STATE OF MICHIGAN

COURT OF APPEALS

LINDA HAND,

Plaintiff-Appellee,

v

CITY OF FLINT, FLINT BOARD OF EDUCATION, and FRIENDS OF THE ALFRED P. SLOAN MUSEUM,

Defendants-Appellants.

UNPUBLISHED
January 17, 1997

No. 180069
LC No. 93-025532-NO

Before: Young, P.J., and Markey and D.A. Teeple,* JJ.

PER CURIAM.

Plaintiff filed this negligence action to recover damages for injuries allegedly sustained when she slipped and fell at a summer fair in the City of Flint. The trial court denied defendants' motion for summary disposition, which was based on the affirmative defense of governmental immunity.[1] MCR 2.116(C)(7). Defendants appeal by leave granted. We affirm in part and reverse in part.

Because defendant The Friends of Alfred P. Sloan Museum (hereafter "defendant Friends") did not move for summary disposition based on the arguments now raised on appeal, we agree with plaintiff's assertion that their arguments are not properly before us. Further, with the exception of defendant Friends' claim that it is a "volunteer" for purposes of MCL 691.1407(2); MSA 3.996(107)(2), we find no unusual circumstances that warrant consideration of defendant Friends' arguments. Cf. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). We consider defendant Friends' argument regarding its status as a "volunteer" in this interlocutory appeal only because it presents a question of law upon which all necessary facts have been presented. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1992).

The parties agree that defendant Friends is a non-profit corporation. For this reason, defendant Friends cannot, as a matter of law, rely on the "volunteer" provision in MCL 691.1407(2); MSA

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

3.996(107)(2) for governmental immunity because a "volunteer" is statutorily defined in MCL 691.1401(g); MSA 3.996(101)(g) as "an individual who is specifically designated as such and who is acting solely on behalf of a governmental agency." When a statute specifically defines a given term, that definition alone controls. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996). Because a non-profit corporation is not an individual, it follows that the "volunteer" immunity provided by MCL 691.1407(2); MSA 3.996(107)(2) cannot apply to defendant Friends. See MCL 8.3*l*; MSA 2.212(12) (the word "person" in a statute "may extend and be applied to bodies politic and corporate, as well as to individuals"). Thus, the trial court did not err in denying summary disposition to defendant Friends.

Next, as to defendant Flint Board of Education (hereafter "defendant Board"), the trial court erred in denying its motion for summary disposition under MCR 2.116(C)(7). All the documentary evidence filed or submitted by the parties must be considered when a motion is based on governmental immunity pursuant to MCR 2.116(C)(7). *Tryc*, *supra* at 134. The contents of the complaint are accepted as true unless specifically contradicted by the movant's proofs. *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). Courts must take care, however, not to confuse the separate inquiries into immunity and negligence. *Canon v Thumudo*, 430 Mich 326, 335; 422 NW2d 688 (1988).

Here, the trial court incorrectly focused on the issue of "duty" in denying summary disposition under MCR 2.116(C)(7) on governmental immunity grounds. "Duty" is an element of a negligence cause of action and it comprehends whether the defendant is under any obligation to the plaintiff to avoid negligent conduct. *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977). Because defendant Board's motion for summary disposition was based on governmental immunity, which in turn raised the question of whether defendant was engaged in a proprietary function pursuant to MCL 691.1413; MSA 5.996(113), the pertinent inquiry is whether its activity was (1) conducted primarily for the purpose of producing a pecuniary profit, and (2) not normally supported by taxes and fees. *Hyde v University of Michigan Regents*, 426 Mich 223, 257-258, 260; 393 NW2d 847 (1986). Thus, tort liability may be imposed under MCL 691.1413; MSA 3.996(113) only where both of these factors are satisfied. *Hyde*, *supra* at 258-259. The first prong of the analysis is dispositive here.

Defendant Board provided evidence that the summer fair was a function of, and served as promotion for, the activities of the Alfred P. Sloan Museum, which itself was a "governmental function" being maintained by defendant Board on a self-sustaining basis. See MCL 691.1401(f); MSA 3.996(101)(f). Even if the "income over expenses" accounting prepared for the summer fair could be deemed "profit," notwithstanding the shortcomings shown by defendant Board (e.g., the accounting did not include expenses associated with certain services provided by museum employees to prepare for the summer fair), defendant Board established that the use of the revenue from the summer fair was restricted to defraying the cost of the fair and for operating the museum.

We do not agree with plaintiff's argument that the use of revenue from the summer fair to add to the museum collection established that defendant Board was engaged in a proprietary function or, stated otherwise, that its primary purpose in holding the summer fair was to produce a pecuniary profit.

Further, conducting an activity on a self-sustaining basis does not require that the governmental agency restrict funds to maintaining the activity's status quo. Indeed, the government agency may fund its activities' current and long-range expenses in various ways without transforming the activity into one that performs a pecuniary function. As our Supreme Court noted in *Hyde, supra* at 259, "[i]f the revenue is used only to pay current and long-range expenses involved in operating the activity, this could indicate that the primary purpose of the activity was not to produce a pecuniary profit." Because the evidence established that adding to the museum collection was as much a part of the museum's function as displaying current exhibits, defendant Board's use of revenue from the summer fair to add to the museum's collection did not convert defendant's activities into a pecuniary function.

In sum, because the activity in question was not a proprietary function of defendant Board, the trial court erred in denying defendant Board's motion for summary disposition under MCR 2.116(C)(7). See *Adam, supra* (city's operation of golf course as a cross-country skiing facility and use of fees to pay costs for the purchase and maintenance of the property was not a proprietary function); cf. *Kootsillas v City of Riverview*, 214 Mich App 570, 572-573; 543 NW2d 356 (1995) (city's operation of landfill and use of funds for services unrelated to landfill operation constituted a proprietary function).

The trial court's order denying summary disposition to defendant Friends is affirmed. The trial court's order denying summary disposition to defendant Board is reversed, however, and the matter is remanded for entry of judgment in favor of defendant Board on the basis that it is entitled to governmental immunity.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Robert P. Young
/s/ Jane E. Markey
/s/ Donald A. Teeple

[1] Preliminarily, we note that the City of Flint is no longer a party in this action, having been dismissed from the suit before the motion for summary disposition was filed. Further, pursuant to the parties' stipulation, the trial court ordered a substitution of names for the remaining defendants between the date when defendants filed the motion for summary disposition and the date when the trial court decided that motion. Hence, the actual defendants at the time the motion was decided were "The Friends of Alfred P. Sloan Museum" and "The Board of Education for the School District of the City of Flint."