STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN RYAN, Personal Representative of the Estate of PATRICK D. RYAN, Deceased,

Plaintiff-Appellant,

v

LAMPHERE PUBLIC SCHOOL SYSTEM, CYNTHIA J. PENN, JOHN A. NICHOLS, and AUDREY MARSHALL,[1]

Defendants-Appellees.

UNPUBLISHED
March 16, 2010

No. 286741
Oakland Circuit Court
LC No. 2007-081952-NO

Before: K. F. Kelly, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's opinion and order granting summary disposition in favor of defendants. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I

Plaintiff's decedent, Patrick Ryan (the decedent), was a cognitively impaired 23 or 24-year-old male who also suffered from a seizure disorder. The decedent attended school at the Lamphere Center, a school for 18 to 26-year-old students with physical and cognitive disabilities from throughout Oakland County. Lamphere Center is located at Paige Middle School in the Lamphere Public School System. Despite his disabilities, the decedent engaged in sporting activities, including swimming, and participated in the Special Olympics. The decedent's Special Olympics practice sessions took place at the Paige Middle School swimming pool. During a Special Olympics practice session on April 15, 2005, the decedent drowned in the swimming pool.

[1] Defendant Marshall's name is spelled as "Audrie Marshal" on this Court's docket sheet and variously as "Audrie Marshal" and "Audrey Marshal" on other papers contained in the lower court file. However, she testified at her deposition that the correct spelling of her name is "Audrey Marshall."

Defendant John Nichols was a substitute teacher at the Lamphere Center at the time of the decedent's death. Nichols had originally been hired as a paraprofessional and had begun "helping out with Special Olympics" at that time. Later, in approximately 2002, Nichols became a substitute teacher at the Lamphere Center and took on the role of a full-time coach for the Special Olympics. Nichols testified that the Special Olympics practice sessions were typically held three days a week at about 11:00 a.m. "because [the Special Olympics] had to work around" the class schedule at Paige Middle School.

Defendant Cynthia Penn was employed as a paraprofessional at the Lamphere Center at the time of the decedent's drowning. When Penn first began working at the Lamphere Center, she volunteered to help with the Special Olympics basketball program. However, after being employed at the Lamphere Center for about a year or two, Penn began working with the Special Olympics swimming program. For most of the school day, Penn was assigned to a classroom with a teacher, two other paraprofessionals, and approximately 15 students. But she assisted with Special Olympics swimming practice at 11:00 a.m. about three days a week.

Defendant Audrey Marshall was a student at Lamphere High School at the time of the decedent's death. Marshall was on the Lamphere High School swimming team and was a certified lifeguard. She had been certified as a lifeguard through the American Red Cross in approximately 2003. Sometime in 2004, Cynthia Penn approached Marshall and another Lamphere High School student and asked them whether they would be interested in volunteering as lifeguards during the Special Olympics swimming practice sessions. Marshall and the other student agreed, and began volunteering as lifeguards during the Special Olympics practice sessions approximately two or three times per week. Marshall was not paid for the time she spent lifeguarding at the Special Olympics practice sessions.

Penn, Nichols, and Marshall were present at a Special Olympics swimming practice session on April 15, 2005. Nichols and Penn testified that there were 12 students in the swimming pool that day, including the decedent. According to Nichols, the practice session began as usual, with the students warming up by swimming laps. After everyone had finished warming up and swimming laps, Nichols went to work with some students in the deep end of the pool, while Penn went to work with some other students on the side of the shallow end of the pool. Penn testified that she spoke to the decedent, who was swimming in the shallow end, concerning some relay races in which he was going to participate. After speaking with the decedent, Penn stepped away from the area where the decedent was swimming and "took a step to the side just to talk with the next relay team." Penn never saw the decedent leave the shallow end, which is where he remained throughout. At that time, Marshall was scanning the pool as she had been taught to do. She then bent down to help one of the students re-buckle his floatation device, which had become undone.

