STATE OF MICHIGAN

COURT OF APPEALS

ANNE FRASER,

Plaintiff-Appellant,

v

LAKE ERIE TRANSPORTATION COMMISSION,

Defendant-Appellee.

and

DAVID BUSSELL; SUBURBAN MOBILE AUTHORITY FOR REGIONAL TRANSPORTATION, a/k/a, SMART; RYDER/ATE, INC, a/k/a, ATE MANAGEMENT AND SERVICE COMPANY, INC; FIRST TRANSIT, INC, f/k/a ATE MANAGEMENT AND SERVICE COMPANY; and FIRST GROUP AMERICA, INC,

Defendants.

UNPUBLISHED
December 11, 2003

No. 242330
Monroe Circuit Court
LC No. 00-011151-NO

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

In this case, plaintiff alleges that defendant Lake Erie Transportation Commission (LETC) should be held liable for injuries she sustained when defendant David Bussell sexually assaulted[1] her. Bussell drove the LETC bus which plaintiff regularly used to get to and from

[1] Bussell pleaded guilty to two counts of fourth-degree criminal sexual conduct, MCL 750.520e, arising out of the incident that forms the basis for plaintiff's claims.

work. Plaintiff contends that the LETC negligently failed to investigate Bussell's background[2] before hiring him as a driver and failed to adequately supervise him so as to provide safe public transit. Monroe Circuit Judge William F. LaVoy granted LETC's motion for summary disposition pursuant to MCR 2.116(C)(7) and (10) and subsequently denied reconsideration, finding that LETC was immune from tort liability as a governmental agency, and that no exception to governmental immunity applied. Plaintiff appeals by right arguing that the trial court erred because material issues of fact exist regarding two exceptions to governmental immunity: (1) that plaintiff was a third-party beneficiary of the agreement between the city of Monroe and Frenchtown Charter Township, which established the LETC, and (2) that plaintiff's injuries arose out of the operation of an automobile within the meaning of MCL 600.1405. The trial court rejected these arguments below as do we on appeal. Accordingly, we affirm.

This Court reviews de novo both a trial court's decision on a motion for summary disposition and questions of statutory interpretation involving the application of governmental immunity. *Brunsell v Zeeland*, 467 Mich 293, 295; 651 NW2d 388 (2002). The interpretation of a contract is also question of law, which we review de novo. *Schmalfeldt v North Pointe Insurance Co*, ___ Mich ___; ___ NW2d ___ (# 122634, dec'd 11/04/03) slip op 5.

Defendant moved for summary disposition under MCR 2.116(C)(7) and (10). Under either rule, the standard of review is very similar. See *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). A party may support its MCR 2.116(C)(7) motion with affidavits, depositions, admissions, or other documentary evidence, but is not required to do so. *Maiden, supra* at 119; MCR 2.116(G)(2). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and must be supported by evidence. MCR 2.116(G)(3); *Maiden, supra* at 120. In either case, the trial court must consider the documentary evidence the parties submit and decide whether a material factual issue remains for trial or whether the moving party is entitled to immunity. *Id*.; *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003); MCR 2.116(G)(3). If the material facts are not disputed, the trial court may decide a claim is barred by immunity as a matter of law. MCR 2,116(G)(4); *Poppen, supra*.

In general, the Legislature has provided immunity from tort liability for every governmental agency "engaged in the exercise or discharge of a governmental function." MCL 691.1407(1); *Poppen, supra*. A "governmental function" is defined as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). Plaintiff correctly acknowledges that the LETC is protected by governmental immunity. The LETC was created by an interlocal agreement between the city of Monroe and Frenchtown Charter Township pursuant to the Urban Cooperation Act, MCL 125.501 et seq., for the following two purposes:

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[2] At the time defendant hired Bussell, he had been convicted of felonious assault and a drug felony. Bussell had also voluntarily resigned his previous employment as a driver for a bakery after being arrested for soliciting for prostitution an undercover police officer. Bussell's resignation from the bakery included an agreement that the bakery not indicate the reason for the resignation in Bussell's personnel records.

> A) To create an inter governmental organization to provide for the operation, management, financing and planning of local and specialized transit services.
>
> B) Creation of a legal and administrative organization to contract with the Suburban Mobility Authority for Regional Transportation (SMART) for necessary equipment, technical assistance, grants and operation funds related to the operation of a public transit system.

Thus, the LETC is a "governmental agency" and a "political subdivision" of this State because it is a "transportation authority or a combination of 2 or more [municipal corporations] . . . acting jointly," performing a governmental function of providing public transportation, and is immune from tort liability while so engaged unless an exception applies. MCL 691.1401(a), (b), & (d); MCL 691.1407(1); MCL 124.509; *Haliw v City of Sterling Heights*, 464 Mich 297; 627 NW2d 581 (2001). Plaintiff argues that the LETC is not immune from liability because she is an intended third-party beneficiary of the interlocal agreement that created the LETC, citing *Koenig v South Haven*, 460 Mich 667, 675; 597 NW2d 99 (1999), and also argues that her claim comes within the "motor vehicle exception," MCL 691.1405. We disagree.

