STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLY BERMUDEZ, Personal Representative of the Estate of ANTHONY BERMUDEZ,

Plaintiff,

and

DIANE CRANMER, Next Friend of Shaun Cranmer and Kyle Cranmer, and GLENN T. HEINTZELMAN, Personal Representative of the Estate of JARED A. HEINTZELMAN,

Plaintiffs-Appellees,

v

CAPITAL AREA TRANSPORTATION AUTHORITY,

Defendant-Appellant,

and

GLENN T. HEINTZELMAN, KATHY A. HEINTZELMAN, and JANET A. LEE,

Defendants.

UNPUBLISHED
December 27, 2007

No. 275067
Ingham Circuit Court
LC No. 02-000384-NI

Before: Donofrio, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant Capital Area Transportation Authority (CATA) appeals by right the trial court's order denying its motion for summary disposition on the basis of governmental immunity. MCR 2.116(C)(7); MCR 7.203(A)(1); MCR 7.202(6)(v). We affirm.

This case arises out of collision between a car that Jared A. Heintzelman was driving and a CATA bus driven by Janet A. Lee. In a prior appeal, this Court determined as a matter of law that reasonable jurors could only find that the traffic light controlling the bus changed from green to yellow when the bus was a short distance from the intersection and that when the bus entered

the intersection the light controlling the car's direction of travel was red. Consequently, this Court determined that governmental immunity, MCL 691.1407(2), protected Lee because her actions could not have been "the" proximate cause of the accident. *Bermudez v Lee*, unpublished opinion per curiam of the Court of Appeals, issued August 17, 2004 (Docket No. 249609); *Robinson v Detroit*, 462 Mich 439, 482-483; 613 NW2d 307 (2000).

In this appeal, CATA argues the trial court erred because this Court's prior opinion is binding on the lower court as the law of the case. Further, CATA argues that because this Court determined Heintzelman's negligence was the sole cause of the accident, the accident could not have resulted from Lee's negligent operation of the bus as required by the motor vehicle exception to governmental immunity. MCL 691.1405.[1] While we agree with CATA that the law of the case applies and binds the lower court, we disagree our prior opinion precludes a finding that Lee negligently operated the bus and that this negligence was a proximate cause of the accident. Accordingly, the current posture of this case is such that we must affirm.[2]

The quote below from this Court's prior opinion frames the parties' arguments in the present appeal. In Docket No. 249609, a majority of the panel (Bandstra, P.J. and Hoekstra, J.), opined:

> Plaintiffs brought this negligence action for injuries and wrongful death arising out of a motor vehicle accident. Defendant Lee is an employee of Capital Area Transportation Authority (CATA) and operated the CATA bus involved in the motor vehicle accident. The accident occurred on the evening of February 9, 2002, on North Larch Street at the intersection of East Shiawassee in the City of Lansing. The intersection is controlled by a traffic signal. The CATA bus was traveling east on Shiawassee as it approached the Larch Street intersection. Plaintiffs' vehicle was driven by Jared Heintzelman and was traveling north on Larch Street. As the CATA bus proceeded through the intersection, it was struck

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[1] MCL 691.1405 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 . . . ."

[2] CATA also asserted in the trial court that it should have been granted summary disposition under MCR 2.116(C)(10) as to plaintiff Heintzelman because, even if Lee were negligent, Heintzelman was more than 50% at fault for the accident. MCL 500.5135(2)(b). This Court agreed with plaintiffs that CATA's alternative argument was beyond the scope of its claim of appeal regarding the trial court's decision on governmental immunity. Unpublished order of the Court of Appeals, entered January 31, 2007 (Docket No. 275067). Further, another panel of this Court denied CATA's delayed application for leave to appeal regarding its alternative argument. Unpublished order of the Court of Appeals, entered January 31, 2007 (Docket No. 276133). Consequently, we express no opinion whether the law of the case doctrine and MCL 500.5135(2)(b) might combine to deny plaintiff Heintzelman the ability to recover tort damages.

by plaintiffs' vehicle.[3] As a result of the accident, two of the plaintiffs' decedents were killed and the other two occupants of the vehicle sustained serious injuries.