Penn testified that it had only been "a few seconds" since she had last spoken to the decedent when she again looked in his direction. It appeared to Penn that the decedent was standing on the bottom of the shallow end with his face submerged in the water. Penn did not initially believe that anything was wrong, but because the decedent was standing in the middle of one of the relay lanes, she called out, "Patrick, you need to move." Penn also asked another student swimming near the decedent to tap him on the head and get his attention. However, the decedent did not respond to Penn's call or to the tap. At that time, Penn jumped into the water and turned the decedent over. The decedent did not respond at all. According to Penn, when she

jumped into the water, Nichols was still in the deep end of the pool and Marshall was still on the side of the pool with another student.

Marshall testified that after she finished helping the student with his floatation device and stood back up, she noticed that Penn had jumped into the pool. She looked toward the shallow end and saw the decedent face down. Marshall went to the shallow end at that time. Nichols testified that he noticed Penn jumping into the pool and knew that something was wrong. He got to the shallow end quickly, and was there by the time Penn was turning the decedent over. Nichols lifted the decedent out of the water. Marshall testified that it took only seconds for Nichols to reach the shallow end and to remove the decedent from the water. Nichols and Marshall began to perform CPR while Penn called 911 from a nearby telephone. Marshall estimated that it had been only "15 seconds, maybe 25 seconds," from the time Penn jumped into the shallow end until the time CPR was commenced. According to the police report filed in this matter, "Penn and Nichols stated they had turned away from the victim for 1 to 2 min[utes] and when they turned back to him [he] was floating face down in the water."

According to the relevant deposition testimony, Nichols cleared the decedent's airway and Marshall checked for a pulse. Nichols performed rescue breathing while Marshall performed chest compressions. Nichols testified that the decedent vomited, that he again cleared the decedent's airway, and that he continued to perform rescue breathing. Nichols testified that he and Marshall continued performing CPR even after the paramedics arrived, because the paramedics "had asked us to continue while they were setting up." Nichols could not remember how long it took for the paramedics to arrive on the scene after Penn called 911. Nichols confirmed that he had never seen the decedent panicking or thrashing about in the water, and that no one had even known that anything was wrong until Penn jumped into the shallow end of the pool. Nichols recalled that this had occurred at about 11:15 a.m.

The decedent was transported to the hospital, where he was placed on life support. Doctors were able to restart the decedent's heart, but he never recovered his brain function. He later died. Oakland County Medical Examiner Dr. Ljubisa Dragovic performed an autopsy on the decedent on April 17, 2005. Dr. Dragovic determined that the cause of death was "anoxic encephalopathy due to near drowning." Dragovic explained that the death resulted from "deprivation of adequate oxygen supply because of the occasion of near drowning . . . ." Dragovic opined that "[i]ndividuals who are unconscious drown very quickly," and that in the case of an unconscious victim, "drowning can actually be accomplished [in] a minimum of 30 seconds." Dragovic noted, "[O]f course, if the resuscitative measures are initiated immediately, there may be artificial [prolongation] of life . . . without brain as it happened in this case." Dragovic explained that the decedent had likely suffered a seizure, become unconscious or semi-unconscious, and quickly drowned.

Kathleen Martin, the retired Director of Special Services for the Lamphere Public Schools, testified that she was the supervisor of the Lamphere Center at the time of the decedent's death in 2005. Martin confirmed that although the Lamphere Center is part of the Lamphere Public School System, it serves multiple school districts in Oakland County by providing special services for students with disabilities from those districts. Martin testified that the Special Olympics Coordinator is an employee of the Lamphere Public Schools and works closely with the Lamphere Public Schools Athletic Department to schedule the use of school facilities and the various Special Olympics practice times. Martin believed that the Special

Olympics Coordinator, in conjunction with the Athletic Department, was also responsible for scheduling lifeguarding times for Marshall and other student lifeguards. Martin stated that "Special Olympics and the Athletic Department working together" typically handled such scheduling responsibilities

Martin confirmed that both Nichols and Penn were Lamphere Public Schools employees who spent part of their time on certain days coaching the Special Olympics. Martin did not specify whether Nichols and Penn were paid for their time coaching the Special Olympics, but did confirm that Nichols's and Penn's Special Olympics coaching occurred on school premises during normal school hours. Martin testified that the Special Olympics practice sessions were "not operated in the same way" as typical Athletic Department activities, and noted that the Special Olympics practice sessions were "extracurricular" and "voluntary." She confirmed that the Lamphere Public School System "doesn't run the Special Olympics," and testified that the school district controls the Special Olympics "[o]nly to the extent that it's done during school hours" and to the extent that the school district "provide[s] the facility for the kids to participate in . . . ." Of note, although Martin did agree with counsel's suggestion that the Special Olympics "was part of the special services that [the decedent] received from Lamphere Center," she thereafter agreed with opposing counsel that the Special Olympics was "not part of the curriculum of the school . . . ."

In April 2007, plaintiff sued defendant Lamphere Public School System, as well as individual defendants Penn, Nichols, and Marshall. Plaintiff's complaint set forth only one count, against all four defendants, entitled "Gross Negligence." Plaintiff listed several ways in which defendants were allegedly grossly negligent. Among other things, plaintiff alleged that the Lamphere Public School System was grossly negligent for failing to have adequate safeguards in place at the swimming pool to prevent drowning, for failing to have adequate staff present, for failing to have proper rescue equipment at the pool, for failing to train and hire enough lifeguards, and for failing to implement a pool supervision plan for swimmers with special needs. Among other things, plaintiff alleged that the individual defendants were grossly negligent for failing to timely recognize that the decedent was drowning and in need of help, for failing to properly watch and supervise the decedent while he was in the water, for failing to timely remove the decedent from the pool, for allowing the decedent to submerge his face below the water of the shallow end, for failing to timely administer CPR and other lifesaving methods, and for failing to follow standard protocol for the prevention of drowning.

Plaintiff retained drowning expert Dr. Jerome Modell, and submitted a report that he prepared for use in this case. Modell disputed Dragovic's conclusion that the decedent could have drowned in as little as 30 seconds. Contrary to the testimony of Penn and Nichols, Modell believed that the decedent had been under water for much more than "seconds." He opined that if the decedent "had been retrieved and resuscitated, as necessary, within 1 ½ to 2 minutes of the onset of submersion, he would have survived without aspiration and, if rescue and resuscitation occurred within 3 minutes of the onset of submersion, even though he would have aspirated and required follow-up care, within reasonable medical probability, he also would have survived." Modell concluded that the time taken to realize that the decedent was drowning, to remove him from the pool, and to begin CPR and rescue breathing must have been much longer than the time period the witnesses had reported.

Defendants moved for summary disposition. Without holding oral argument,[2] the circuit court granted summary disposition in favor of all four defendants on the basis of governmental immunity. The circuit court ruled that the Lamphere Public School System had been engaged in the exercise of a governmental function and was therefore entitled to governmental immunity pursuant to MCL 691.1407(1). With respect to the individual defendants, the circuit court ruled that Penn, Nichols, and Marshall were either governmental employees or volunteers acting within their authority, see MCL 691.1407(2)(a), that the school district had been engaged in the exercise of a governmental function at the time, see MCL 691.1407(2)(b), and that it was beyond genuine factual dispute that Penn, Nichols, and Marshall had not been grossly negligent, see MCL 691.1407(2)(c). The court noted that even if the three individual defendants were somehow negligent, evidence of ordinary negligence does not create a genuine issue of material fact concerning gross negligence. See *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999).

II

Summary disposition is properly granted pursuant to MCR 2.116(C)(7) when, among other things, a claim is barred by governmental immunity. We review de novo the circuit court's grant of summary disposition pursuant to MCR 2.116(C)(7). *Tarlea v Crabtree*, 263 Mich App 80, 87; 687 NW2d 333 (2004). Similarly, "[t]he applicability of governmental immunity is a question of law that is reviewed de novo on appeal." *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). In reviewing a C(7) motion, we consider the affidavits, depositions, admissions, and other documentary evidence to determine whether the defendant is in fact entitled to immunity as a matter of law. *Tarlea*, 263 Mich App at 87. We view the evidence in a light most favorable to the nonmoving party, and make all legitimate inferences in favor of the nonmoving party as well. *Jackson v Saginaw Co*, 458 Mich 141, 142; 580 NW2d 870 (1998).

Whether an activity of a governmental agency constitutes a "governmental function" within the meaning of MCL 691.1407 is a question of law. *Ovist v Dep't of Highways*, 119 Mich App 245, 250; 326 NW2d 468 (1982). Questions of law are reviewed de novo. *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006). Whether an individual defendant was acting as a governmental employee or governmental volunteer within the meaning of MCL 691.1407(2), or as an agent for a private nongovernmental entity, are generally questions of fact for the jury. *Vargo v Sauer*, 457 Mich 49, 71-72; 576 NW2d 656 (1998); *Rakowski v Sarb*, 269 Mich App 619, 626; 713 NW2d 787 (2006).[3]

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[2] The circuit court is specifically authorized to dispense with oral argument, MCL 2.119(E)(3), especially when the court has been "fully apprised of the parties' positions, by way of the parties' briefs, before rendering a decision," *Fast Air, Inc v Knight*, 235 Mich App 541, 550; 599 NW2d 489 (1999). Such was the case here.

[3] We acknowledge that in *Rakowski*, 269 Mich App at 626, this Court held that there was no genuine issue of material fact concerning whether the individual defendant at issue was a governmental employee within the meaning of MCL 691.1407(2). However, by so holding, the *Rakowski* Court implicitly recognized that questions concerning an individual defendant's status

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III

The government tort liability act (GTLA), MCL 691.1401 *et seq*., "broadly shields a governmental agency from tort liability 'if the governmental agency is engaged in the exercise or discharge of a governmental function.'" *Grimes v Dep't of Transportation*, 475 Mich 72, 76-77; 715 NW2d 275 (2006), quoting MCL 691.1407(1). A public school district, such as defendant Lamphere Public School System, unambiguously qualifies as a "governmental agency" within the meaning of the GTLA. MCL 691.1401(b) and (d). Therefore, the relevant question for decision is whether defendant Lamphere Public School System was engaged in "the exercise or discharge of a governmental function" at the time of the decedent's death. If it was, then it is immune from any potential tort liability arising out of the decedent's drowning. MCL 691.1407(1). Throughout our analysis, we must remain mindful that "the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Nawrocki v Macomb Co Road Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000) (emphasis in original).

The GTLA defines "[g]overnmental function" 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). "To determine whether a governmental agency is engaged in a governmental function, the focus must be on the general activity, not the specific conduct involved at the time of the tort." *Pardon v Finkel*, 213 Mich App 643, 649; 540 NW2d 774 (1995). In the context of drowning deaths, for example, our Supreme Court has observed that because counties and townships are authorized by statute to maintain and operate public parks and recreational areas, the operation of a public swimming facility by a county and township constituted a "governmental function," and the governmental entities were therefore entitled to immunity from tort liability when the plaintiff's decedent drowned there. *Richardson v Jackson Co*, 432 Mich 377, 381-383; 443 NW2d 105 (1989). Likewise, this Court has determined that because the Department of Natural Resources was authorized by statute to operate a public recreation area and swimming beach, such an activity was a governmental function that entitled the department to tort immunity when the plaintiff's decedent drowned at the beach. *Jenkinson v Dep't of Natural Resources*, 159 Mich App 376, 379; 406 NW2d 302 (1987). This Court has similarly held that because the Department of Social Services was statutorily obligated to provide "an effective program of out-of-home care for delinquent or neglected children," the department's operation of an off-premises swimming outing for such children at Lake Michigan constituted a governmental function, entitling the department to immunity from tort liability when one of the children drowned in the lake. *Willis v Nienow*, 113 Mich App 30, 37; 317 NW2d 273 (1982).

Turning to the present case, the parties agree that the operation of a public school in general, as well as the implementation and execution of a public school's curriculum, are governmental functions within the meaning of the GTLA. This much is beyond dispute. *Stringwell v Ann Arbor Pub School Dist*, 262 Mich App 709, 712; 686 NW2d 825 (2004); *Davis*, 138 Mich App at 155; *Brosnan v Livonia Pub Schools*, 123 Mich App 377, 381; 333 NW2d 288 (1983); *Deaner v Utica Community School Dist*, 99 Mich App 103, 108; 297 NW2d 625 (1980).

