

STATE OF MICHIGAN
COURT OF APPEALS

BRITTEN STRINGWELL,

Plaintiff-Appellant,

v

ANN ARBOR PUBLIC SCHOOL DISTRICT,

Defendant-Appellee,

FOR PUBLICATION

July 6, 2004

9:20 a.m.

No. 247052

Washtenaw Circuit Court

LC No. 02-000343-NI

Official Reported Version

Before: Hoekstra, P.J., and O'Connell and Donofrio, JJ.

HOEKSTRA, P.J.

In this personal injury action, plaintiff Britten Stringwell appeals as of right from the trial court's order granting summary disposition to defendant Ann Arbor Public School District under MCR 2.116(C)(7) on the basis of governmental immunity. We vacate and remand.

In October 1998, plaintiff and Artem Raibekas were high school students at Huron High School within defendant school district. Both students were enrolled in a class entitled "Know Your Car," and as a part of the class, they were participating in a four-person group assigned to check the fluids in a truck that defendant school district owned. When Raibekas started the vehicle, the vehicle lurched forward, striking and injuring plaintiff.

Plaintiff filed suit against Raibekas and defendant school district. Defendant school district moved for summary disposition on the basis of governmental immunity. In response, plaintiff argued that the motor vehicle exception to governmental immunity, MCL 691.1405, applied and therefore her claim was not precluded by governmental immunity. The trial court disagreed, and, therefore, granted defendant school district's motion and dismissed with prejudice the cause of action against defendant school district. The trial court denied reconsideration and this appeal ensued.¹

¹ The trial court defaulted Raibekas for failure to appear, plead, or otherwise defend and later entered a default judgment against Raibekas. Raibekas is not a party to this appeal.

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). To survive a motion under this subrule, the plaintiff must allege facts justifying the application of an exception to governmental immunity. *Id.* "We consider 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.*; MCR 2.116(G)(5). "[T]he motion should be granted only if no factual development could provide a basis for recovery." *Xu v Gay*, 257 Mich App 263, 267; 668 NW2d 166 (2003).

Resolution of the issue before us requires statutory interpretation, which is a question of law that is also reviewed de novo. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 62; 642 NW2d 663 (2002). Our Supreme Court has explained the well-established rules of statutory construction:

The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. This task begins by examining the language of the statute itself. The words of a statute provide "the most reliable evidence of its intent" If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. [*Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999) (citations omitted).]

"Unless defined in the statute, every word or phrase of a statute will be ascribed its plain and ordinary meaning." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002).

Tort immunity is broadly granted to governmental agencies when engaged in the exercise or discharge of a governmental function. MCL 691.1407(1). The operation of a public school is a governmental function. *Nalepa v Plymouth-Canton Community School Dist*, 207 Mich App 580, 587; 525 NW2d 897 (1994); *Brosnan v Livonia Pub Schools*, 123 Mich App 377, 381-382, 386; 333 NW2d 288 (1983). However, the governmental immunity act sets forth exceptions to immunity, which must be narrowly construed, *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003), including the motor vehicle exception. MCL 691.1405 sets forth this exception to governmental immunity and provides:

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, as defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948.

For purposes of its summary disposition motion, defendant school district did not dispute its ownership of the vehicle that caused plaintiff's injuries. Thus, the only question here is whether, under the statute, Raibekas can be considered an agent or employee of the district.

Plaintiff argues on appeal that Raibekas may be considered an employee or agent of defendant school district at the time of the accident, and thus the motor vehicle exception to governmental immunity applies.² Plaintiff points out that the statute applies to "any officer, agent, or employee of the governmental agency," MCL 691.1405 (emphasis supplied), but does not define the terms "employee" and "agent." Plaintiff argues that possible factual development could lead to the conclusion that, for purposes of the motor vehicle exception, Raibekas was either an employee or agent of defendant school district. While perhaps plaintiff's agency and employment theories are novel, the lack of discovery before defendant's motion deprived plaintiff of the opportunity to more fully ascertain facts relevant to a determination whether her theories are sustainable. By way of example, plaintiff through discovery could explore the concept of agent or permissive user as used in the ownership liability statute of the Michigan Vehicle Code and its interrelationship with the governmental immunity statute to develop relevant facts to sustain her theories.³ Plaintiff asserts that even though Raibekas was a fellow student, the actions of starting the vehicle at the teacher's direction during a class to apparently allow for the fluid levels to be checked may confer a benefit on defendant school district depending on the status and use of the vehicle within the district. Given these facts and circumstances, we believe that summary disposition was premature. "Generally, a motion for summary disposition is premature if granted before discovery on a disputed issue is complete." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003). Although "summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position," *id.* at

² To the extent that plaintiff's complaint does not plead facts in avoidance of governmental immunity, amendment is appropriate because plaintiff's complaint was filed, and the trial court granted summary disposition, before our Supreme Court's decision in *Mack v Detroit*, 467 Mich 186; 649 NW2d 47 (2002). In *Mack*, our Supreme Court held that governmental immunity is a characteristic of government, not an affirmative defense, and a party suing a governmental unit must plead in avoidance of governmental immunity. *Id.* at 190, 197-203. In allowing the *Mack* plaintiff to amend her complaint to attempt to plead in avoidance of governmental immunity, the Supreme Court further noted: "As to all other cases pending that involve governmental immunity, plaintiffs shall be allowed to amend their complaints in order to plead in avoidance of governmental immunity. If a case is pending on appeal and governmental immunity is a controlling issue, the Court of Appeals may remand to allow amendment." *Id.*, at 203 n 20.

³ MCL 257.401(1) provides in pertinent part, "[t]his section shall not be construed to limit the right of a person to bring a civil action for damages for injuries to either person or property resulting from a violation of this act by the owner or operator of a motor vehicle or his or her agent or servant. The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law. The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge."

25, we conclude that there is a reasonable chance that discovery in the instant case will uncover factual support for plaintiff's position.

Vacated and remanded. We do not retain jurisdiction.

Donofrio, J., concurred.

/s/ Joel P. Hoekstra

/s/ Pat M. Donofrio