Plaintiffs sued defendant Lee in her capacity as the driver of the CATA bus involved in the accident. Defendant moved for summary disposition, arguing that her conduct did not amount to gross negligence and was not the proximate cause of plaintiffs' injuries, thereby entitling her to governmental immunity under MCL 691.1407. The trial court denied defendant's motion, concluding that there were genuine issues of material fact as to whether defendant's conduct constituted gross negligence.

* * *

As an employee of CATA, a governmental agency, defendant Lee is entitled to governmental immunity if she was acting within the scope of her authority, was "engaged in the exercise or discharge of a governmental function," and her conduct did not "amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2). The parties initially disagree on whether defendant Lee's conduct amounted to gross negligence. We need not decide this issue as we conclude that plaintiffs came forward with insufficient evidence to support a finding that Lee's actions here were "the" proximate cause of the accident.

To the contrary, three of the eyewitnesses to the accident said that defendant's bus entered the intersection just shortly after the light on Shiawassee changed from green to yellow. This testimony was remarkably consistent. Defendant Lee testified that the light changed when the bus was a mere five to ten feet short of the intersection; passenger Sinclair estimated that the light turned yellow less than 20 feet before the bus entered the intersection and Derek Couzzins, another motorist who observed the accident, testified that the bus was approximately five yards from the intersection when the light changed to yellow. Further, this consistent testimony was uncontroverted. Although plaintiffs rely on the deposition testimony of cab driver Evert Smith, he actually only said that the light on Larch was green "when the bus was directly underneath the light . . . . [a]fter the impact." Plaintiffs also rely on the expert testimony of an accident reconstructionist, Ernest Klein, but he concluded that, at the time the bus entered the intersection the light on Shiawassee "could have been yellow . . . as well as it could have been . . . red." Even considering this record in a light most favorable to plaintiffs, *the only reasonable and nonspeculative conclusion that could be drawn is that the light changed from green to yellow when the bus was only a small distance short of the intersection.*

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[3] A careful reading of witnesses' deposition testimony reveals that the front of the bus made contact with the driver's side of the Heintzelman car.

Thus, even considering the evidence in a light most favorable to plaintiffs, *the light was not red on Shiawassee when the bus entered the intersection*.[1] Consequently, *a reasonable fact finder would almost certainly conclude that, when plaintiffs' car entered the intersection, the light on Larch was red*.[2] That conclusion is buttressed by two of the eye witnesses, Sinclair and Couzzins, who testified that they saw plaintiffs' vehicle go through the red light into the intersection.

[1] We note that all accounts estimated the bus' speed to be at least 30 miles per hour, which is more than 40 feet per second. Thus, it would have taken the bus less than half a second to traverse the distance between where it was when the light changed and the perimeter of the intersection, consistent with the account of passenger Sinclair who estimated that it was "probably a second." Further, defendant's expert testified that the traffic signal at the intersection displays a yellow light to oncoming Shiawassee traffic for four seconds before it changes to red.

[2] Even if the fact finder was to somehow conclude that, contrary to the consistent eye witness testimony that the events here occurred in a "split second," there was sufficient time for the Larch signal to turn green before the plaintiffs' vehicle entered the intersection, plaintiffs still would have contributed to the accident by failing to allow the intersection to clear before doing so.

In sum, the available record supports the conclusion drawn by Sergeant David Ellis, the police accident investigator/reconstructionist who opined that:

> As the bus entered the intersection at Larch the traffic light turned yellow or amber colored . . . . In all I find that the Oldsmobile entered the intersection on a red light . . . . In the totality of the circumstances I find fault rests solely with the Oldsmobile for failing to yield right of way at a lighted intersection.

Defendant Lee's actions, even if they rose to the level of gross negligence, were at most "a" proximate cause of the accident, not "the" proximate cause. *Robinson v Detroit*, 462 Mich 439, 482-483; 613 NW2d 307 (2000). Plaintiff failed to come forward with sufficient evidence to avoid the immunity afforded to defendant Lee by the statute and the trial court erred in failing to grant her summary disposition. [*Bermudez v Lee*, unpublished opinion per curiam of the Court of Appeals, issued August 17, 2004 (Docket No. 249609) (Emphasis added).]