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under MCL 691.1407(2) are for the jury when reasonable minds could differ.

Nevertheless, plaintiff contends that the loaning out of a public school's swimming facilities to a private entity, such as the Special Olympics here, goes beyond the normal operation of a public school district. Plaintiff further contends that the Special Olympics practice sessions held on the premises of defendant Lamphere Public School System were not part of the school's curriculum, and were therefore not sufficiently related to the educational mission of the school to rise to the level of a governmental function. Defendants respond by arguing that the Special Olympics swimming practice sessions *were* part of the regular curriculum at the Lamphere Center. Accordingly, defendants maintain that the school district's act of loaning out the swimming pool and permitting its use for Special Olympics practice sessions qualified as a "governmental function" within the meaning of MCL 691.1407.

Contrary to defense counsel's misleading representations at oral argument before this Court, it is beyond factual dispute that the Special Olympics swimming practice sessions in which the decedent participated were not part of the regular curriculum of the Lamphere Center or the Lamphere Public Schools, and were not akin to a regular physical education program required by state statute. Indeed, Kathleen Martin specifically testified that the practice sessions were not a component of the school's curriculum. Defense counsel's assertion that the swimming practice sessions were held in conjunction with regular physical education classes is entirely disproved by the record evidence in this case. The uncontroverted evidence establishes that although the Special Olympics practice sessions were held on school premises and during school hours, they did not constitute a regular class offering for students at the Lamphere Center. And although Nichols and Penn were employees of defendant Lamphere Public School System, coaching the Special Olympics practice sessions was not one of their regular classroom assignments. Instead, the evidence indicates that Nichols and Penn undertook these coaching activities *in addition to* their normal classroom responsibilities at the Lamphere Center. We acknowledge that Nichols and Penn supervised the swimming practice sessions during their normal workdays, and were therefore essentially paid a portion of their normal salaries for their time spent coaching the Special Olympics. But in spite of defense counsel's protestations to the contrary, this fact did not somehow transform the Special Olympics practice sessions into a "special education program [of] Lamphere Public Schools," "simply a swimming class," "a school practice . . . provided to . . . the special education students," or "a swim class which is part of [the] sports or physical education requirements of the special education program." Nor were the Special Olympics practice sessions one of "the special services that [the Lamphere Public Schools] were paid for by the state to provide to [the decedent]" as defense counsel argued. There is simply no evidence in the record to substantiate any of these representations by defense counsel. Indeed, after making these assertions and being further questioned by this Court, defense counsel finally admitted that the Special Olympics swimming practice sessions were "not affiliated with the school" and were "not a part of our [physical education] requirement." We remind defense counsel that attorneys have a duty of candor toward the tribunal, MRPC 3.3, and that this Court may, on its own initiative, sanction a party or take other disciplinary action upon a determination that an "argument . . . was grossly lacking in the requirements of propriety . . . or grossly disregarded the requirements of a fair presentation of the issues to the court," MCR 7.216(C)(1)(b).

However, even though the Special Olympics swimming practice sessions were not part of the school's regular curriculum, we must nonetheless conclude that defendant Lamphere Public School System was engaged in the exercise of a governmental function when it loaned out its

facilities to the Special Olympics and allowed their use for swimming practice sessions. It is true, as plaintiff asserts, that an activity does not rise to the level of a "governmental function" merely because it occurs on school time and on school premises. See *Galli v Kirkeby*, 398 Mich 527, 537-538; 248 NW2d 149 (1976) (opinion of WILLIAMS, J.). But our courts have uniformly held that when a school district engages in an activity that is expressly or impliedly authorized by the Revised School Code, MCL 480.1 *et seq*., the district is engaged in the exercise of a "governmental function" for purposes of governmental immunity. See, e.g., *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 649-650; 363 NW2d 641 (1984) (holding that because the Revised School Code authorizes a school district to provide building trades classes, and to instruct, warn, and supervise its students during such classes, the offering of a building trades class constituted a "governmental function" and the defendant school district was immune from tort liability for injuries that occurred during the class); *Jones v Williams*, 172 Mich App 167, 173; 431 NW2d 419 (1988) (observing that the alleged transfer of a high school student from special education classes to regular classes so that the defendant school district could exploit his athletic talent was a function authorized by the constitution and the Revised School Code, and was therefore a "governmental function" entitling the district to immunity from tort liability); *Eichhorn v Lamphere School Dist*, 166 Mich App 527, 538; 421 NW2d 230 (1988) (holding that the Revised School Code impliedly authorized the defendant school district to sponsor a homecoming parade, and that the district was therefore immune from liability with respect to any negligence claims arising out of the parade); *Willoughby v Lehrbass*, 150 Mich App 319, 347; 388 NW2d 688 (1986) (observing that because the Revised School Code specifically authorizes school districts to hire and contract with teachers, the defendant school district's act of hiring a teacher and continuing his employment was a governmental function entitling it to immunity from negligent hiring and supervision claims); *Davis v Homestead Farms, Inc*, 138 Mich App 152, 154-155; 359 NW2d 1 (1984) (observing that because the Revised School Code formerly required school districts to teach their pupils about the humane treatment of animals, the defendant school district "was fulfilling [a] curriculum requirement by taking kindergartners on [a] field trip to [a] farm," and was consequently immune from liability when one of the kindergarteners was bitten by a horse during the trip); *Weaver v Duff Norton Co*, 115 Mich App 286, 292-293; 320 NW2d 248 (1982) (holding that the operation of the defendant school district's vocational education program, which was specifically authorized by the Revised School Code, was a governmental function giving rise to immunity from negligence claims); *Cobb v Fox*, 113 Mich App 249, 256-257; 317 NW2d 583 (1982) (holding that because the Revised School Code authorizes school districts to provide transportation for pupils and regulates the issue of bussing, "the maintenance and operation of a school bus system by a school district constitutes an immune governmental function"); *Smith v Mimnaugh*, 105 Mich App 209, 212; 306 NW2d 454 (1981) (observing that because the Revised School Code authorizes a school district to acquire or construct pedestrian overpasses for the safe conduct of pupils to and from school, the defendant school district's decision not to provide an overhead walkway was a governmental function and the district was entitled to immunity from the plaintiff's negligence claims).[4]

[4] Although some of these cases were decided before the enactment of MCL 691.1401(f) by way of 1986 PA 175, the pre-1986 definition of "governmental function" was substantially similar to
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With respect to the matter at issue in the present case, the Revised School Code specifically authorizes a public school district to convey, maintain, or dispose of school district property, facilities, and equipment. MCL 380.11a(3)(c). The Revised School Code further explicitly authorizes a school district to exercise any "power implied or incident to a power expressly stated in this act . . . ." MCL 380.11a(3). We believe that the loaning out of school district athletic facilities to a private nonprofit organization such as the Special Olympics is fairly encompassed within this power to convey, maintain, or dispose of school district property, facilities, and equipment. Providing further support for our conclusion is MCL 380.11a(3)(a), which states that in addition to educating pupils in grades K-12, a school district is authorized to sponsor or operate "lifelong education, adult education, community education, training, enrichment, *and recreation programs for other persons*." (Emphasis added.) It cannot be denied that by making available its facilities and staff members for Special Olympics swimming practice sessions, defendant Lamphere Public School System was acting within the scope of its broad power to sponsor or operate "recreation programs for other persons." MCL 380.11a(3)(a).

By loaning its athletic facilities to the Special Olympics and by making available its staff members to supervise the Special Olympics swimming practice sessions, defendant Lamphere Public School System was acting within the scope of its broad powers under the Revised School Code and was accordingly engaged in the exercise of a governmental function. MCL 691.1401(f); *Eichhorn*, 166 Mich App at 538. As a consequence, defendant Lamphere Public School System is immune from liability as a matter of law with respect to any negligence claims arising out of the Special Olympics swimming practice sessions. MCL 691.1407(1). The circuit court correctly granted summary disposition in favor of defendant Lamphere Public School System. MCR 2.116(C)(7).

