 NW2d 517 (1995); see also *Persinger v Holst*, 248 Mich App 499, 505; 639 NW2d 594 (2001) (the principal is liable for an agent's lawful actions performed under the auspices of the principal's authority). This concept is embodied in the motor vehicle exception to governmental immunity, where the governmental agency becomes liable for injuries caused by the negligent operation of an agency-owned vehicle driven by an employee, officer, or agent. An agency relationship arises when there is a manifestation by the principal that the purported agent may act on the principal's account. *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). The authority of an agent to bind the principal may either be actual or apparent, and actual authority may be express or implied. *Id.* at 698; see also *Stephenson v Golden (On Rehearing)*, 279 Mich 710, 734; 276 NW 849 (1937) (an agent is a person who has express or implied

authority to represent or act on behalf of another person, the principal). Implied authority is the authority that an agent believes he or she possesses. *Meretta*, 195 Mich App at 698. Apparent authority arises when acts and appearances lead third parties to reasonably believe that an agency relationship exists. *Id.* at 698-699. Apparent authority must be traceable to the principal, and it cannot be established by the conduct and acts of the alleged agent. *Id.* at 699. "In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances." *Id.*

In determining whether an agency has been created, a court must consider the relations of the parties as they in fact exist under their acts or agreements and note that in its broadest sense an agency includes every relationship in which one person acts for or represents another by his authority. *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n*, 458 Mich 540, 557; 581 NW2d 707 (1998). An essential component of an agency relationship is the right of the principal to control, "at least at some point, the conduct and actions of his agent." *Persinger*, 248 Mich App at 504-505.

While the MOU reflected an agreement by the participating departments to be responsible for the negligent or wrongful acts or omissions of their respective employees, this agreement was somewhat limited by the prefatory language, "Unless specifically addressed by the terms of this MOU."[2] "Vehicles" are specifically addressed in the MOU, wherein it provided that "[t]he DPD and the WCS agree to provide vehicles as needed for local and county enforcement officers."[3] Although this provision does not speak directly to the issue of liability, it concerns the granting of permission to operate certain vehicles, which necessarily implicates liability issues. Importantly, a reasonable interpretation of the language is that WCS expressly agreed to and authorized the use of county vehicles by local officers involved in operations conducted by the FAST, which would include Williams. There is no indication that Williams had commandeered the police cruiser, that she was not engaged in proper FAST-related activities, or that there was no need to use the vehicle.

MCL 691.1405 gives rise to liability where a vehicle, owned by a governmental agency, was negligently operated by an employee, officer, or agent of the governmental agency, resulting in bodily injury or property damage. The question concerning the status of the person operating the vehicle, i.e., whether he or she was an employee, officer, or agent of the governmental

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[2] We note that even if the agreement between the FAST members to be responsible only for the negligence of their respective employees was not subject to contractual limitation, the agreement could not circumvent or nullify MCL 691.1405 as to a plaintiff injured in a crash that was caused by the negligent operation of an agency-owned vehicle if, under all of the facts and circumstances, the driver was legally determined to be an agent of the owner. See *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 358-359; 764 NW2d 304 (2009) (a contract that is in conflict with a statute is contrary to public policy and thus invalid). The language in the MOU is being reviewed to simply help determine whether an agency relationship existed in the first place.

[3] The MOU also provided that "[a]ll law enforcement action will be coordinated and conducted in a cooperative manner."

agency, must necessarily focus on the timeframe during which the accident occurred. Accordingly, the issue posed here turns on whether Officer Williams was defendant's agent at the time she was operating the vehicle and ran the red light, causing the accident. Considering only the MOU, we find that if a non-county FAST officer like Williams is operating a vehicle owned by the county pursuant to the vehicle provision in the MOU, a trier of fact could indeed find that the officer is an agent of the county while operating said vehicle.[4] It would defy logic and contravene the Legislature's intent in enacting MCL 691.1405 to provide immunity to a governmental agency that effectively gives written permission to a person who is not an employee or officer of the agency to operate an agency-owned vehicle that is then involved in an accident due to driver negligence. Under such circumstances, the governmental agency's written authorization to use the vehicle results in the vehicle's operator becoming an agent for the governmental agency for purposes of MCL 691.1405 while the vehicle is being driven by the authorized person; express and implied authority, along with apparent authority, would all coexist. Because the vehicle provision here in the MOU is arguably a bit unclear or ambiguous with respect to the parameters and meaning of the phrase "agree to provide vehicles" in relation to whether it gave authority to a non-county, FAST officer to actually drive the vehicles, it is for the trier of fact to resolve the contractual ambiguity and agency issue. See *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997).

We do note that there is nothing to suggest that the control element of agency must be satisfied by a showing of complete and total control. Indeed, as indicated above, the panel in *Persinger*, 248 Mich App at 504, stated that there need only be a right to control "at least at some point, the conduct and actions of his agent." Here, it is undisputed that, under the MOU's "supervision" paragraph, defendant generally did not have the right to control the day-to-day operations and actions of FAST officers. However, defendant did have the ability to control the use of its fleet of vehicles and thereby control police officers relative to their use of those county vehicles. By executing the MOU, the WCS agreed to provide county vehicles, as needed, for use by non-county, FAST officers. While reasonable minds could differ regarding whether that use entailed operating county police cruisers, defendant, through the WCS, certainly retained a level of control over non-county FAST officers with respect to the day-to-day use and operation of county vehicles that could give rise to an agency relationship.

Further adding to our finding that an issue of fact exists on the agency question is Director Underwood's affidavit in which he averred that Williams lacked authorization to operate the vehicle, that only county employees were authorized to operate county vehicles, and that Deputy Sheriff Poma could not authorize the use of the cruiser by Williams. This affidavit arguably conflicts with the MOU as to the operation of county vehicles by non-county FAST

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[4] This does mean that officers found in these circumstances cannot also be simultaneously acting as agents for other governmental agencies, such as the actual employing agency. *Vargo v Sauer*, 457 Mich 49, 68-69; 576 NW2d 656 (1998) ("it is axiomatic that an individual may serve two masters simultaneously"). We note that, in general, actions by Williams and other FAST officers are beneficial to the various communities covered and served by the MOU and that the participating FAST members also benefit financially by the sharing of seized and forfeited property resulting from the concerted efforts of FAST personnel.

officers. The competing evidence supports a conclusion that defendant's motion for summary disposition was properly denied by the trial court. See *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994) (courts may not assess credibility or weigh competing facts when reviewing a motion for summary disposition).

Affirmed. Having prevailed in full on appeal, plaintiff is entitled to taxable costs under MCR 7.219.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens