

STATE OF MICHIGAN  
COURT OF APPEALS

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THE DETROIT EDISON COMPANY,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

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UNPUBLISHED

February 21, 2006

No. 257667

Wayne Circuit Court

LC No. 02-243159-NZ

Before: Murray, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Plaintiff appeals as of right the grant of summary disposition in favor of defendant based on the assertion of governmental immunity. We affirm the trial court's grant of defendant's motion for summary disposition under MCR 2.116(C)(7), but reverse the denial of plaintiff's motion to amend the complaint.

For its first issue, plaintiff contends the trial court erred in determining that governmental immunity barred plaintiff's tort claims, asserting that defendant's operation of the Public Lighting Department ("PLD") comprised a proprietary function. A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The applicability of governmental immunity is also a question of law that this Court reviews de novo. *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

MCL 691.1407(1) provides broad tort immunity to governmental agencies, providing, in relevant part:

Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.

A "governmental function" is defined as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). See also *Herman v Detroit*, 261 Mich App 141, 144; 680 NW2d 71 (2004), citing *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003). To be deemed a governmental function "only requires that there be some constitutional, statutory, or other legal basis for the activity in which the governmental agency was engaged," *Herman, supra* at 144

(citation omitted), with the focus being “on the general activity and not the specific conduct involved at the time of the tort.” *Id.*, citing *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003).

There are six narrow statutory exceptions to this broad grant of immunity. See *Chandler v Muskegon Cty*, 467 Mich 315, 320; 652 NW2d 224 (2002) and MCL 691.1401 et. seq. MCL 691.1413 establishes the guidelines for finding a proprietary function:

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.

In accordance with this statutory definition, to be considered a proprietary function, an activity: “(1) must be conducted primarily for the purpose of producing a pecuniary profit; and (2) it cannot be normally supported by taxes and fees.” *Herman, supra* at 145, quoting *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998).

On at least two prior occasions, this Court has determined that defendant’s operation of the PLD constitutes a governmental, as opposed to a proprietary, function. *Herman, supra*, at 146; *Taylor v Detroit*, 182 Mich App 583, 587-588; 452 NW2d 826 (1989). We conclude that the facts in this case likewise compel a holding that the operation of the PLD is not a proprietary function.

Authority for establishment of the PLD is found in the Detroit Charter, ch 12, § 7-1204. The mission statement of the PLD is defined as comprising the provision of “reliable, economic, high quality lighting and emergency services that light the streets for safety and are responsive to the needs of the citizens, businesses and visitors of the City of Detroit.” In addition, the PLD is described as a “general fund agency” which “owns and operates thirty-one (31) substations throughout the City and a steam plant. Power is furnished to over 1,800 public and private customers.” The PLD is denoted as maintaining and operating “almost 87,000 street and alley lights as well as 1,200 traffic signal installations.” The goals of the PLD are listed as:

1. Provide reliable, efficient light to make the streets of Detroit safe.
2. Deliver high quality, economic energy (electric and steam) to our customers.
3. Operate and maintain the Traffic Signal System of the City of Detroit.
4. Operate and maintain an efficient communications system for Police, Fire and Lighting departments.
5. Exercise regulatory control of the overhead lines and poles in the City’s Right-of-Way.

Additionally, as a general fund agency, for the PLD “primary revenue sources are the general tax levy . . . , local income taxes, certain state and federal aid, and fees and charges of the general fund departments.”

Plaintiff’s arguments on this issue focuses primarily on the allegation that the PLD competes with plaintiff for private customers, and that the PLD generates a profit. In addressing these arguments, we note that “whether an activity actually generates a profit is not dispositive, but the existence of profit is relevant to the governmental agency’s intent.” *Herman, supra* at 145. Both the Supreme Court and this Court have determined that the proprietary function exception is not applicable to activities that an agency conducts on a self-sustaining basis because tort liability is imposed “only where the *primary* purpose is to produce a pecuniary profit. It does not penalize a governmental agency’s legitimate desire to conduct an activity on a self-sustaining basis.” *Hyde v Univ of Michigan Regents*, 426 Mich 223, 258-259; 393 NW2d 847 (1986). However, where profits are deposited may demonstrate intent. If funds are deposited into a general fund or used for unrelated activities, the use may indicate a pecuniary motive. *Herman, supra* at 145. When profits are used to defray the expenses incurred for the activity, a nonpecuniary purpose is indicated. *Id.*

Plaintiff contends that defendant’s deposit of profits or monies from operation of the PLD into the general fund, for disbursement to any/all departments or agencies, without restrictive use of these funds by the PLD, demonstrates that it is engaged in a proprietary function. Plaintiff’s contention is contrary to our conclusion in *Herman*, where we determined that “[b]ecause the general fund’s primary revenue sources are the general tax levy, and because the lighting department’s expenditures come out of the general fund, the operation of the lighting department is supported by taxes,” establishing the “governmental nature of the lighting department’s functions.” *Herman, supra* at 146-147. In addition, plaintiff’s position is contradicted by the recognition that “[t]o be excluded from the proprietary function exception to immunity, an activity need not actually be supported by taxes or fees if it is a kind normally supported by taxes or fees.” *Id.* at 145.

Plaintiff contends defendant’s PLD actually realizes a profit, suggesting forfeiture of immunity because the scope of the profit and activity is such “as to render it a private profit-making enterprise.” *Herman, supra* at 146, citing *Kootsillas v City of Riverview*, 214 Mich App 570, 573; 543 NW2d 356 (1995). In support of its position that the PLD does not realize a profit, defendant submitted to the trial court budget documentation spanning five fiscal years indicating that expenditures for the PLD consistently exceeded revenues.

The trial court properly rejected plaintiff’s expert’s affidavit as being based on speculation. While plaintiff’s expert opined that a prior year’s alleged understatement of budgeted revenues could convert a PLD loss to a profit for a specific fiscal year, he indicated the need for “further documentation” to substantiate or verify his opinion.<sup>1</sup> As such, the trial court’s rejection of the affidavit of plaintiff’s expert as “purely speculation” was appropriate.

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<sup>1</sup> To establish the profitability of the PLD, plaintiff’s expert implies the necessity of separating  
(continued...)

As indicated by the *Hyde* Court, even if plaintiff were able to demonstrate that defendant's PLD did generate consistent financial profits, it is not enough to exempt defendant from the applicability of governmental immunity. Plaintiff has failed to demonstrate that the "primary purpose" of the activity conducted by defendant's PLD was to produce a pecuniary profit and "that the activity is not normally supported by taxes or fees." *Id.* at 260. Therefore, the trial court did not err in granting summary disposition in favor of defendant based on governmental immunity.

Finally, the fact that defendant has admitted the unremarkable fact that the PLD competes with plaintiff for private Detroit customers is unpersuasive. Attempting to generate revenue to deflect costs does not turn an activity into a proprietary function. *Hyde, supra.* Mr. Petty in fact testified that this was the purpose of seeking out private customers. Accordingly, the trial court properly held that plaintiff's tort claims were barred by statutory governmental immunity.

For its second issue on appeal, plaintiff contends the trial court erred by failing to permit it to amend its complaint to add a claim for contractual indemnification. Specifically, plaintiff cites to an agreement between it and defendant which contained the following "Liability and Indemnification" provision:

The electric energy supplied under this Agreement is supplied upon the express condition that after it passes the points of delivery, as specified in Section 3.1 hereof, such energy becomes the property of the City and Edison shall not be liable for, and shall be held harmless by the City against loss or damage to any person or property whatsoever, resulting directly or indirectly from the use, misuse, or presence of said electric energy on the city's premises, or elsewhere, after its [sic] passes the point of delivery to the City, except where such loss or damage shall be shown to have been occasioned by active negligence of Edison, its agents or employees.

Plaintiff contends the trial court abused its discretion in failing to consider its motion to amend the complaint, resulting in denial of the motion as an action ancillary to the grant of summary disposition. This Court reviews for an abuse of discretion a trial court's decision to deny leave to amend a complaint. *Dowerk v Charter Twp of Oxford*, 233 Mich App 62, 75; 592 NW2d 724 (1998).

MCR 2.118(A)(2) provides that "a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires."

(...continued)

the expenses incurred by the PLD for mandated functions such as street lighting from revenues generated by the purchase and distribution of electricity. Plaintiff suggests that it is appropriate to evaluate the profitability of the PLD based on the balancing or comparison of revenues and expenses incurred only from the generation and distribution of electricity, while ignoring expenditures incurred in fulfilling the stated purpose and mission of the PLD, to provide energy for street lights, traffic signals and communications systems for public services. This serves to substantially alter the stated goals of the PLD and does not provide a comprehensive or balanced picture of the actual economic or fiscal status of the PLD. The functions and responsibilities of the PLD cannot be severed merely to demonstrate the potential for profit.

Reasons justifying a trial court's denial of leave to amend include undue delay, dilatory motive or bad faith, repeated failure to cure deficiencies by amendments previously permitted, undue prejudice to the other party, or futility. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997).

Defendant argues the trial court properly considered and rejected plaintiff's motion to amend its complaint, determining that if the trial court granted summary disposition in favor of defendant, it would render plaintiff's request moot. Of course, we have no ability to know why the trial court denied the motion, other than it had already granted defendant's motion for summary disposition<sup>2</sup>, because there is nothing on record indicating it's reasons. However, a trial court is required to articulate the reasons for its refusal to permit amendment of the complaint. *Tierney v Univ of Michigan Regents*, 257 Mich App 681, 687-688; 669 NW2d 575 (2003).

We can, of course, always affirm the trial court's decision if it reached the right result for the wrong reason. *Outdoor Systems, Inc v City of Clawson*, 262 Mich App 716, 720 n 4; 686 NW2d 815 (2004). However, none of the other reasons proffered by defendant warrant such relief. For instance, defendant asserts the contract is essentially an inappropriate exercise of authority and comprises an ultra vires act which is unenforceable. Specifically, defendant contends it was precluded from entering into the agreement because it results in the unauthorized dispersal of government assets in contradiction of Const 1963, art 7, § 26 which provides:

Except as otherwise provided in this constitution, no city or village shall have the power to loan its credit for any private purpose or, except as provided by law, for any public purpose.

Although defendant is correct in asserting that “[c]ontracts which involve an attempt to use public money for the furtherance of a private enterprise are void,” *Skutt v Grand Rapids*, 275 Mich 258, 266; 266 NW 344 (1936) (citations omitted), the entry into the contract between defendant and plaintiff does not necessarily constitute an ultra vires or unauthorized agreement. Rather, Const 1963, art 7, § 26 is inapplicable, as the clear language of the provision refers only to the preclusion of any municipality engaging in the “loan [of] its credit” to a private corporation. Clearly, the indemnification provision does not constitute a loan of credit, but rather, an extension of financial liability, which is not addressed by the constitutional provision.

Defendant's reliance on *Wheeler v Sault Ste Marie*, 164 Mich 338; 129 NW 685 (1911) is misplaced. Although that case did hold that it was beyond the power of the city to enter into an indemnity agreement, that decision was not based upon any Michigan statute, constitution or case law. Instead, the Court relied on case law from other jurisdictions for that holding. *Id.* at 341. More important, however, is the fact that defendant is a “home rule city,” and “home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not

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<sup>2</sup> Plaintiff sought to amend the complaint to include a contractual claim for indemnification. This is not automatically precluded by the grant of summary disposition based on governmental immunity, as immunity only applies to tort liability.

expressly denied.” *AFSCME v Detroit*, 468 Mich 388, 410; 662 NW2d 695 (2003), quoting *Detroit v Walker*, 445 Mich 682, 690; 520 NW2d 135 (1994). As discussed in *Walker*, the 1963 Constitution contains a municipal governance system consisting of a “general grant of rights and powers, subject only to certain enumerated restrictions instead of the earlier method of granting enumerated rights and powers definitely specified.” *Walker, supra* at 690. Because defendant has not pointed out any statutory or constitutional restrictions on defendant’s ability to enter into this indemnity clause,<sup>3</sup> plaintiff’s motion to amend should have been granted.

We also reject as factually unsound defendants argument that the contract does not apply because the date for implementation of the indemnification provision of the contract, July 12, 2001, was subsequent to the April 12, 2001 incident, rendering plaintiff’s request for amendment of its complaint futile. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). As plaintiff points out, the agreement containing the indemnity clause was first entered into in 1991. It was only an amendment to the 1991 agreement that was agreed upon in 2001, and that amendment had no impact upon the indemnity clause. We therefore conclude that the trial court abused its discretion in denying plaintiff’s motion to amend the complaint.<sup>4</sup>

For its final issue on appeal, plaintiff asserts the trial court erred in failing to impose sanctions against defendant for the wrongful spoliation of evidence.<sup>5</sup> This Court reviews a trial court’s decision whether to impose sanctions for spoliation of evidence for a clear abuse of discretion. *Citizens Ins Co v Juno Lighting, Inc*, 247 Mich App 236, 242; 635 NW2d 379 (2001).

Plaintiff contends the trial court erred in denying its motion for sanctions for defendant’s destruction, either intentionally or unintentionally, of “911” and emergency tapes pertaining to calls regarding downed wires in the area of the electrocution earlier in the day. Plaintiff contends the tapes were integral in answering “questions about whom was notified and when notification was given about the Defendant City’s own downed power line.” Defendant contends

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<sup>3</sup> Defendant has an ordinance providing the PLD with the general authority to exercise powers to perform any duties necessary to carry out its function of furnishing and selling light and power. See Ordinance 7-1024(i) and (ii).

<sup>4</sup> Plaintiff also asserts the trial court erred in granting summary disposition because a genuine issue of material fact existed regarding whether defendant’s PLD was negligent in failing to maintain its wires in a safe and reasonable manner. Plaintiff also implies defendant’s employees were negligent in addressing reports of downed electrical wires on April 12, 2001. Based on our determination of the applicability of governmental immunity, and plaintiff’s failure to allege any other exception to immunity, plaintiff’s allegation is barred. Although plaintiff does not name individual employees of defendant, it implies defendant’s employees were negligent in the discharge of their duties pertaining to investigation and response to calls of downed wires on April 12, 2001. However, under MCL 691.1407(7)(a), even if plaintiff had succeeded in coming forward with evidence of ordinary negligence, it does not create a genuine issue of material fact regarding gross negligence. *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999). Hence, the trial court’s grant of summary disposition was not in error.

<sup>5</sup> We address this issue so that it is not revisited on remand.

the loss of the evidence was inadvertent and irrelevant because it did not impact the ultimate question to be answered – was defendant entitled to governmental immunity?

When material evidence is lost or destroyed, either intentionally or unintentionally, and “the other party is unfairly prejudiced because it is unable to challenge or respond to the evidence,” a trial court is given the inherent authority to sanction the culpable party. *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). In determining whether sanctions are required or necessary to assure a “fair playing field”, we must determine how important the lost or destroyed evidence is to claims and defenses asserted by the parties. While the disputed evidence might provide a clearer picture of events and notice provided to the parties on the day of the event, it does not impact the applicability of governmental immunity. When lost evidence is deemed to be immaterial, sanctioning the culpable party is not merited. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 193; 600 NW2d 129 (1999).

Plaintiff secured deposition testimony by persons known to be involved in notifying defendant of problems with electrical wires in the vicinity and the individuals with responsibility for evaluating the situation. None of the witnesses or persons involved reported having contacted defendant regarding problems with its wires on the subject date. As such, the absent “911” and dispatch tapes are unlikely to shed further information on how the events transpired or implicate defendant in any liability given the applicability of governmental immunity. Hence, the trial court did not err in denying plaintiff’s request for sanctions.

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

/s/ Christopher M. Murray  
/s/ Mark J. Cavanagh  
/s/ Henry William Saad