IV

We now consider the potential liability of individual defendants Penn, Nichols, and Marshall. Under the GTLA, an "employee of a governmental agency" or a "volunteer acting on behalf of a governmental agency" is immune from tort liability (1) if he or she was "acting or reasonably believe[d] he or she [wa]s acting within the scope of his or her authority," (2) if "[t]he governmental agency [wa]s engaged in the exercise or discharge of a governmental function," and (3) if his or her conduct "does not amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(a), (b), and (c). As noted previously, the circuit court concluded that Penn, Nichols, and Marshall were either governmental employees or governmental volunteers acting within their authority, see MCL 691.1407(2)(a), that the school district was engaged in the exercise of a governmental function at the time of the decedent's death, see MCL 691.1407(2)(b),[5] and that it was beyond genuine factual dispute that Penn, Nichols, and Marshall had not been grossly negligent, see MCL 691.1407(2)(c).

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the definition ultimately adopted by the Legislature. See *Ross*, 420 Mich at 620. By adopting MCL 691.1401(f), the Legislature adopted and "put its imprimatur on" the existing common-law definition of "governmental function" that had been developed by our courts. See *Reardon v Dep't of Mental Health*, 430 Mich 398, 412; 424 NW2d 248 (1988).

[5] For the reasons stated above in Part III, we agree with the circuit court that defendant Lamphere

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However, in reaching these conclusions, the circuit court overlooked a critical step in the inquiry. Before proceeding to consider whether a purported governmental employee or governmental volunteer is immune from tort liability under the GTLA, it is first necessary to determine whether the person is, in fact, an "employee of a governmental agency" or a "volunteer acting on behalf of a governmental agency" within the meaning of MCL 691.1407(2). Indeed, as our Supreme Court has specifically observed, MCL 691.1407(2) "mandates an examination of the . . . *status* of the individual seeking immunity." *Vargo*, 457 Mich at 67-68 (emphasis in original). This step in the inquiry is particularly important because if an individual defendant is found not to be a governmental "employee" or "volunteer" within the meaning of the GTLA, or if the individual defendant is found to have been simultaneously serving both a governmental agency and a private entity, the governmental immunity conferred by MCL 691.1407(2) does not apply to that individual, and he or she may be held liable for mere ordinary negligence. See *Vargo*, 457 Mich at 71.

In the present case, the circuit court wholly failed to undertake such an examination of the individual defendants' status. The court merely concluded without explanation that Penn, Nichols, and Marshall qualified for immunity under MCL 691.1407(2), never addressing whether they were actually governmental "employee[s]" or "volunteer[s]" within the meaning of the statute, or alternatively, whether they were simultaneously serving both a governmental agency and a private entity. This was erroneous. Whether an individual qualifies as an "employee of a governmental agency" or a "volunteer acting on behalf of a governmental agency" within the meaning of MCL 691.1407(2) is generally a question of fact for the jury, *Rakowski*, 269 Mich App at 626, and must typically be determined through reference to common-law agency principles, *Vargo*, 457 Mich at 69-71; see also *Ross*, 420 Mich at 624 n 38.[6]

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Public School System was "engaged in the exercise or discharge of a governmental function" with respect to the activities giving rise to the decedent's death. MCL 691.1407(2)(b).

[6] In *Ross*, which was decided before the enactment of MCL 691.1407(2), our Supreme Court specifically stated that matters such as an individual tortfeasor's status as a governmental employee, governmental agent, or governmental volunteer should "generally be determined with reference to common-law tort and agency principles." *Ross*, 420 Mich at 567 n 38. After the enactment of MCL 691.1407(2), our Supreme Court again suggested that the common law of agency should govern inquiries concerning an individual defendant's status as a governmental employee, governmental agent, or governmental volunteer under the GTLA. *Vargo*, 457 Mich at 69-71. It is true that at least one panel of this Court, in *Rakowski*, 269 Mich App at 624-626, omitted any mention of the common law of agency in considering whether an individual defendant was a governmental employee for purposes of the GTLA. The *Rakowski* panel focused instead on the plain and ordinary meaning of the word "employee" in MCL 691.1407(2). *Rakowski*, 269 Mich App at 626. But we do not believe that this plain meaning approach taken in *Rakowski* in any way conflicts with the dictates of *Ross* and *Vargo*. Surely, many of the longstanding common-law principles of agency are encompassed within most dictionary definitions of the word "employee." See, e.g., Black's Law Dictionary (7th ed) (incorporating elements of the common-law control test into the definition of "employee"). We do doubt the appropriateness of the "economic-realities test," which was used by the circuit court to determine the individual defendant's employment status in *Rakowski*. This is because

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Moreover, whether an individual defendant was simultaneously serving both a governmental agency and a nongovernmental entity is generally a question of fact for the jury. *Vargo*, 457 Mich at 71.

In *Vargo*, our Supreme Court considered whether the defendant physician was immune from liability on the plaintiff's claim. The defendant physician was employed as a professor of human medicine at Michigan State University, but also consulted and treated patients at a private hospital with which Michigan State University was affiliated. *Vargo*, 457 Mich at 53-54. After the plaintiff's decedent died during childbirth at the private hospital, the plaintiff brought suit against the defendant physician, alleging medical malpractice. *Id*. at 54. Our Supreme Court determined that Michigan State University qualified as a governmental agency for purposes of the GTLA and that the defendant physician was performing a governmental function at the time of the alleged malpractice. *Id*. at 66-67. However, the Court was troubled by the fact that the defendant physician had been working for both Michigan State University and the private hospital at the same time. Indeed, the *Vargo* Court noted that "it is axiomatic that an individual may serve two masters simultaneously," and observed that "the definition of 'governmental agency' [in MCL 691.1407(2)] does not include, or remotely contemplate, joint ventures, partnerships, arrangements between governmental agencies and private entities, or any other combined state-private endeavors." *Id*. at 68. After reviewing the record evidence that had been presented in the court below, our Supreme Court concluded that there remained a genuine issue of material fact with respect to whether the defendant physician had an agency relationship with the private hospital, a nongovernmental entity. The Court made clear that "there is no indication that the [GTLA], when read in conjunction with its definitional sources, even remotely contemplates a grant of immunity for agents who are simultaneously serving a private entity." *Id*. at 71.

In the instant case, it is undisputed that Nichols and Penn were employees of defendant Lamphere Public School System and that they supervised the Special Olympics swimming practice sessions on school property during normal school hours. Similarly, it is clear from the record that Marshall was a volunteer lifeguard for defendant Lamphere Public School System. But as in the case of the defendant physician in *Vargo*, there existed genuine issues of material fact concerning whether Penn, Nichols, and Marshall were simultaneously serving as agents of the Special Olympics—a private entity—at the time of the decedent's drowning. As noted earlier, the GTLA does not "even remotely" contemplate "immunity for agents who are simultaneously serving a private entity," *id*. at 71, and such dual agents are therefore not entitled to governmental immunity from tort liability pursuant to MCL 691.1407(2).

Because there remained genuine issues of fact with respect to the status of individual defendants Penn, Nichols, and Marshall at the time of the decedent's death, we must reverse the grant of summary disposition in favor of the individual defendants and remand this matter to the

(…continued)

the economic-realities test is not based on the common law of agency, see *Dole v Elliott Travel & Tours, Inc*, 942 F2d 962, 965 (CA 6, 1991), and its use to determine an individual defendant's status under MCL 691.1407(2) would therefore seem to undermine our Supreme Court's directives in *Ross* and *Vargo*. However, we need not definitively decide this matter for purposes of the present appeal.

circuit court for further proceedings with respect to their potential liability. We do not pass judgment on the likely outcome of the proceedings on remand. We do note, however, that although Penn, Nichols, and Marshall were apparently not paid for their services to the Special Olympics, this does not mean that they could not have been serving as agents of that organization. See 1 Restatement Agency, 3d, § 1.04, comment *c*, p 72.

V

We affirm the circuit court's grant of summary disposition in favor of defendant Lamphere Public School System. We reverse the circuit court's grant of summary disposition in favor of individual defendants Penn, Nichols, and Marshall, and remand for further proceedings consistent with this opinion concerning their potential liability.

In light of our conclusions, we need not consider whether individual defendants Penn, Nichols, and Marshall were grossly negligent.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs under MCR 7.219, a public question having been involved.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen