

STATE OF MICHIGAN
COURT OF APPEALS

WALLACE CARROLL JUSTICE,

Plaintiff-Appellee,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellant,

and

DEPARTMENT OF STATE POLICE,

Defendant.

UNPUBLISHED

June 13, 2006

No. 266924

Court of Claims

LC No. 05-000117-MZ

Before: O’Connell, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Defendant Department of Corrections (DOC) appeals as of right the trial court’s order denying its motion for summary disposition pursuant to MCR 2.116(C)(7). We reverse and remand for entry of judgment in favor of the DOC as it was shielded from liability on the basis of governmental immunity.

The gravamen of plaintiff’s action was that the DOC improperly and unlawfully registered him as a sex offender pursuant to Michigan’s Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, following his no contest plea to assault and battery.¹ While plaintiff was originally charged with fourth-degree criminal sexual conduct, MCL 750.520e, this charge was dropped as a result of the plea bargain.

This Court reviews de novo a trial court’s ruling on a motion for summary disposition. *Williams v AAA Michigan*, 250 Mich App 249, 257; 646 NW2d 476 (2002). “The applicability of governmental immunity is a question of law that is reviewed de novo on appeal.” *Herman v*

¹ Plaintiff has since been removed from the registry.

Detroit, 261 Mich App 141, 143; 680 NW2d 71 (2004). Questions of statutory construction are also reviewed de novo. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 62; 642 NW2d 663 (2002).

MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and it requires the court to consider all of the documentary evidence filed or submitted by the parties. *Herman, supra* at 143. A court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in a light most favorable to the nonmoving party. *Id.* at 143-144.

MCL 691.1407(1) provides, “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.” There is no dispute that the DOC qualifies as a governmental agency. MCL 691.1401(f) defines “governmental function” as follows:

[A]n activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. Governmental function includes an activity, as directed or assigned by his or her public employer for the purpose of public safety, performed on public or private property by a sworn law enforcement officer within the scope of the law enforcement officer’s authority.

“The term ‘governmental function’ is to be broadly construed, and the statutory exceptions are to be narrowly construed.” *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003). Tort liability may be imposed on a governmental agency only if it “was engaged in an ultra vires activity, i.e., an activity which is not expressly or impliedly mandated or authorized by constitution, statute, or other law.” *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 253; 393 NW2d 847 (1986); see also *Herman, supra* at 144; *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 97; 494 NW2d 791 (1992). In determining whether a governmental agency is engaged in a governmental function, our focus must be on the agency’s general activity, not the specific conduct involved at the time of the tort. *Herman, supra* at 144; *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003); *Pardon v Finkel*, 213 Mich App 643, 649; 540 NW2d 774 (1995). In *Tate, supra*, this Court found that the defendant city was entitled to immunity after the plaintiff filed suit when a police dog bit him despite the canine handler’s repeated and loud orders for the dog to heel. The panel stated that it was undisputed that, at the time of the incident, the police were investigating a crime, and thus they were engaged in police activity, which is a governmental function. *Id.* at 661.

The SORA authorizes the compilation of a sex-offender registry, explains the registration procedure, dictates the format for the registration documents, mandates that the offender keep his or her information current, and requires the Michigan State Police (MSP) to maintain a computerized database of registrations. MCL 28.723 – 28.728. Although the MSP is the governmental agency specifically assigned the task of fulfilling the requirements listed in the SORA, other departments and agencies work in conjunction with the MSP in fulfilling these duties. Relative to this appeal, MCL 28.724(5) provides in pertinent part:

[A]n individual convicted of a listed offense in this state after October 1, 1995 shall register before sentencing, entry of the order of disposition, or

assignment to youthful trainee status. The probation officer or the family division of circuit court shall give the individual the registration form after the individual is convicted, explain the duty to register and to pay a registration fee, to verify his or her address, and to provide notice of address changes, and accept the completed registration for processing under section 6. The court shall not impose sentence . . . until it determines that the individual's registration was forwarded to the [MSP] as required under section 6.

Therefore, pursuant to this section, the probation officer is authorized and required by law to be involved in the registration and compilation process.² The registration information is then forwarded to the MSP. MCL 28.727(4). Accordingly, the DOC, through its probation officers, is statutorily authorized to compile the registration information under the SORA and forward it to the MSP. The compilation of the registry is thus a governmental function for purposes of MCL 691.1407(1).

Plaintiff contends, and the trial court agreed, that although the DOC was authorized to compile the registration information, the DOC's act of registering plaintiff as a sex offender was an *ultra vires* activity because assault and battery is not one of the enumerated offenses that trigger registration. See MCL 28.722(e). However, as referenced above, this Court is required to focus on the general activity, not the specific conduct involved at the time of the tort. Therefore, although the specific activity of registering plaintiff as a sex offender may have been improper, the general activity of compiling registration information constituted a governmental function protected by immunity. Improper performance of an activity authorized by law is, despite its impropriety, still "authorized" within the meaning of the governmental function test. *Richardson v Jackson Co*, 432 Mich 377, 385; 443 NW2d 105 (1989); *Gracey v Wayne Co Clerk*, 213 Mich App 412, 420; 540 NW2d 710 (1995), overruled on other grounds *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143; 560 NW2d 50 (1997).

Plaintiff contends that MCL 28.730(5) constitutes an exception to governmental immunity. MCL 28.730(5) provides, "An individual whose registration or report is revealed in violation of this act has a civil cause of action against the responsible party for treble damages." Even assuming that this provision factually encompasses plaintiff's action,³ plaintiff cannot avoid governmental immunity under the SORA. MCL 28.730(6) provides, "Subsections (4) and (5) do not apply to the compilation described in section 8(2)[.]" Section 8(2), MCL 28.728(2), provides that "[t]he [MSP] shall maintain a computerized database separate from that described in subsection (1) to implement section 10(2) and (3)[⁴] [T]he database shall consist of a

² MCL 28.727(5) also requires the "officer, court, or an employee of the agency registering the individual or receiving or accepting a registration" to sign the registration form.

³ The DOC was not alleged to have improperly "revealed" a registration, but rather was accused of improperly preparing, completing, and submitting a registration.

⁴ Section 10(2) and (3), MCL 28.730(2) and (3), require local authorities to make the list of local sex offender registrants available for public inspection during regular business hours and require the MSP to make the information from the compilation available to the public through
(continued...)

compilation of individuals registered under this act.” Therefore, pursuant to MCL 28.730(6), the civil liability language found in MCL 28.730(5) does not apply to the compilation of registrants for purposes of maintaining public registry lists and databases. The DOC’s challenged action here arises from registering plaintiff as a sex offender as part of the compilation process for exposure of the information on the MSP database and local registry lists. Thus, the SORA does not carve out an exception to governmental immunity in the case at bar. Further, MCL 691.1407(1) provides immunity from tort liability to a governmental agency engaged in a governmental function except as otherwise provided in the government tort liability act, and plaintiff does not argue that any of the exceptions listed in the act are applicable. The trial court erred in denying DOC’s motion for summary disposition.

Reversed and remanded for entry of judgment in favor of the DOC. We do not retain jurisdiction.

/s/ Peter D. O’Connell
/s/ William B. Murphy
/s/ Kurtis T. Wilder

(...continued)
computerized or electronic means.