

STATE OF MICHIGAN
COURT OF APPEALS

ANN E. MASKERY and ROBERT MASKERY,

Plaintiffs-Appellants,

v

UNIVERSITY OF MICHIGAN BOARD OF
REGENTS,

Defendant-Appellee.

UNPUBLISHED
March 24, 2000

No. 187738
Court of Claims
LC No. 94-015604-CM

CONNIE FANE and CHARLES FANE,

Plaintiffs-Appellees,

v

DETROIT LIBRARY COMMISSION,

Defendant-Appellant.

No. 211232
Wayne Circuit Court
LC No. 96-648922-NO

KAREN L. COX and NORMAN W. COX,

Plaintiffs-Appellants,

v

UNIVERSITY OF MICHIGAN BOARD OF
REGENTS,

Defendant-Appellee.

No. 215337
Court of Claims
LC No. 96-016039-CM

Before: Whitbeck, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

These consolidated cases come before us on remand from the Michigan Supreme Court. The issue common to each case is whether the public building exception, MCL 691.1406; MSA 3.996(106), as interpreted by the Supreme Court in *Horace v Pontiac*, 456 Mich 744; 575 NW2d 762 (1998), is applicable to defeat defendants' governmental immunity defense. With regard to Docket No. 215337, we are also asked to consider whether the proprietary function exception to governmental immunity, MCL 691.1413; MSA 3.996(113), was applicable to defeat defendant's immunity defense. In each case, we conclude that defendants were entitled to summary disposition pursuant to MCR 2.116(C)(7).

The applicability of governmental immunity is a question of law that is reviewed de novo on appeal. *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995). In deciding a motion for summary disposition based on governmental immunity, a court must consider all documentary evidence submitted by the parties. *Terry v Detroit*, 226 Mich App 418, 428; 573 NW2d 348 (1997), citing *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). All well-pleaded allegations are accepted as true and construed most favorably to the nonmoving party in determining whether the defendant is entitled to judgment as a matter of law. *Wade, supra* at 162-163.

Tort immunity is broadly granted to governmental agencies in MCL 691.1407(1); MSA 3.996(107)(1), which provides:

Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

The parties do not dispute that defendants were governmental agencies and, with the exception of defendant in Docket No. 215337, were engaged in the exercise or discharge of a governmental function at the time of plaintiffs' injuries.

The public building exception to governmental immunity is set forth in MCL 691.1406; MSA 3.996(106), which provides in part:

Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.

This exception applies only when a plaintiff can establish that:

(1) a governmental agency is involved, (2) the public building in question was open for use by members of the public, (3) a dangerous or defective condition of the public building itself existed, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable period. . . . [Kerbersky v Northern Michigan University, 458 Mich 525, 529; 582 NW2d 828 (1998); see also Sewell v Southfield Public Schools, 456 Mich 670, 675; 576 NW2d 153 (1998).]

A structure is a “building” subject to the public building exception if it is a relatively permanent structure enclosing a space and is designed for shelter, storage, habitation, manufacturing, or other uses. *Ali v Detroit*, 218 Mich App 581, 584-585; 554 NW2d 384 (1996).

We first note that in each of these cases, the alleged injuries occurred outside, but in areas adjacent to, entrances to the public buildings. Our Supreme Court has determined that “[a] danger or injury caused by the area in front of an entrance or exit is not a danger that is presented by a physical condition of the building itself.” *Horace*, *supra* at 757. In *Horace*, the Court stated:

In sum, we hold that slip and fall injuries arising from a dangerous or defective condition existing in an area adjacent to an entrance or exit, but nevertheless still not part of a public building, do not come within the public building exception to governmental immunity. [*Id.* at 758.]

The Supreme Court, in *Kerbersky*, *supra* at 535, further stated, “[a]s we recently held in *Horace*, the public building exception does not apply to injuries sustained in a slip and fall in an area adjacent to a public building.”

Docket No. 187738

Application of *Horace*, *supra*, to the facts of this case fails to cause us to change our previous conclusion that the residence hall owned and operated by defendant University was not open to the public. This residence hall is indistinguishable from the privately occupied public housing in *Griffin v Detroit*, 178 Mich App 302; 443 NW2d 406 (1989), and *White v Detroit*, 189 Mich App 526; 473 NW2d 702 (1991), where the buildings were similarly not freely accessible to the public. Although *Kerbersky*, *supra*, might, at first blush, lend support to plaintiff’s argument that because non-residents were occasionally let into the building, it was “open to the public,” this argument impermissibly attempts to broaden the public building exception beyond acceptable bounds. While access to *some portions* of the building in *Kerbersky* may have been restricted at the time of the plaintiff’s injury, access to the *entire* building in the present case was limited to the building’s residents, guests admitted by the residents, and maintenance personnel.