Plaintiff first argues that as a mildly mentally handicapped person with Down's syndrome, she is a member of a defined class of third-party beneficiaries of the interlocal agreement that established the LETC. Plaintiff contends that the LETC acknowledged her third-party beneficiary status when its manager swore in an affidavit that the LETC "was formed and organized for the primary purpose of providing public transportation for the citizens of the City of Monroe, Frenchtown Township and other areas of Monroe County, particularly and primarily elderly and/or handicapped citizens." Because plaintiff was only 23 years old at the time of the underlying assault, plaintiff alleges that the LETC breached its implied promise to provide safe transit to "handicapped citizens," the group to which she claims to be an identified member. Plaintiff relies on MCL 600.1405, which provides in pertinent part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.
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> * * *
>
> (2)(b) If such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the promise has not been discharged by agreement between the promisor and the promisee in the meantime.

"[G]overnmental immunity does not extend to contract actions, even when the contract action arises out of the same facts that would support a tort action." *Koenig*, *supra* at 675, citing *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 647; 363 NW2d 641 (1984). But

MCL 600.1405 is in derogation of the common law and must be strictly construed. *Koenig, supra* at 678 n 3. Further, to be able to enforce a contract as a third-party beneficiary, the party claiming under the contract must be more than an incidental beneficiary. The contract itself must objectively manifest that the promising party knowingly undertook an obligation "'to give or to do or to refrain from doing something *directly* to or for' the putative third-party beneficiary." *Id.* at 679-680, quoting MCL 600.1405(1) (emphasis supplied by the Court). See also, *Brunsell, supra* at 296-298, and *Schmalfeldt, supra*, slip op at 6-7. A "court should look no further than the 'form and meaning' of the contract itself to determine whether a party is an intended third-party beneficiary within the meaning of [MCL 600.] 1405." *Id*., slip op at 8. Here, despite the averment of the LETC manager, there is no promise at all in the interlocal local agreement between the city of Monroe and Frenchtown Charter Township, which established the LETC, made *directly* to plaintiff, or the class to which she claims membership.

Indeed, the LETC made no promise at all in the interlocal agreement because it was not a party to the agreement; it was the entity formed by the agreement. A third-party beneficiary stands in the shoes of the promisee and may only enforce the rights the promisee possessed under the contract against the promisor. *Rudolph Steiner School of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 738; 605 NW2d 18 (1999); *Riemersma v Riemersma*, 29 Mich App 485, 487; 185 NW2d 556 (1971). The person (party) manifesting an intention to act in a specified way is the promisor and the person (party) to whom the manifestation is addressed is the promisee. Restatement Contracts, 2d, § 2. Here, the LETC made no promise "to give or to do or to refrain from doing something *directly* to or for" plaintiff or any class of which she was member because the LETC made no promises at all.

In sum, plaintiff's third-party beneficiary claim fails because an objective examination of the interlocal agreement reveals no promise directly made to plaintiff or any class to which she is a member, and because the LETC was not a party (promisor) to the contract, which would make it subject to suit for alleged breach of contract. This conclusion is supported by the plain language of the Urban Cooperation Act that expresses the intent of the Legislature that two or more governmental agencies may combine by "interlocal agreement" to provide governmental services and not lose governmental immunity, which the agencies would otherwise enjoy. "All of the privileges and immunities from liability, and exemptions from laws, ordinances and rules, . . . which apply to the activity of officers, agency, or . . . employees of any public agency when performing their respective functions within the territorial limits for their respective agencies shall apply to the same degree and extent to the performance of such functions and duties of such officers, agents or employees extraterritorially under the provisions of any such interlocal agreement." MCL 124.509(1).

Next, plaintiff argues that the alleged negligence of the LETC in hiring and failing to supervise Bussell falls under MCL 691.1405, which 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 [the Motor Vehicle Code, MCL 257.1, et seq.].

Although plaintiff may correctly argue that but for Bussell's being hired by the LETC as a bus driver, he would not have met plaintiff, and would therefore not have assaulted her, such attenuated logic will not survive analysis under our Supreme Court's interpretation of "operation" within the meaning of MCL 691.1405. Applying the settled principle that exceptions to governmental immunity must be narrowly construed and a dictionary definition of the word "operation," our Supreme Court held that the "operation . . . of a motor vehicle," within MCL 691.1405, "encompasses activities that are directly associated with the driving of a motor vehicle." *Chandler v Muskegon Co*, 467 Mich 315, 321; 652 NW2d 224 (2002). The Court further explained that in the context of a motor vehicle, "the common usage of the term 'operation' refers to the ordinary use of the vehicle *as* a motor vehicle, namely, driving the vehicle. In this case, the injury to plaintiff did not arise from the negligent operation of the bus as a motor vehicle." *Id.* at 321-322 (emphasis in the original). See also *Poppen, supra* at 355-356.

When *Chandler* is applied to the case at bar, it is clear that the trial court did not err by granting the LETC summary disposition on the basis of governmental immunity. Plaintiff's allegations of negligence against the LETC had nothing whatsoever to do with Bussell's driving its bus and causing plaintiff injuries from his driving. Accordingly, the motor vehicle exception to governmental immunity does not apply. *Chandler, supra* at321-322; *Poppen, supra* at 355-356.

We affirm.

/s/ Henry William Saad
/s/ Jane E. Markey
/s/ Patrick M. Meter