

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF MARY E. GORDON, Deceased,

Plaintiff-Appellant,

v

GARB KO, INC. and MARATHON OIL
COMPANY,

Defendants-Appellees,

and

MICHAEL EARL YOUNG, SAGINAW COUNTY
SHERIFF'S DEPARTMENT and SAGINAW
COUNTY POLICE CHIEF,

Defendants.

UNPUBLISHED

March 22, 2002

No. 222810

Saginaw Circuit Court

LC No. 96-013646-NO

ESTATE OF MARY E. GORDON, Deceased,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee,

and

DIRECTOR OF STATE POLICE,

Defendant.

No. 222872

Court of Claims

LC No. 95-016016-CM

Before: Gage, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from separate orders of the Court of Claims and Saginaw Circuit Court that granted defendant-appellants summary disposition of plaintiff's claims arising from the decedent's wrongful death. We affirm.

The decedent worked at a Saginaw 7-Eleven store, which was owned by defendant Garb Ko, Inc. and supplied with products by defendant Marathon Oil Company, where she was murdered during an armed robbery of the store by defendant Michael Earl Young. Defendant Michigan Department of Corrections (MDOC) had released Young on parole within several days of the decedent's murder despite that Young had pending murder charges that should have foreclosed any possibility of his release.

Plaintiff filed a four-count complaint in the Court of Claims against fifteen state agencies and employees, three county and municipal agencies and officials, twenty unnamed defendants, and Young, seeking recovery under theories of ultra vires acts, negligence and gross negligence, constitutional torts, and nuisance per se. Plaintiff also filed a two-count complaint in the Saginaw Circuit Court against Young, Garb Ko and Marathon seeking recovery pursuant to theories of negligence and nuisance. The Court of Claims granted defendants MDOC, Director of the MDOC Kenneth L. McGinnis, Deputy Director of Correctional Facilities Administration Dan Bolden, and Deputy Director of Field Operations Robert Steinman (hereinafter the MDOC defendants) summary disposition pursuant to MCR 2.116(C)(7) on the basis of governmental immunity. The Saginaw Circuit Court granted Garb Ko and Marathon summary disposition pursuant to MCR 2.116(C)(10).

Plaintiff now challenges both summary disposition rulings. This Court reviews de novo the trial court's grant of a motion for summary disposition to determine whether the moving party was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). In reviewing a motion brought pursuant to MCR 2.116(C)(7), a court must accept all of the nonmoving party's well-pleaded allegations as true and should grant summary disposition only when no factual development could possibly furnish a basis for recovery. The nonmoving party must plead sufficient facts to overcome a claim of governmental immunity. *Stoick v Caro Community Hosp*, 167 Mich App 154, 159-160; 421 NW2d 611 (1988). With respect to a motion brought under MCR 2.116(C)(10), a court must consider in the light most favorable to the nonmoving party the pleadings and all relevant documentary evidence submitted by the parties to determine whether any genuine issue of material fact exists to warrant a trial. *Morales, supra*.

Plaintiff first argues that the Court of Claims erroneously granted the MDOC defendants summary disposition on the ground of governmental immunity because the complaint demonstrated that the MDOC defendants engaged in ultra vires acts that exceeded the scope of their authority. Governmental immunity shields the government's agencies and its highest appointive executive officials from any tort liability arising from their performance of governmental functions. MCL 691.1407. Governmental functions are activities "expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance." MCL 691.1401(f). Governmental immunity does not apply when the agency or official engages in ultra vires activity, which is activity that the governmental agency lacks legal authority to perform in any manner. *Richardson v Jackson Co*, 432 Mich 377, 387; 443 NW2d 105 (1989).

Plaintiff suggests that the MDOC defendants' release of Young on parole constituted an ultra vires act. However, the MDOC possesses legal authority to release prisoners on parole. MCL 791.235. The MDOC's negligent release of Young that plaintiff alleges does not qualify as an ultra vires act because "ultra vires activity is not activity that a governmental agency performs in an unauthorized manner." *Richardson, supra*. Because the MDOC had authority to release Young, and because director McGinnis and deputy directors Bolden and Steinman were among the MDOC's highest appointive officials and acted within the scope of their executive authority, *Chivas v Koehler*, 182 Mich App 467, 471; 453 NW2d 264 (1990), we conclude that the MDOC defendants had immunity for their alleged negligence with respect to Young's release. Therefore, the trial court properly granted them summary disposition pursuant to MCR 2.116(C)(7).¹

