

STATE OF MICHIGAN  
COURT OF APPEALS

---

ARLENE HOUSE,

Plaintiff-Appellant,

v

GRAND RAPIDS HOUSING COMMISSION and  
MOUNT MERCY LIMITED,

Defendant-Appellees,

and

FRANK MOST, d/b/a MOST ENTERPRISING,

Defendant.

---

UNPUBLISHED

May 11, 2004

No. 248465

Kent Circuit Court

LC No. 00-004639-NO

Before: Gage, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants Grand Rapids Housing Commission (GRHC) and Mount Mercy Limited Partnership's motions for summary disposition.<sup>1</sup> We affirm.

I. Facts and Procedure

GRHC is a governmental agency, created by ordinance, which provides subsidized housing to certain qualified individuals. Mount Mercy Apartments, which is owned by Mount

---

<sup>1</sup> This Court dismissed plaintiff's initial claim of appeal for lack of jurisdiction, because the order being appealed was not a final order for the reason that plaintiff's claims against defendant Frank Most were still outstanding. *House v Grand Rapids Housing Comm*, unpublished order of the Court of Appeals, entered February 20, 2002 (Docket No. 239408). Plaintiff filed the claim of appeal in the present case after the trial court entered an order granting Most's motion for summary disposition.

Mercy Ltd., is a residential apartment complex, through which GRHC provides such subsidized housing. GRHC and Mount Mercy Ltd. entered a management agreement regarding the land, buildings, and improvements of Mount Mercy Apartments, which stated, in pertinent part:

Appointment and Acceptance. The Owner [Mount Mercy Ltd.] appoints the Agent [GRHC] as exclusive agent for the management of the property described in Section 2 of this Agreement, and the Agent accepts the appointment, subject to the terms and conditions set forth in this Agreement.

The agreement included the following provision regarding maintenance of the Mount Mercy Apartments:

Maintenance and Repair. The Agent will cause the Project to be maintained and repaired in a condition at all times acceptable to the Owner, including but not limited to cleaning, painting, decoration, plumbing, carpentry, grounds care, and other maintenance and repair work as may be necessary, subject to any limitations imposed by the Owner in addition to those contained herein. . . .

Under the management agreement, GRHC was responsible for the operation and maintenance of the apartments, but Mount Mercy Ltd. had the final say in many of the decisions.

Frank Most, doing business as Most Enterprising, was hired to maintain the parking lot of Mount Mercy Apartments by plowing snow and taking other reasonable measures to keep the parking lot safe. On February 21, 2000, plaintiff, a resident of Mount Mercy Apartments, slipped and fell in the snow-filled parking lot of Mount Mercy Apartments, fracturing her right ankle. Plaintiff filed a complaint against GRHC, Mount Mercy Ltd., and Most, alleging that they were negligent for failing to keep the Mount Mercy Apartments parking lot reasonably safe and that her injuries were caused by these unsafe conditions.

GRHC moved for summary disposition under MCR 2.116(C)(7) and Mount Mercy Ltd. moved for summary disposition under MCR 2.116(C)(10). The trial court determined that Mount Mercy Ltd. maintained some limited control over the apartments, but did not have possession. Because liability requires both control and possession, the trial court granted Mount Mercy Ltd.'s motion for summary disposition. The trial court also granted GRHC's motion for summary disposition, concluding that GRHC was protected by governmental immunity, because all of the purposes it pursued were public and not private.<sup>2</sup>

## II. Analysis

### A. Standard of Review

---

<sup>2</sup> The trial court denied plaintiff's motion for rehearing and later dismissed plaintiff's claims against Most.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). The trial court granted Mount Mercy Ltd.'s motion for summary disposition under MCR 2.116(C)(10). In reviewing a motion for summary disposition under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Summary disposition is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

The trial court granted GRHC's motion for summary disposition under MCR 2.116(C)(7). Summary disposition under MCR 2.116(C)(7) is proper for a claim that is barred because of immunity granted by law. *Smith v Kowalski*, 223 Mich App 610, 616; 597 NW2d 463 (1997). When reviewing a grant of summary disposition pursuant to MCR 2.116(C)(7), this Court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). All well-pleaded allegations are accepted as true unless contradicted by documentation submitted by the moving party. *Id.*

## B. Discussion

### 1. Mount Mercy Ltd.'s Liability

Plaintiff argues that Mount Mercy Ltd. retained sufficient possession and control of the Mount Mercy Apartments to be subject to tort liability for an alleged defective condition of the premises. As stated in *Merritt v Nickelson*, 407 Mich 544, 552-553; 287 NW2d 178 (1980):

Premises liability is conditioned upon the presence of both possession and control over the land. This is so because

“[T]he man in possession is in a position of control, and normally best able to prevent any harm to others.”

Michigan has consistently applied this principle in imposing liability for defective premises.

Our application of this principle is in accordance with the Restatement of Torts. The Restatement imposes liability for injuries occurring to trespassers, licensees, and invitees upon those who are “possessors” of the land. A “possessor” is defined as:

“(a) a person who is in occupation of the land with intent to control it or

“(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or

“(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).”

Ownership alone is not dispositive. Possession and control are certainly incidents of title ownership, but these possessory rights can be “loaned” to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility. [Citations omitted.]

