STATE OF MICHIGAN

COURT OF APPEALS

RANDALL BURROW and KELLY BURROW,

Plaintiffs-Appellants,

v

STATE OF MICHIGAN and the DEPARTMENT OF CORRECTIONS,

Defendants-Appellees.

UNPUBLISHED
November 21, 1997

No. 184874
Court of Claims
LC No. 95-015641-CM

Before: Sawyer, P.J., and Hood and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right a Court of Claims order granting summary disposition in defendants' favor pursuant to MCR 2.116(C)(7), on the grounds that their claims were barred by the statute of limitations and governmental immunity. We affirm.

Plaintiff Randall Burrow (plaintiff) was employed as a corrections officer at the Adrian Temporary Correctional Facility in Lenawee County. In January 1990, plaintiff and other correctional officers notified their supervisors that allowing the inmates to rush toward the prison store located in the courtyard of the prison at the time the store was scheduled to open was a dangerous condition. The correctional officers further informed their supervisors that there were an insufficient number of prison guards assigned to the courtyard at the time the store regularly opened to control the number of prisoners rushing to the store. On January 3, 1992, plaintiff was injured when he was struck by several inmates rushing to the prison store. Plaintiff and his wife brought suit alleging assault, battery, and loss of consortium. The trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7), on the grounds that plaintiffs' claims were barred by governmental immunity and the statute of limitations.

Plaintiffs first argue that the trial court erred in granting summary disposition of their complaint pursuant to MCR 2.116(C)(7), on the ground that their claims were barred by governmental immunity. We disagree. To survive a motion for summary disposition on this ground, the plaintiff must allege facts

that justify the application of an exception to governmental immunity. *Summers v Detroit,* 206 Mich App 46, 48; 520 NW2d 356 (1994).

MCL 691.1406(1); MSA 3.996(107)(1) provides that, "[e]xcept 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 defined as "any activity which is expressly or impliedly mandated or authorized by constitution, statute, or other law." MCL 691.1401(f); MSA 3.996(101)(f); *Ross v Consumers Power Co (On Rehearing),* 420 Mich 567, 591; 363 NW2d 641 (1984). At the time of Randall Burrow's injury, defendants were operating a correctional facility, and were authorized by statute to do so. MCL 791.204; MSA 28.2274; *Cross v Dep't of Corrections,* 103 Mich App 409, 413; 303 NW2d 218 (1981). Thus, they were engaged in the exercise or discharge of a governmental function.

Plaintiffs argue that defendants' conduct amounted to an intentional tort, which is an exception to governmental immunity. Here, we need not determine whether defendants' conduct amounted to an intentional tort, because plaintiffs are incorrect in claiming that an exception to governmental immunity exists on this basis. This Court has repeatedly held that there is no intentional tort exception to governmental immunity. *Payton v Detroit*, 211 Mich App 375, 392; 536 NW2d 233 (1995); *Harrison v Director of Dep't of Corrections,* 194 Mich App 446, 450; 487 NW2d 799 (1992). Therefore, we find that the trial court properly granted summary disposition of plaintiffs' complaint pursuant to MCR 2.116(C)(7) on the ground that plaintiffs' claims were barred by governmental immunity.[1]

Plaintiffs also argue that the trial court erred in denying their motion to amend their complaint to add a claim of nuisance per se. We disagree. A nuisance per se is a condition or activity which constitutes a nuisance all the time and under all circumstances, without regard to the care with which it is maintained or conducted. *Palmer v Western Mich Univ*, 224 Mich App 139; ___ NW2d ___ (1997). Unlike a nuisance in fact, a nuisance per se "is not predicated on want of care, but is unreasonable by its very nature." *Li v Feldt (After Second Remand),* 439 Mich 457, 477; 487 NW2d 127 (1992) (Cavanagh, C.J.). Because the operation of a prison is not "unreasonable by its very nature," it does not constitute a nuisance per se. Moreover, plaintiffs' claim of nuisance per se would have been barred by the exclusive remedy provision of the WDCA. Therefore, we find that the trial court did not abuse its discretion in denying plaintiffs' motion to amend their complaint to add a claim of nuisance per se because the amendment would have been futile.

Affirmed.

/s/ David H. Sawyer
/s/ Harold Hood
/s/ Joel P. Hoekstra

[1] Because we find that summary disposition was properly granted on the basis of governmental immunity, we need not address plaintiffs' remaining arguments regarding the applicable statute of limitations or whether plaintiffs' injuries were the result of intentional torts.