Plaintiff next asserts that the Court of Claims erred in dismissing its state constitutional tort claim because the complaint set forth that a custom or policy of the MDOC resulted in the decedent's murder. "Where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action." *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), *aff'd sub nom Will v Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). Plaintiff did not contradict the MDOC defendants' evidence that the MDOC had a policy of checking for outstanding charges before releasing a prisoner on parole, but produced evidence tending to show only that in this case the MDOC failed to adhere to its established policy. Because plaintiff showed only that the MDOC defendants in this case failed to follow the applicable MDOC policy, we conclude that the Court of Claims properly granted the MDOC defendants summary disposition of the constitutional tort claim.²

Plaintiff further contends that the trial court erred in dismissing its claim that Young constituted a nuisance per se for whose conduct the MDOC defendants were liable by virtue of their control of Young. A nuisance per se, which represents an exception to governmental immunity, is defined as an activity or condition that constitutes a nuisance without regard to the care with which it is conducted or the circumstances under which it exists. *Dinger v Dep't of Natural Resources (On Second Remand)*, 191 Mich App 630, 634; 479 NW2d 353 (1991). We

¹ To the extent that plaintiff suggests the Court of Claims erroneously granted the MDOC defendants summary disposition before the conclusion of discovery, we observe that no amount of discovery could have altered the fact that the MDOC defendants, in releasing Young on parole, acted in the pursuit of a governmental function.

Furthermore, with respect to plaintiff's special relationship argument, we note that even if we assumed that some special relationship existed between the MDOC defendants and the decedent that created a duty by the MDOC defendants to act to protect the decedent, the MDOC defendants' absolute immunity for actions relating to Young's release would preclude any tort liability.

² Although the Court of Claims indicated that it granted summary disposition pursuant to MCR 2.116(C)(8), we note that the proper subrule represented MCR 2.116(C)(10) because the court considered documentary evidence beyond the pleadings. *Krass v Tri-County Security, Inc*, 233 Mich App 661, 664-665; 593 NW2d 578 (1999); *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997).

initially note that plaintiff has furnished no authority supporting the proposition that a person may constitute a nuisance per se. *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998) (noting that the Court need not consider an issue inadequately briefed on appeal). Moreover, plaintiff's claim—that Young qualified as a nuisance per se “because he knew he had pending murder charges against him, including knowledge as to the strength of the State's case, which made him unreasonable and intrinsically dangerous”—believes that Young was a nuisance under all circumstances because the argument suggests to the contrary that Young was not a nuisance before the filing of the murder charges. We conclude that the trial court properly granted the MDOC defendants summary disposition of plaintiff's nuisance per se claim.

Plaintiff lastly avers that the Saginaw Circuit Court improperly granted Marathon and Garb Ko summary disposition of plaintiff's claims that they failed to protect the decedent from a foreseeable risk of harm. The parties agreed and the trial court assumed that the decedent was an invitee, and therefore that Garb Ko, the business invitor, owed the decedent a duty to exercise reasonable care to protect the decedent against unreasonable risks of harm caused by dangerous conditions on the land that the Garb Ko knew or should have known the decedent would not discover or protect herself against. *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 532; 542 NW2d 912 (1995). We find that the trial court correctly determined that Garb Ko owed the decedent no duty to protect her against the criminal acts of Young, a third party. *MacDonald v PKT, Inc*, 464 Mich 322, 334-335; 628 NW2d 33 (2001). Plaintiff provided no evidence demonstrating any specific criminal acts that had occurred on the premises that posed a risk of imminent and foreseeable harm to an identifiable invitee. *Id.* at 338.

With respect to plaintiff's argument that the court improvidently granted Marathon summary disposition in the face of the court's acknowledgment that the nature of the business relationship between Marathon and Garb Ko remained unclear, we note that plaintiff produced no evidence contradicting the affidavit submitted by Marathon that indicated it had sold the business to Garb Ko. Furthermore, even assuming that plaintiff could have obtained further discovery reflecting that Marathon possessed and controlled the 7-Eleven store, Marathon nonetheless was entitled to judgment as a matter of law because it likewise owed the decedent no duty to protect her from Young's unforeseeable criminal acts.³ MCR 2.116(I)(1); *MacDonald, supra* at 334-335.

Affirmed.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra

³ Plaintiff does not challenge the court's finding that the complaint's nuisance “allegations all sound in negligence and, for the reasons set forth . . . , must also fail.”