“Possession” is defined as “[t]he right under which one may exercise control over something to the exclusion of all others” *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 703; 644 NW2d 779 (2002), quoting Black’s Law Dictionary (7<sup>th</sup> ed) (emphasis in *Derbabian*). “Control” is defined as “the power to . . . manage, direct, or oversee.” *Id.* at 703-704, quoting Black’s Law Dictionary (7<sup>th</sup> ed). “[P]ossession for purposes of premises liability does not turn on a theoretical or impending right of possession, but instead depends on the actual exercise of dominion and control over the property.” *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 661; 575 NW2d 745 (1998).

Here, Mount Mercy Ltd. did not have possession of or a high degree of actual control over Mount Mercy Apartments when plaintiff was injured. Although Mount Mercy Ltd. retained control over some of GRHC’s final decisions regarding the property, GRHC was responsible for the management and everyday decisions. Under the management agreement, GRHC was the “exclusive agent for the management of the property.” It is clear under this agreement that Mount Mercy Ltd. gave GRHC possession of the apartment complex. Mount Mercy Ltd. did not control the apartment complex to the exclusion of all others and, thus, did not possess the property. See *Derbabian, supra* at 703. Although Mount Mercy Ltd. retained its ultimate authority over the complex, GRHC had actual control, being as it had the power to manage and oversee the complex. Furthermore, GRHC, being the manager of the property, was in the best position to prevent plaintiff’s harm. See *id.* at 705. Therefore, Mount Mercy Ltd. was not a “possessor” for purposes of premises liability, and the trial court did not err in granting Mount Mercy Ltd.’s motion for summary disposition. *Id.* at 706.

## 2. GRHC’s Liability

Next, plaintiff argues that GRHC was not protected by governmental immunity, because it was managing a private apartment complex at the time of the accident. Plaintiff argues that, because Mount Mercy Ltd. hired GRHC to manage a private apartment complex, defendants operated as partners, and GRHC was not engaged in a governmental function. We disagree. Generally, a governmental agency is immune from tort liability when it is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Curtis v City of Flint*, 253 Mich App 555, 558-559; 665 NW2d 791 (2002). Thus, if GRHC was not a governmental agency or was not engaged in the exercise or discharge of a governmental function in managing Mount Mercy Apartments when plaintiff was injured, it is not protected from tort liability.

First, GRHC is a governmental agency and not a combined public-private endeavor. A “governmental agency” is defined as “the state or a political subdivision.” MCL 691.1401(d). “[T]he definition of ‘governmental agency’ does not include, or remotely contemplate, joint ventures, partnerships, arrangements between governmental agencies and private entities, or any

other combined state-private endeavors.” *Vargo v Sauer*, 457 Mich 49, 68; 576 NW2d 656 (1998). GRHC is a governmental agency created by ordinance and authorized by MCL 125.653(a).<sup>3</sup> Although Mount Mercy Ltd. is not a governmental agency,<sup>4</sup> because it is a partnership that includes private entities as limited partners,<sup>5</sup> defendants are claiming that GRHC—not Mount Mercy Ltd.—is a governmental agency. That GRHC is the sole member of a nonprofit corporation that is the general partner in a limited partnership with private entities does not change its status as a governmental agency.

Second, GRHC was engaging in a governmental function when it managed Mount Mercy Apartments. 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). This definition of governmental function is broadly applied. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 97; 494 NW2d 791 (1992). “Tort liability may be imposed only if the agency was engaged in an ultra vires activity.” *Id.* Plaintiff cites *Pardon v Finkel*, 213 Mich App 643; 540 NW2d 774 (1995), in support of her argument that GRHC’s management of the apartment complex was private in nature, rather than a governmental function. In the present case, GRHC, unlike the defendant county in *Pardon*, was engaged in governmental activity that is expressly authorized by statute. MCL 125.651 *et seq.* expressly authorizes the operation of subsidized housing projects by municipal housing commissions. Among the powers specifically conferred upon housing commissions is the power “to lease and/or operate any housing projects or projects.” MCL 125.657(b). Here, GRHC managed the Mount Mercy Apartments, which is a subsidized housing project. Because GRHC was engaged in an activity that is expressly authorized by statute, MCL 691.1401(f), it was engaged in a governmental function and is immune from tort liability.

Affirmed.

/s/ Hilda R. Gage  
/s/ Peter D. O’Connell  
/s/ Brian K. Zahra

---

<sup>3</sup> MCL 125.663 expressly provides that a governmental housing commission such as GRHC is not precluded from asserting a defense of governmental immunity to which it may be entitled under the law.

<sup>4</sup> Nonetheless, because Mount Mercy Ltd. is a limited partnership having a Michigan nonprofit corporation (Mount Mercy Housing Corporation) as its sole general partner, and GRHC is the sole member of the Mount Mercy Housing Corporation, Mount Mercy Ltd. is a “qualified entity” with tax exempt status under MCL 125.661a(3)(a)(iii).

<sup>5</sup> The limited partners of Mount Mercy Ltd. consist of Old Kent Financial Corporation, NBD Community Development Corporation, and First of America Community Development Corporation.