

STATE OF MICHIGAN  
COURT OF APPEALS

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GREGORY J. HOLLIDAY,

Plaintiff-Appellant,

v

HURLEY MEDICAL CENTER,

Defendant-Appellee.

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UNPUBLISHED

September 26, 2006

No. 267614

Genesee Circuit Court

LC No. 04-080108-NO

Before: Cavanagh, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the summary dismissal under MCR 2.116(C)(7) of his premises liability action, arising from a trip and fall incident, on the ground that defendant was immune from liability. We affirm.

On appeal, plaintiff argues that defendant was not entitled to governmental immunity; therefore, the trial court should not have summarily dismissed this case. After review de novo of the trial court's decision on this question of law, we disagree. See *Davis v Detroit*, 269 Mich App 376, 378; 711 NW2d 462 (2005); *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004).

Under the governmental tort liability act (GTLA), a governmental agency is shielded from tort liability if it is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1). A city and its council are both considered governmental agencies. *Warda v Flushing City Council*, 472 Mich 326, 331-332; 696 NW2d 671 (2005). And, a governmental function is "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f).

Here, defendant is owned by the city of Flint, a governmental agency. See *Warda, supra*. The mayor of the city appoints the members of the board of hospital managers, with the approval of the Flint City Council. The city of Flint accepted James J. Hurley's bequest pursuant to its charter's authorization. See *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613-614;

664 NW2d 165 (2003). This authorization contained the limitation that the bequest not require an annual city expenditure exceeding \$1,000 or three percent of the value. Plaintiff does not dispute that defendant is owned by a governmental agency and is engaged in the exercise of a governmental function. But, plaintiff argues that an exception applies to the broad grant of governmental immunity that defendant enjoys—the proprietary function exception. See MCL 691.1413; *Tate v Grand Rapids*, 256 Mich App 656, 659; 671 NW2d 84 (2003).

The proprietary function exception is set forth in MCL 691.1413 and 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.

Under the first part of the proprietary function test, the primary purpose of the activity is considered. Under the second part of the test, whether it is an activity not normally supported by taxes or fees is considered. *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998), citing *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 258; 393 NW2d 847 (1986). Relevant factors in determining if the agency’s primary purpose is to produce a pecuniary profit include whether a profit is actually generated and, if so, how it is spent. *Coleman, supra*, citing *Hyde, supra*. The type of activity under examination, including its scope compared to the size of the community, is relevant with regard to the second part of the test. *Coleman, supra* at 622-623. The proprietary function exception, however, is narrowly construed. *Maskery, supra* at 614.

Plaintiff argues that defendant is engaged in a proprietary function as evidenced by the facts that it “competes with several private hospitals in the area” and “is entirely self-supporting.” In response, defendant argues that it does not have the primary purpose of producing a pecuniary profit, as evidenced by its tax-exempt status with the Internal Revenue Service under 26 USC 115(a)(2). In addition, defendant argues its nonprofit status is demonstrated in its bylaws that state its mission as that of “providing the citizens of Flint and the surrounding region quality Hospital services and clinical care.”

We conclude that plaintiff did not allege facts warranting the application of the proprietary function exception as required when a motion is brought under MCR 2.116(C)(7). See *Renny v Dep’t of Transportation*, 270 Mich App 318, 322; 716 NW2d 1 (2006). Plaintiff’s reliance on the two asserted “facts,” i.e., that defendant competes with private hospitals and is self-supporting, are not sufficient or persuasive. See *Hyde, supra* at 231, 260. These facts, even if true, do not lead to the conclusion that defendant’s primary purpose is to produce a profit and, if it does produce a profit, that such profit is spent anywhere other than to fund hospital activities. See *id.* at 259-260. We will “not penalize a governmental agency’s legitimate desire to conduct an activity on a self-sustaining basis.” *Id.* at 259. Therefore, defendant was entitled

to immunity from tort liability under MCL 691.1407(1) and the trial court properly granted its motion for summary disposition on that ground. In light of our resolution of this dispositive issue, we need not consider whether the alleged danger was open and obvious.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Jane E. Markey  
/s/ Patrick M. Meter