A. Standard of Review

Whether the law of the case applies is a question of law we review de novo. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). This Court also reviews de novo a trial court's determination to grant or deny summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(7) asserts that a claim is barred by immunity granted by law and may but need not be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 25-26; 703 NW2d 822 (2005). The allegations of the complaint are accepted as true unless contradicted by documentary evidence. *Maiden*, *supra* at 119. The motion is

properly granted when the undisputed facts establish the moving party is entitled to immunity granted by law. *By Lo Oil Co, supra* at 26.

B. The Law Of The Case Doctrine

The doctrine of the law of the case provides that "'if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.'" *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). As a general rule, the law of the case binds lower courts, which may take no action on remand that is inconsistent with the appellate court's decision on the case. *Grievance Administrator*, *supra* at 260; *Ashker*, *supra* at 13. "The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Id*. Thus, the law of the case doctrine applies regardless of the correctness of the prior appellate decision; a conclusion that the prior decision was wrong will not be sufficient in itself to justify ignoring the doctrine. *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002). But the law of the case doctrine "'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.'" *Locricchio v Evening News Ass'n*, 438 Mich 84, 109; 476 NW2d 112 (1991), quoting *Messenger v Anderson*, 225 US 436, 444; 32 S Ct 739; 56 L Ed 1152 (1912). Courts have recognized several exceptions to applying the doctrine in subsequent proceedings, including, (1) when the law has changed after the first appellate decision, *Ashker*, *supra* at 13; (2) to avoid precluding review of constitutional issues, *Locricchio, supra* at 109-110; and (3) where the facts do not remain materially or substantially the same, *Grace*, *supra* at 363. Further, the law of the case applies "only to issues actually decided, either implicitly or explicitly, in the prior appeal." *Grievance Administrator, supra* at 260.

C. The Parties' Arguments

CATA argues that this Court made several factual determinations necessary to the Court's prior decision that Lee's alleged negligent operation of the bus was at most "a," not "the," proximate cause of the accident resulting in plaintiffs' injuries. Specifically, CATA argues that this Court determined as a matter of law that its bus entered the intersection on a yellow light, that the Heintzelman car entered the intersection on a red light, and that Jared Heintzelman's failure to yield the right-of-way was the sole cause of the accident. CATA argues that because this Court made its factual determinations as a matter of law, they are legal issues not subject to further review in the lower court under the law of the case doctrine. Thus, CATA contends that the trial court erred by denying its motion for summary disposition on the basis that a disputed issue of fact remained for trial - - which party ran a red light - - because such a ruling is inconsistent with this Court's findings of fact as a matter of law. The capstone of CATA's argument is that because this Court previously determined that Heintzelman's failure to yield the right-of-way was the sole cause of the accident, plaintiffs' injuries could not have resulted from Lee's negligent operation of the bus. Thus, the motor vehicle exception to governmental immunity does not apply. See MCL 6912.1405.

Plaintiff Heintzelman argues that the law of the case does not bind the trial court with respect to ruling on CATA's motion for summary disposition under governmental immunity

because different standards apply in determining whether an exception to government immunity applies to CATA or Janet Lee. Whereas to establish Lee's individual liability, plaintiffs were required to raise a material issue of fact supporting a finding of gross negligence that was "the" proximate cause of the accident, but CATA's liability may rest on Lee's ordinary negligence that was "a" proximate cause of the accident. Apparently arguing that the facts have materially changed since this Court's prior decision, Heintzelman notes that his accident reconstruction expert, Daniel Lee, had not yet completed his investigation and rendered his opinion regarding Janet Lee's negligence. Also, Heintzelman asserts that investigating police officer Ellis had not yet been deposed.[4]

Heintzelman further argues that the law of the case has no application here because the present appeal and the appeal in Docket No. 249609 regarding whether Janet Lee enjoyed governmental immunity do not involve the same parties. In addition, different legal issues are involved in the two appeals regarding the level of negligence and proximate cause required to establish liability. Finally, Heintzelman argues that because CATA did not argue the law of the case below, this Court is without jurisdiction to consider this argument on appeal.[5]

The Cranmer plaintiffs mirror the arguments of Heintzelman, asserting that the law of the case has no application to the issue of whether CATA is protected by governmental immunity. The Cranmers argue that this Court in Docket No. 249609 failed to make conclusive findings regarding the intersection traffic signal, stressing the italicized word in the following sentence: "[A] reasonable fact finder would *almost* certainly conclude that, when plaintiffs' car entered the intersection, the light on Larch was red." *Bermudez, supra*, slip op at 3. Also, the Cranmers point out that this Court in its prior opinion did not conclude that fault for the accident rested solely with Heintzelman.