Moreover, we conclude that in light of *Horace* the steps on which plaintiff fell cannot be considered part of the residence hall building itself. These steps merely facilitated ingress and

egress to the building; they did not extend into the building. The steps may correctly be considered “adjacent” to the residence hall. According to *Random House Webster’s College Dictionary* (1997), the word “adjacent” is defined as “lying near, close, or contiguous; adjoining; just before, after, or facing.” According to *Horace*, however, an area “adjacent” to a public building is not part of the public building for purposes of applying the public building exception to governmental immunity. *Id.* at 754-758. We therefore affirm the trial court’s order granting summary disposition in favor of defendant.

Plaintiff’s equal protection argument is raised for the first time on appeal and is thus not preserved for our review. See *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 562; 475 NW2d 304 (1991). Moreover, plaintiff failed to provide this Court with any authority supporting her constitutional challenge to the public building exception to governmental immunity. When a party fails to cite any supporting legal authority for its position, the issue is effectively abandoned. *Schellenberg v Rochester Elks*, 228 Mich App 20, 49; 577 NW2d 163 (1998).

Docket No. 211232

In light of *Horace*, we conclude that the trial court erred, as a matter of law, in finding that the terrace on which plaintiff fell was part of the building operated by defendant. Although there was some dispute over how far plaintiff was from the entrance to the Detroit Public Library when she fell, there is no dispute that she had not yet entered the building at the time of her fall. Although the terrace was adjacent to the library and provided ingress and egress, it was merely contiguous with the building; it was not part of the building itself. See *Horace, supra* at 754-758. The plaintiff in *Horace* fell while she was on a descending walkway approaching the doors to the Pontiac Silverdome, and after she had passed through a set of turnstiles. *Id.* at 747. Because the terrace in front of the entrance to the Detroit Public Library was not part of the library building, we conclude, in line with *Horace*, that plaintiff was precluded from arguing that the public building exception was applicable to defeat defendant’s governmental immunity defense. We thus remand this case to the trial court with instructions to enter an order of summary disposition in favor of defendant.

Docket No. 215337

Plaintiff argues that the moveable ramp on which she tripped and fell was a part of the public building owned and operated by defendant. We disagree. Injuries occurring on property adjacent to a public building do not survive assertions of governmental immunity. *Horace, supra* at 754-758. However, fixtures are considered part of the building for which liability can be imposed. *Velmer v Baraga Area Schools*, 430 Mich 385, 393-394; 424 NW2d 770 (1988). Whether an object is a fixture depends on the circumstances, as determined by three factors: (1) annexation to the realty, whether actual or constructive, (2) adaptation or application to the use or purpose to which that part of the realty is appropriated, and (3) intention to make the article a permanent accession. *Id.* at 394, quoting *Peninsular Stove Co v Young*, 247 Mich 580, 582; 226 NW 225 (1929).

Annexation refers to:

[T]he act of attaching or affixing personal property to real property and, as a general proposition, an object will not acquire the status of a fixture unless it is in some manner or means, albeit slight, attached or affixed, either actually or constructively, to the realty. That is, if the object is not attached to the land or to some structure or appliance which is attached to it, it will retain its character as personalty even though intended for permanent use on the premises. [*Wayne Co v Britton Trust*, 454 Mich 608, 615; 563 NW2d 674 (1997), quoting 35 Am Jur 2d, Fixtures, § 5, p 703.]

“If an object is not physically affixed to the realty, it may acquire the status of a fixture by constructive annexation.” *Id.* at 615. If actual annexation is absent, several factors may be considered: (1) would removal of the item from the realty impair both its value and the value of the realty, (2) how mobile is the item, and (3) would the item be useless without the realty and would the realty be useless without the item? *Id.* at 616-617.

The adaptation of the item to the use of the realty can be explained as follows:

[A]n object introduced onto the realty may become a fixture if it is a necessary or at least a useful adjunct to the realty, considering the purposes to which the latter is devoted. [*Wayne Co, supra* at 619, quoting 35 Am Jur 2d, *supra* at 708.]

Whether there was an intent that an article become a fixture is determined by objective, visible facts. *Carmack v Macomb Co Community College*, 199 Mich App 544, 547; 502 NW2d 746 (1993). “The surrounding circumstances determine the intent of the party making the annexation, not the annexor’s secret subjective intent.” *Wayne Co, supra* at 619. “Intent may be inferred from the nature of the article affixed, the purpose for which it was affixed, and the manner of annexation.” *Id.*

The ramp in the present case cannot be considered a fixture or part of the estate house. The ramp was easily moveable and was not attached to the building. Plaintiff’s argument that the ramp provided her and others with entrance into and exit out of the estate house is without merit. The record shows that ingress and egress to the house were not dependent on the ramp. We conclude that the ramp was neither a necessity to the use of the estate house nor would its removal have impaired the value of the building. In fact, it appears from the record that the ramp was purposely not affixed to the building because of the building’s historical nature. Removal of the ramp would not have made the estate house useless. The mobility of the ramp is also demonstrative of defendant’s intention not to make the ramp part of the estate house itself.

Moreover, in light of *Horace*, the ramp was merely “adjacent” to the estate house and cannot be considered an integral part of the building itself. *Id.* at 754-758. Thus, the trial court properly determined that the public building exception was inapplicable in this case.

Plaintiff further argues that defendant’s operation of food services and catering at the estate house was a proprietary function enabling plaintiff to overcome governmental immunity.

Again, we disagree. The proprietary function exception to governmental immunity is set forth in MCL 691.1413; MSA 3.996(113), which provides:

The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees. No action shall be brought against the governmental agency for injury or property damage arising out of the operation of proprietary function, except for injury or loss suffered on or after July 1, 1965.

The definition of proprietary function is clear and unambiguous. *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998). To be a proprietary function, an activity must: (1) be conducted primarily for the purpose of producing a pecuniary profit, and (2) not normally be supported by taxes and fees. *Id.*

The first prong of the proprietary function test has two relevant considerations. First, whether an activity actually generates a profit is not dispositive, but the existence of profit is relevant to the governmental agency's intent. *Coleman, supra* at 621. An agency may conduct an activity on a self-sustaining basis without being subject to the proprietary function exemption. *Hyde v University of Michigan Bd of Regents*, 426 Mich 223, 258-259; 393 NW2d 847 (1986); *Codd v Wayne Co*, 210 Mich App 133, 136; 537 NW2d 453 (1995). To sufficiently find that a governmental agency is engaged in a proprietary function, it must be established that the generation of a profit is the primary motive. *Hyde, supra* at 258-259. Second, where the profit is deposited and where it is spent indicate intent. *Murphy v Muskegon Co*, 162 Mich App 609, 621-622; 413 NW2d 73 (1987). If profit is deposited in the general fund or used on unrelated events, the use indicates a pecuniary motive, but use to defray expenses of the activity indicates a nonpecuniary purpose. *Coleman, supra* at 621-622; *Murphy, supra* at 622.

Our review of the record shows that defendant was not engaged in a proprietary function at the time of plaintiff's injury. Although income was generated by the estate from tours, food services, and rental of the estate house and outbuildings, it was used for debt retirement, educational purposes, maintaining the estate, and defraying costs associated with the operation. There is nothing in the record to indicate that any profit generated by defendant's operation of the estate was used to fund other projects unrelated to the estate. Compare *Hyde, supra* at 258-259 and *Coleman, supra* at 621-622.

Moreover, plaintiff's focus on the revenue produced by the food service component of the estate is misplaced. Although the bulk of the estate's revenue was generated through this component of the operation, there is a difference between revenue and profit. The record shows that, at best, the estate operated at a nominal profit and often operated at a loss. Plaintiff thus failed to present sufficient evidence that defendant's primary motive in operating the estate was to earn a profit. See *Murphy, supra* at 621-622.

Defendant provided sufficient evidence that the estate serves the community by focusing on the cultural, educational and historical value of the facility. Plaintiff admitted that defendant's estate operates a museum and that the estate is a National Historic Landmark. Because governmental agencies traditionally provide these types of services to the community, it could be expected that taxes and fees would be utilized to support the provision of these services. See *Codd, supra* at 136. It is not required that taxes and fees *actually* support the operation. *Hyde, supra* at 260 n 32.

Docket Nos. 187738 and 215337 are affirmed. Docket No. 211232 is reversed and remanded for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Donald S. Owens