

STATE OF MICHIGAN
COURT OF APPEALS

MOLLY HALL,

Plaintiff-Appellee,

v

PONTIAC SCHOOL DISTRICT,

Defendant-Appellant,

and

JOHN C. CLAYA, WALLACE DUNN, JR., and
MILDRED MASON,

Defendants.

UNPUBLISHED

October 19, 2006

No. 269981

Oakland Circuit Court

LC No. 2005-065412-CD

Before: Cavanagh, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Defendant Pontiac School District appeals as of right from the trial court's order denying its motion for summary disposition of plaintiff's claims for defamation and tortious interference with a contract. Defendant sought summary disposition under MCR 2.116(C)(7), based on governmental immunity. We reverse.

Plaintiff, an employee of defendant school district, took a medical leave of absence in early 2004. Plaintiff applied for disability benefits through a privately funded policy she held with the Colonial Life and Accident Company ("Colonial Life"). In April 2004, plaintiff asked John C. Claya, defendant's executive director of human resources and general counsel, to complete a Colonial Life form verifying that she was on a leave of absence and that her medical condition required her to remain homebound. Claya had received information that plaintiff was working full time as a real estate agent while she was on the medical leave of absence, so he hired a private investigator to conduct surveillance of plaintiff. The private investigator posed as a prospective condominium buyer, and plaintiff showed him a condominium that was for sale in her condominium complex. The investigator also learned that plaintiff placed and received several phone calls pertaining to real estate transactions. Claya informed Colonial Life of plaintiff's activities. Colonial Life subsequently rescinded plaintiff's benefit payments after plaintiff failed to provide documentation that she was disabled from her employment as a real

estate agent. Defendant issued a written warning to plaintiff, but took no other disciplinary action against her.

Plaintiff subsequently filed this action against defendants, alleging several claims. At issue in this appeal are plaintiff's claims for tortious interference with contractual relations and defamation, arising from Claya's conduct in hiring a private investigator to conduct surveillance of plaintiff and reporting the results of the investigation to Colonial Life. Defendant moved for summary disposition based on governmental immunity, but the trial court denied the motion, reasoning that there was a question of fact whether Claya's activity was related to the discharge of a governmental function.

We review a trial court's decision on a motion for summary disposition de novo. *Pierce v City of Lansing*, 265 Mich App 174, 176; 694 NW2d 65 (2005). In reviewing a motion under MCR 2.116(C)(7), we accept the allegations in plaintiff's complaint as true "unless affidavits or other appropriate documents specifically contradict them." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). The pleadings and documentary evidence must be construed in the light most favorable to the nonmoving party. *Tarlea v Crabtree*, 263 Mich App 80, 87-88; 687 NW2d 333 (2004).

The governmental immunity act, MCL 691.1401 *et seq.*, provides immunity to a government defendant when it is engaged in a governmental function. MCL 691.1407(1) provides, in pertinent 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. . . .

Unless a statutory exception applies, tort liability may be imposed only if the agency was engaged in an ultra vires activity. *Herman v Detroit*, 261 Mich App 141, 144; 680 NW2d 71 (2004). "A governmental function is 'an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.'" *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003), quoting MCL 691.1401(f). This definition must be broadly applied, and the governmental function requirement is satisfied whenever there is "some constitutional, statutory, or other legal basis for the activity in which the governmental agency was engaged." *Herman, supra* at 144, quoting *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 253; 393 NW2d 847 (1986). The determination whether an activity was a governmental function must focus on the general activity and not the specific conduct involved at the time of the tort. *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003).

The central issue here is whether Claya and defendant were engaged in the exercise or discharge of a governmental function when Claya hired an investigator to conduct surveillance, and when he reported his findings to Colonial Life. The operation of a public school is a governmental function within the meaning of MCL 691.1407(1). *Stringwell v Ann Arbor Pub School Dist*, 262 Mich App 709, 712; 686 NW2d 825 (2004). Plaintiff argues, however, that Claya acted outside of that function when he hired an investigator to conduct surveillance on plaintiff and then communicated adverse information to plaintiff's insurer. Plaintiff's argument erroneously focuses on the specific conduct, rather than the general activity involved. The

conduct of conducting surveillance was related to the general activity of supervising employees to insure that they are complying with defendant's policies, which relates to the governmental function of running a school district. Defendant was investigating whether plaintiff was engaged in full-time real estate employment in violation of her medical leave of absence. Accordingly, the surveillance was related to the discharge of a governmental function.

Although plaintiff's disability policy was a private policy, and defendant's governmental function would not necessarily encompass supervising its employees' relationships with their private insurers, plaintiff expressly involved defendant in her private contractual relationship by asking it to sign Colonial Life paperwork verifying pertinent information related to her medical leave. Defendant's governmental function encompassed providing accurate information regarding its employees' work-related conduct to parties having a legitimate interest in obtaining the information. Defendant also had an interest in insuring that plaintiff was not abusing its medical leave status for pecuniary gain. Accordingly, the general activity was within the scope of defendant's governmental authority, and the trial court erred in denying defendant's motion for summary disposition.

Plaintiff argues that defendant failed to raise the issue of governmental immunity in the trial court and, therefore, is precluded from raising it on appeal. Although defendant did not raise governmental immunity as an affirmative defense, it was not required to do so. Governmental immunity is not an affirmative defense, but rather is a characteristic of government. Accordingly, a party bringing an action against a government unit must plead in avoidance of governmental immunity. *Kendricks v Rehfield*, 270 Mich App 679, 681; 716 NW2d 623 (2006). Plaintiff failed to allege that defendant acted outside the scope of its governmental function. Furthermore, plaintiff's arguments and documentary evidence in response to defendant's second summary disposition motion failed to establish facts justifying an application of an exception to governmental immunity. *Fane, supra* at 74.

Reversed.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens