STATE OF MICHIGAN

COURT OF APPEALS

JAMES JAMAR JOY, a minor by his next friend, CHERRY JOY; CHERRY JOY, individually and JAMES WILLIAMS, individually,

Plaintiffs-Appellees,
Cross-Appellees,

v

CONSUMERS POWER COMPANY, a Michigan corporation, THE CITY OF FLINT, a municipal corporation,

Defendants,

and

THE FLINT HOUSING COMMISSION, a nonprofit public body established under the laws of the State of Michigan, REGINALD RICHARDSON, individually, and REDONNA BANKS, individually,

Defendants-Appellants,
Cross-Appellants.

UNPUBLISHED
September 20, 1996

No. 172693
LC No. 93025046 NO

JAMES JAMAR JOY, a minor, by his next friend, CHERRY JOY; CHERRY JOY, individually; and JAMES WILLIAMS , individually,

Plaintiffs-Appellees,

v

CONSUMERS POWER COMPANY, a Michigan corporation,

No. 176682
LC No. 93025046 NO

Defendant-Appellee,

and

THE CITY OF FLINT , a municipal corporation,

Defendant,

and

THE FLINT HOUSING COMMISSION, a nonprofit public body established under the laws of the State of Michigan; REGINALD RICHARDSON, individually; and REDONNA BANKS, individually; and certain unknown agents, employees or contractors of Defendant FLINT HOUSING COMMISSION, individually,

Defendants-Appellants.

Before: Marilyn Kelly, P.J., and Wahls and M.R. Knoblock,* JJ.

PER CURIAM.

In Docket No. 172693, defendants Flint Housing Commission (FHC), Reginald Richardson and Redonna Banks cross-appeal from an order granting in part and denying in part defendant City of Flint's motion for summary disposition and denying plaintiffs' counter motion for summary disposition. In Docket No. 176682, the defendants appeal by leave granted from the trial court's finding that defendant FHC's management of Howard Estates is not a governmental function and constitutes a proprietary function. We reverse and remand.

I

Howard Estates is a public housing development operated by defendant FHC. On October 10, 1993, plaintiff James Joy, age six, was playing with other children in a common area shared by tenants of the Howard Estates development. Nearby, attached to a building in the common area was an electrical transformer, owned, operated and maintained by defendant Consumers Power Company.

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* Circuit judge, sitting on the Court of Appeals by assignment.

The door to the transformer box was open, leaving high voltage power cables exposed. James poked a stick into the box, suffering severe and extensive injuries.

James' parents filed suit against Consumers Power Company, the City of Flint (Flint) and FHC, alleging negligence, gross negligence, breach of contract and breach of the statutory warranty of habitability. It further alleged that defendants Flint and FHC were not immune from liability pursuant to the public building, nuisance per se and proprietary function exceptions to governmental immunity. Plaintiffs later filed an amended complaint adding Reginald Richardson and Redonna Banks as defendants.[1]

The trial court held a hearing on Flint's motion for summary disposition and plaintiff's counter-motion for summary disposition. It ruled that whether the transformer box was a nuisance per se, whether operation of Howard Estates constituted a proprietary function and whether the Renter's Act had been violated were questions of fact to be decided by the jury. The court also found that the public building exception did not apply in this case.

Flint filed an application for leave to appeal and FHC cross-appealed. Leave to appeal was granted by this Court.[2] Plaintiffs then filed a motion with the trial court to amend their complaint. At a hearing on the motion, the court sua sponte ruled that Flint and FHC were performing a proprietary function, not a governmental function, by running Howard Estates.

Defendant FHC filed an application for leave to appeal from the trial court's decision. The parties stipulated to dismiss Flint from the case as long as the FHC's cross-appeal in docket No. 172693 continued. The two cases were consolidated by order of this Court.

II

When reviewing a motion for summary disposition under MCR 2.116(C)(7), this Court considers all documentary evidence submitted by the parties. *Summers v City of Detroit*, 206 Mich App 46, 48; 520 NW2d 356 (1994). All well-pleaded allegations are accepted as true and construed most favorably to the non-moving party. *Id*. at 49. In order to survive a motion brought under MCR 2.116(C)(7), a plaintiff must allege facts justifying application of an exception to governmental immunity. Id.

MCL 691.1407; MSA 3.996(107) states in part:

> (1) Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the governmental agency is engaged in the exercise or discharge of a governmental function.

A governmental function is an activity expressly or impliedly mandated or authorized by constitution, statute, local charter, ordinance or other law. MCL 691.1401(f); MSA 3.996(101)(f); *Peterman v DNR*, 446 Mich 177, 203; 521 NW2d 499 (1994). The definition of governmental function is to be broadly applied. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 97; 494 NW2d 791 (1992). It requires only that there be some constitutional, statutory or other legal basis for the activity in which the agency is engaged. *Hyde v Univerity of Michigan Bd of Regents*, 426 Mich 223, 252-253; 393 NW2d 847 (1986).

Defendant FHC argues that it was performing a governmental function in operating Howard Estates. Plaintiffs, on the other hand, argue that the operation of Howard Estates is a proprietary function. In order for an activity to be a proprietary function, it must: (1) be conducted primarily for the purpose of producing a pecuniary profit; and (2) not normally be supported by taxes or fees. *Id.* at 257-258; Ad*am, supra* at 97. Whether an activity actually generates a profit is not dispositive, but the existence of profit is relevant to a determination of the governmental agency's intent. *Hyde, supra* at 258-259. An agency may conduct an activity on a self-sustaining basis without subjecting itself to the proprietary function exception. *Id.* Another factor to be considered is where the profit generated by the activity is deposited and where it is spent. *Id.* at 259.

In support of their contention that operation of Howard Estates does not constitute a proprietary function, FHC relies on MCL 125.677; MSA 5.3037, which precludes municipal housing commissions from operating public housing projects for a profit. Moreover, FHC submitted the affidavit of Reginald Richardson, Deputy Director of the FHC, which states that Howard Estates "is a totally non-profit leased housing project." Plaintiffs presented no evidence at the trial court level to counter the affidavit.

Moreover, the operation of low income housing projects by municipal housing commissions is expressly authorized by statute. See MCL 125.651 *et seq.*; MSA 5.3011 *et seq*. Among the powers specifically conferred upon such commissions is the power "to lease and/or operate any housing project or projects." MCL 125.657(b); MSA 5.3017(b).

The trial court first considered the issue on January 10, 1994. It held that whether operating Howard Estates was a proprietary function was a question of fact for the jury. When the court revisited the issue on June 6, 1994, it did so sua sponte and without oral argument. It found that operating Howard Estates was a proprietary function as a matter of law. Acting under the assumption that the proprietary function issue had already been decided, plaintiffs state that they had no reason to submit additional evidence to the lower court on the issue. On appeal, they claim to have obtained evidence supporting their position. Given the procedural history of this case, it would be improper to hold as a matter of law at this time that FHC's operation of Howard Estates did not constitute a proprietary function.

We vacate the finding that operation of Howard Estates is a proprietary function and remand the issue to the trial court to allow further discovery. Following discovery, the trial court should redetermine the issue and decide as a matter of law whether FHC is entitled to governmental immunity. *Baker v Waste Management of Michigan*, 208 Mich App 602, 605; 528 NW2d 835 (1995). Any factual disputes should be resolved by the trier of fact.

III

Plaintiffs argue that, even if defendant FHC was performing a governmental function in operating Howard Estates, FHC is exempt from immunity because it engaged in ultra vires activities. In support of their argument, plaintiffs rely on the Public Housing Act and the Renter's Rights Act. MCL 125.651 *et seq.*; MSA 5.3011 *et seq*., MCL 554.131 *et seq.*; MSA 26.1101 *et seq*. The preamble to the housing act provides that it was intended to eliminate housing conditions detrimental to the public peace.

The Renter's Rights Act requires landlords to warrant the fitness of their premises for their intended use, to keep their premises in reasonable repair, and to comply with applicable health and safety laws. MCL 554.139; MSA 26.1109.

Plaintiffs claim that defendant FHC violated its statutory obligations by permitting the transformer box to remain open. Therefore, their actions were ultra vires and preclude them from claiming governmental immunity as a defense. The trial court did not decide whether FHC committed ultra vires acts. However, we will review the issue, because it involves a question of law and the facts necessary for its resolution have been presented. *Gillette Co v Dep't of Treasury*, 198 Mich App 303, 311; 497 NW2d 595 (1993).

We find that FHC did not commit ultra vires acts. This Court has previously stated:

> Generally, the omission of an act is not sufficient to elevate even intentional omissions of a duty, i.e. negligence, to an ultra vires intentional tort. The commission of an act, rather than an omission, is required. [*Epperson v Crawford Co Road Commission*, 196 Mich App 164, 167; 492 NW2d 455 (1992).]

Because the complaints against defendant FHC involve omissions, rather than commissions, FHC was not guilty of ultra vires acts.

IV

Plaintiffs also argue that granting immunity to FHC would be contrary to public policy in that it would create an incentive for housing commissions to disregard deadly hazards on their property. However, in enacting the governmental immunity act, the Legislature has explicitly declared that a governmental agency is to be immune from tort actions if it engages in a governmental function. Exceptions arise if its actions are proprietary in nature or fall within other statutory exceptions. *Ross v Consumers Power (On Rehearing)*, 420 Mich 567, 620; 363 NW2d 641 (1984). The wisdom of the statute is a matter of legislative responsibility with which courts may not interfere. *Jennings v Southwood*, 446 Mich 125, 142; 521 NW2d 230 (1994). Where statutory language is unambiguous, our task is to apply the law as written. *Allstate Ins co v Dep't of Ins*, 195 Mich App 538, 547; 491 NW2d 616 (1992). Therefore, plaintiffs' public policy argument must fail.

V

In addition, plaintiffs argue that granting immunity to public housing commissions such as defendant FHC would violate the rights of low-income housing residents to equal protection of the law. The guarantee of equal protection requires that all persons similarly situated be treated alike. *El Souri v Dep't of Social Services*, 429 Mich 203; 414 NW2d 679 (1987). Unless legislation creates an inherently suspect classification or affects a fundamental interest, the test of whether a governmental classification violates the guarantees of equal protection is whether the classification has a rational basis. *Doe v Dep't of Social Services*, 439 Mich 650, 670-671; 487 NW2d 166 (1992).

To the extent that plaintiffs are arguing discrimination on the basis of wealth, no suspect classification has been implicated. Wealth discrimination alone is not an adequate basis for invoking

strict scrutiny. *San Antonio Independent School District v Rodriguez*, 411 US 1, 29; 93 S Ct 1278; 36 L Ed 2d 16 (1973).

The governmental immunity act is rationally related to several valid state purposes. *Smith v Dep't of Public Health*, 428 Mich 540, 612 n 22; 410 NW2d 749 (1987) (Brickley, J.), aff'd 491 US 58; 109 S Ct 2304; 105 L Ed 2d 58 (1989). This Court has consistently rejected claims that the governmental immunity act violates the equal protection clause. *Charmeneau v Wayne County General Hospital*, 158 Mich App 730, 734; 405 NW2d 151 (1987); *Genessee Rd Comm v State Hwy Comm*, 86 Mich App 294, 300; 272 NW2d 632 (1978). Therefore, plaintiffs' claim is without merit.

VI

On appeal, both parties argue that the trial court improperly ruled that the issue of whether the transformer was a nuisance per se was a question of fact. We agree.

It is well-established that the question of whether a condition constitutes a nuisance per se is one of law for the trial court to decide. *Bluemar v Saginaw Oil Service*, 356 Mich 399, 411; 97 NW2d 90 (1959); *Orion Charter Twp v Burnac Corp*, 171 Mich App 450, 459; 431 NW2d 225 (1988); *Beard v Michigan*, 106 Mich App 121, 125; 308 NW2d 185 (1981). We will review the issue now, because the facts regarding the condition that led to James' injuries are not in dispute.

We find that the transformer box is not a nuisance per se. A nuisance per se in an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained. *Li v Feldt, (After Second Remand)*, 439 Mich 457, 476-477; 487 NW2d 127 (1992); *Taylor v Detroit*, 182 Mich App 583, 589; 452 NW2d 826 (1989).

In the instant case, Plaintiffs do not assert that the transformer was inherently dangerous. Rather, their claim is founded upon a theory that, had defendants ensured that the transformer was properly locked, the condition would not have been dangerous and James would not have been injured. Where the basis of plaintiffs' claim is that the underlying activity became unreasonable and dangerous because a defendant allegedly exercised improper or inadequate care, no colorable nuisance per se claim has been presented. *Taylor*, *supra* at 589.[3]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Marilyn Kelly
/s/ Myron H. Wahls
/s/ M. Richard Knoblock

[1] Richardson was head of maintenance for the FHC, and Banks was manager of the Howard Estates housing development.

[2] Docket No. 172693.

[3] Because we find that the transformer was not a nuisance per se, it is not necessary for us to address the issue whether nuisance per se is a viable exception to governmental immunity.