In sum, all plaintiffs argue that despite this Court's prior opinion, disputed issues of fact remain regarding the traffic light controlling the Shiawassee and Larch intersection. Further, all

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[4] CATA contends these arguments are bogus because the depositions of both Daniel Lee and Officer Ellis were taken and filed before plaintiffs filed their responsive briefs in Docket No. 249609. Nevertheless, both witnesses were deposed after the trial court had ruled on Janet Lee's motion for summary disposition. Consequently, neither the trial court in ruling on the motion or this Court on appeal could have considered the depositions. See *South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 654; 625 NW2d 40 (2000).

[5] Heintzelman relies for this proposition on *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 640; 734 NW2d 217 (2007), citing *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). Both cases stand for the unremarkable proposition that an argument not raised in the trial court has not been preserved for appeal, not that this Court lacks jurisdiction to consider the issue. Applicable to this case is the further observation of the *Laurel Woods* Court that "'this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented.'" *Id*., quoting *Smith v Foerster Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

plaintiffs argue that even assuming the CATA bus entered the intersection when the light controlling its direction of travel was yellow, other evidence of driver Lee's negligence exists. In particular, substantial evidence exists that Janet Lee was exceeding the posted 25 miles-per-hour (mph) limit by at least 10 mph. Further, there was testimony that Lee was "in a hurry" and not fully attentive to traffic on Larch street approaching the intersection with Shiawassee.

D. Analysis

First, we reject the argument that the law of the case is inapplicable because the parties involved in the prior appeal are different from the parties participating in the present appeal. The "law of the case offers the same parties a measure of certainty by according finality to the litigated issues until the cause of action is fully litigated, including retrials or appeals, and the superseding doctrines of res judicata and collateral estoppel become effective." *Topps-Toeller, Inc v City of Lansing*, 47 Mich App 720, 729; 209 NW2d 843 (1973). While some of the parties to this litigation are no longer participating, either because they have settled or because, in Lee's case, this Court held that she was protected by governmental immunity, the parties listed in this Court's docket sheet in No. 249609 are identical to those listed in the present appeal. Furthermore, the parties against whom the law of the case doctrine is asserted, plaintiffs, were parties to both appeals. The fundamental underlying policy consideration of the same parties requirement is that every party should have their day in court. *Topps-Toeller*, *supra* at 729. "Generally, the law of the case applies only against those who were parties to the case when the prior decision was rendered and who had their day in court." 5 Am Jur 2d, Appellate Review, § 571, p 332. Thus, even if the second appeal involves additional parties the law of the case applies "where the party against whom the doctrine is invoked was fully heard on the prior appeal." *Id*.

Next, we disagree with plaintiff Heintzelman that facts on which the prior panel relied have materially and substantially changed so as to justify not applying the law of the case. Heintzelman does not assert any truly changed facts, only that additional evidence has come to light after the depositions of an expert, Daniel Lee, and police investigator Ellis, both taken after the trial court's ruling with respect Janet Lee. Compare *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997) (the first appellate decision was premised on the whistle-blower plaintiff reporting to a state agency but on the second appeal the parties agreed that the plaintiff's report was made to a federal agency), with *South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647; 625 NW2d 40 (2000) (post-judgment deposition of expert was a material change in the facts rendering the law of the case inapplicable but because it could have with reasonable diligence been produced earlier it did not justify setting aside the judgment).[6] The "application of the doctrine is not precluded where different evidence is presented at the second trial, but the issue was not left open in the appellate court's decision." 5

[6] We note that the opinion of the Court in *South Macomb* that an expert opinion rendered after the first appellate decision could constitute a sufficient change in the material facts that justify not applying the law of the case doctrine is obiter dicta because the Court decided the case on the basis that the expert opinion was not newly discovered evidence, and therefore, the trial court abused its discretion setting aside the prior judgment. *South Macomb*, *supra* at 655-656.

Am Jur 2d, Appellate Review, § 572, p 333, citing *National Airlines, Inc v Int'l Ass'n of Machinists & Aerospace Workers*, 430 F2d 957 (CA 5, 1970). "The exception to law of the case where evidence on a subsequent trial is substantially different is inapplicable where by the prior appeal the issue is not left open for decision." *Id*. at 960 (internal punctuation omitted).

With respect to Ellis' deposition, plaintiffs fail to adequately explain how it shows that the facts this Court previously relied on have substantially and materially changed. In general, "where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). We deem this part of plaintiffs' argument abandoned.

We also conclude that Daniel Lee's deposition testimony provides no basis for ignoring the law of the case. As discussed already, more is necessary to overcome the doctrine than that the earlier decision might have been wrong. *Grace, supra* at 363-364; *Bennett v Bennett*, 197 Mich App 497, 500; 496 NW2d 353 (1992). As this Court explained in *Bennet*:

> While we tend to agree with plaintiff that this Court's prior decision was erroneous . . . we do not believe that a conclusion that the prior decision was erroneous is sufficient by itself to justify ignoring the law-of-the-case doctrine. To do so would vitiate that doctrine as it would allow this Court to ignore the prior decisions in a case merely because one panel concluded that the earlier panel had wrongly decided the matter. It would, therefore, reopen every case to relitigation of every issue previously decided in hopes that a subsequent panel of the Court would decide the issue differently than did the prior panel. Clearly, the law-of-the-case doctrine has no usefulness if it is only applied when a panel of this Court agrees with the decision reached by a prior panel. [*Id*. at 500.]

Rather, to justify not applying the doctrine, the facts on which the earlier decision relied must be substantially and materially changed. *Grace*, *supra* at 363. Thus, a court may decline to apply the law of the case when the facts have materially changed so as to render the prior determination clearly erroneous, or to otherwise avoid injustice. See *Johnson v White*, 430 Mich 47, 55; 420 NW2d 87 (1988); *People v Wells*, 103 Mich App 455, 463; 303 NW2d 226 (1981). "Under law of the case doctrine . . . it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Arizona v California*, 460 US 605, 619 n 8; 103 S Ct 1382, 75 L Ed 2d 318 (1983).

The essence of Lee's testimony pertinent to this Court's prior decision is that Lee opined more positively than Ernest Klein that Janet Lee ran a red light and, conversely, that Heintzelman entered the intersection on a green light. While plaintiff has only supplied this Court with portions of Daniel Lee's deposition testimony, we assume that Lee used the same methodology and data to render his opinion as did Klein. In formulating his expert opinion regarding the Shiawassee/Larch traffic light, Klein based his equivocal opinion on testimony regarding the speed of the bus at various points in time, the distance between Cedar and Larch on Shiawassee, and the traffic signals' timing sequence between those two intersections. In other

words, both Klein and Lee appear to base their opinions on witness testimony placing the bus at the intersection of Cedar and Shiawassee at a particular point in the sequence of that traffic light, then using estimates of the bus' speed over the distance between Cedar and Larch to calculate the point in the timing sequence of the Shiawassee/Larch traffic light when the bus would have entered that intersection.

There are several problems with respect to both Klein and Lee's opinion testimony. First, they rely on eyewitness testimony as to the location of the bus at a place and time distant from the accident, the intersection of Cedar and Shiawassee. Indeed, Daniel Lee testified in his deposition that the starting point of his calculations was the Shiawassee/Cedar intersection and also that he relied on Janet Lee's testimony that the light at that intersection changed to yellow before the bus entered that intersection. But Janet Lee testified that the Shiawassee/Cedar light changed to green as she approached it and that when she drove through that intersection, it was still green. Bus passenger Faith Sinclair testified that the Shiawassee/Cedar light changed from green to yellow as the bus was passing underneath the light. Thus, in contrast to the consistent and uncontroverted eyewitness testimony regarding the traffic light at the accident intersection, *Bermudez v Lee, supra*, slip op at 2, there is conflicting testimony regarding the color of the light at the intersection of Shiawassee and Cedar when the bus passed through it. Second, there simply is no reliable data regarding the speed of the bus over the entire distance of approximately 500 feet between the two intersections. Finally, although plaintiff Heintzelman has attached to his brief a one-page sheet purported to be the timing sequence of the two intersections, the Court is not directed to any testimony in the record verifying either its authenticity or its accuracy at the time of the accident. Expert opinion testimony must be based on reliable data to be admissible in evidence. MRE 702; *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004).

We conclude based on the foregoing that Daniel Lee's testimony is no less speculative than the testimony of Ernest Klein, which this Court considered in reaching its decision in Docket No. 249609. *Bermudez v Lee, supra*, slip op at 2. Consequently, the facts on which the earlier decision relied have not substantially and materially changed so as to justify ignoring the law of the case. *Grace, supra* at 363; *Bennett, supra* at 500. Further, the subsequent depositions on which plaintiffs rely do not show that this Court's prior judgment was clearly erroneous or that declining to apply the law of the case is necessary to avoid injustice. *Johnson, supra* at 55. We therefore hold that this Court's decision in *Bermudez v Lee, supra* is binding on the parties as to all "issues actually decided, either implicitly or explicitly, in the prior appeal." *Grievance Administrator, supra* at 260.

Nevertheless, plaintiffs' argument that the elements necessary to establish tort liability of CATA differ from those necessary to overcome governmental immunity of Janet Lee has merit. To establish CATA's tort liability, plaintiffs need only show that Janet Lee was guilty of ordinary negligence in driving the bus that struck the Heintzelman car, and that the negligent operation of the bus was "a" proximate rather than "the" proximate cause of the accident resulting in plaintiffs' injuries. MCL 691.1405; MCL 691.1407(2); *Curtis v City of Flint*, 253 Mich App 555, 562-563; 655 NW2d 791 (2002); *Frohman v Detroit*, 181 Mich App 400, 411; 450 NW2d 59 (1989).

This Court has already conclusively determined that Janet Lee's negligence was "at most 'a' proximate cause of the accident, not 'the' proximate cause" of the accident at issue.

Bermudez v Lee, supra, slip op at 3. "The" proximate cause for purposes of imposing tort liability on a government employee under MCL 491.1407(2) "means the one most immediate, efficient, and direct cause preceding an injury." *Robinson v Detroit*, 462 Mich 439, 445-446; 613 NW2d 307 (2000). The prior determination that even viewing the evidence in the light most favorable to plaintiffs, reasonable jurors could only conclude that the CATA bus entered the Shiawassee/Larch intersection on a yellow, not a red traffic light, was the explicit factual lynchpin of this Court's determination. *Bermudez v Lee, supra*, slip op at 2-3. Although there is some authority that the law of the case doctrine applies only to questions of law, not determinations of fact, there is also contrary authority. See 5 Am Jur 2d, Appellate Review, § 570, p 332. Because the factual determination that the CATA bus entered the intersection on a yellow light was made as a matter of law, and any contrary factual determination would be inconsistent with this Court's legal conclusion regarding proximate cause, we conclude it also is binding under the law of case. This furthers the primary purpose of the law of the case doctrine, which is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. *Locricchio*, *supra* at 109; *Ashker*, *supra* at 13.

That Heintzelman's negligence was "the" proximate cause of the accident was the implicit counterpoint to this Court's determination that Janet Lee's actions were not. But this Court, as already noted, left open the possibility of negligence on Lee's part. Although this Court found that the available record supported a finding that fault rested solely with the operator of the Heintzelman car, *Bermudez v Lee, supra*, slip op at 3, this observation was not necessary to the Court's legal determination regarding proximate cause. Accordingly, it is not binding under the law of the case. *Grievance Administrator, supra* at 260. Thus, under the law of the case, this Court's prior opinion does not compel the conclusion that Janet Lee was not negligent in her operation of the CATA owned bus. Consequently, CATA, a governmental agency, is not entitled to summary disposition on the basis of governmental immunity.

We affirm.

/s/ Patrick M. Donofrio
/s/ Joel P. Hoekstra
/s/ Jane E. Markey