STATE OF MICHIGAN

COURT OF APPEALS

RODNEY BURFORD, Plaintiff-Appellant,	UNPUBLISHED November 13, 2008
v	No. 278262 Oakland Circuit Court
CITY OF PONTIAC and EWALT CENTER, Defendants-Appellees.	LC No. 2006-074737-NO

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting defendants' motion for summary disposition, pursuant to MCR 2.116(C)(7),[1] on the basis that plaintiff's claims are barred by governmental immunity. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This Court reviews de novo decisions to grant or deny summary disposition. Summary disposition under MCR 2.116(C)(7) is proper when a claim is barred by immunity granted by law. In order to get past such a motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity. *Marchyok v Ann Arbor*, 260 Mich App 684, 687; 679 NW2d 703 (2004). When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true the plaintiff's well-pleaded factual allegations and construe them in the plaintiff's favor. The court must look to the pleadings, affidavits, or other documentary evidence to determine whether there is a genuine issue of material fact. If no facts are in dispute, and reasonable minds could not differ on the legal effect of those facts, whether the plaintiff's claim is barred is a question for the court as a matter of law. *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997).

[1] Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). Although the trial court's order does not specify the subrule under which summary disposition was granted, the trial court explicitly found that governmental immunity applied because the operation of a community center is a governmental function. Accordingly, we presume that the court granted the motion pursuant to MCR 2.116(C)(7).

Tort immunity is broadly granted to governmental agencies. Governmental agencies generally include the state, political subdivisions and municipal corporations, and combinations of them acting jointly. MCL 691.1401; *Warda v Flushing City Council*, 472 Mich 326, 331-332; 696 NW2d 671 (2005). Except as otherwise provided by law, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1).

Pursuant to MCL 691.1401(f), a "'[g]overnmental function' is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." The definition of governmental function is to be broadly applied. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003).

The Legislature exempted actions to recover for bodily injury or property damage arising out of the performance of a proprietary function from the general grant of governmental immunity. See MCL 691.1413. A proprietary function is an activity that is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, not including any activity normally supported by taxes or fees. *Id.* Before an activity is deemed a proprietary function, it must satisfy two tests: (1) the activity must be conducted primarily for the purpose of producing a pecuniary profit, and (2) the activity cannot be normally supported by taxes and fees. *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998).

In determining whether a governmental activity is a propriety function under the governmental immunity act, whether an activity actually generates a profit is not dispositive, although the existence of profit is relevant to the governmental agency's intent. An agency may conduct an activity on a self-sustaining basis without being subject to the proprietary function exemption. Further, where the profit is deposited and where it is spent are evidence of the agency's intent. If profit is deposited in the general fund or used on unrelated events, the use indicates a pecuniary motive. However, use of the funds received to defray expenses of the activity indicates a nonpecuniary purpose. *Herman v Detroit*, 261 Mich App 141, 145-146; 680 NW2d 71 (2004).

In the present case, the trial court concluded that the parties had failed to present admissible evidence with regard to the question of whether the City made a profit with the basketball league. We find no error. Troy Craft, who organized and managed the basketball league, testified that he collected fees from the players and turned the money over to the City. The record is devoid of evidence concerning what the City did with the money thereafter. Although the parties offer assertions that are either unsupported or based on incomplete evidence, neither party provides a full accounting of the fees obtained and the costs of operating the league. There is nothing in the record to indicate that any profit generated by defendant's operation of the basketball league was used to fund any unrelated projects.

Moreover, even if this Court were to accept plaintiff's calculation that defendants obtained a net profit of $945 each season, we would conclude that the proprietary function exception to governmental immunity does not apply. The fact that an activity generates a profit is not dispositive. *Herman*, *supra* at 145. A profit of $945 is more likely nominal than indicative of a pecuniary motive. Because plaintiff has failed to present sufficient evidence that defendant's primary motive in operating the league was to earn a profit, the proprietary function exception is not applicable.

After finding that plaintiff failed to provide evidence regarding whether the City was making a profit with the league, the trial court properly held that the general governmental immunity statute applies because the City's operation of a community center constitutes a governmental function. Plaintiff asserts that the trial court erred by focusing on the operation of the community center rather than the operation of the basketball league. However, we conclude that the distinction is irrelevant. The Legislature has authorized municipalities to engage in both activities. MCL 123.51 provides:

> Any city, village, county or township may *operate a system of public recreation and playgrounds*; acquire, equip and maintain land, buildings or other recreational facilities; employ a superintendent of recreation and assistants; vote and expend funds for the operation of such system. [Emphasis added.]

The operation of both the community center and the basketball league are clearly elements of the City's system of public recreation.

Affirmed.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis