

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

LINDA PECK,

Plaintiff-Appellant,

v

ANN ARBOR PUBLIC SCHOOLS,

Defendant-Appellee.

---

UNPUBLISHED

January 21, 2000

No. 212780

Washtenaw Circuit Court

LC No. 97-004091-NO

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

PER CURIAM.

Plaintiff appeals by right from the trial court's order granting defendant's motion for summary disposition, which was brought pursuant to MCR 2.116(C)(7) on the ground of governmental immunity and also MCR 2.116(C)(8) and (10). We affirm.

The parties do not dispute the following facts. Defendant is a governmental entity. Defendant entered into a contract with Marriott Management Services Corporation ("Marriott") to operate two food service programs out of the kitchen of Pioneer High School in Ann Arbor—one was primarily a lunch program for defendant's students and staff, and the other was a program to prepare food for service to a state mental health project. In consideration for the use of defendant's facilities to provide the meals for the state mental health project, Marriott paid defendant \$38,618 per year. Plaintiff, an employee of Marriott who worked in the program that provided meals for the mental health project, parked her automobile in a parking lot owned by defendant. At the time, the parking lot was covered with snow and ice. When plaintiff got out of her automobile, she was injured when she stepped onto the snow and ice, slipped and fell.

Plaintiff sued defendant for negligence, alleging that defendant is a governmental entity but was engaged in a proprietary function at the time of plaintiff's injury and therefore not entitled to governmental immunity. Plaintiff alleged that based on the contract between Marriott and defendant, of which plaintiff asserted she was a third party beneficiary, defendant owed a duty to plaintiff to reasonably remove the ice and snow from the parking area.

Defendant moved for summary disposition of plaintiff's claim, asserting that it was not engaged in a proprietary function and was entitled to governmental immunity. Defendant's motion for summary disposition was filed under three grounds enumerated in MCR 2.116(C). Defendant asserted that it was immune from suit, MCR 2.116(C)(7), that plaintiff had failed to state a claim on which relief can be granted, MCR 2.116(C)(8), and that there was no genuine issue as to any material fact, and it was entitled to judgment as a matter of law, MCR 2.116(C)(10). A motion filed under MCR 2.116(C)(7) *may* be supported, and a motion under MCR 2.116(C)(10) *must* be supported, by affidavits, depositions, admissions or other documentary evidence, MCR 2.116(G)(3). *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). For a motion based on MCR 2.116(C)(10), the adverse party must present affidavits or other documentary evidence as provided in the court rule to show that there is a genuine issue for trial or the adverse party risks having judgment entered against her. MCR 2.116(G)(4). *Patterson, supra*. Under MCR 2.116(C)(7) and (10), the trial court *must* consider the supporting and opposing material submitted to the trial court by the parties. MCR 2.116(G)(5); *Patterson, supra*. In the instant case, it appears that the trial court did consider the documentary evidence submitted to the trial court by the parties and granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(7) and (10). We conduct a de novo review of the trial court's grant of summary disposition, *Coleman v Kootsillas*, 456 Mich 615, 618; 575 NW2d 527 (1998), and agree with the trial court that plaintiff did not show that the proprietary function exception was applicable in this case.

The governmental immunity statute provides that "all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1); MSA 3.996(107)(1). Governmental function is defined as an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. MCL 691.1401(f); MSA 3.996(101)(f). The definition is to be broadly construed and only requires that there be some constitutional, statutory or other legal basis for the activity in which the entity was engaged. *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 253; 393 NW2d 847 (1986). Tort liability may be imposed only if the governmental entity was engaged in an ultra vires activity. *Id.* The instant defendant was engaged in a governmental function in contracting with Marriott for the provision of food services, whether for its students and staff or for the state mental health project, because both are either explicitly or implicitly authorized by law. See MCL 380.1272; MSA 15.41272, MCL 380.1116; MSA 14.41116, and MCL 380.11a; MSA 15.4100a.

Even though defendant was engaged in a governmental function in leasing its facilities to Marriott for the purpose of providing food service for the state mental health project, which is the food service program at issue here, defendant could be held liable if the activity were proprietary in nature. *Coleman, supra* at 620; *Hyde, supra* at 254. To be a proprietary function, an activity must be conducted *primarily* for the purpose of producing a pecuniary profit and not normally be supported by taxes or fees. MCL 691.1413; MSA 3.996(113); *Coleman, supra* at 621; *Hyde, supra* at 258-259. Whether the activity actually generates a profit is not dispositive, but the existence of profit is relevant in determining the governmental entity's intent. *Hyde, supra*. In addition, where profit is deposited and where it is spent indicate intent. An entity's use of the profits to defray expenses of the activity indicates the primary purpose was nonpecuniary in nature. See, e.g., *Hyde, supra* at 259. A governmental entity

may conduct an activity on a self-sustaining basis without being subject to the proprietary function exception. *Hyde, supra*. The statutory exceptions to governmental immunity, including the proprietary function exception, are to be narrowly construed. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998).

In support of its motion for summary disposition, defendant presented evidence in the form of an affidavit from its deputy superintendent of planning and business services, who attested that all funds received from Marriott were mandated to be used for food service purposes and related administrative functions, that any revenue generated by the project is returned to the project for its use, and that the project is zero budgeted and not a source of revenue. The evidence amply supported defendant's argument that its primary purpose was nonpecuniary in nature. See *Hyde, supra* at 258-259. Plaintiff argued that the monetary consideration received by defendant and the terms of the agreement between defendant and Marriott showed that defendant's leasing of its facilities to Marriott to service the state health project was proprietary in nature. We agree with the trial court that plaintiff did not present the necessary evidence to rebut the evidence presented by defendant, and that the proprietary function exception was inapplicable and defendant was entitled to summary disposition as a matter of law on the ground of governmental immunity.

The application of governmental immunity is dispositive of plaintiff's appeal. Therefore, it is unnecessary for us to address plaintiff's further claim that trial court erred when it determined that the terms of the contract between defendant and Marriott did not impose a duty upon defendant on behalf of plaintiff to reasonably remove the ice and snow from the parking lot in which plaintiff sustained her injuries. Although the trial court and the parties discussed a possible breach of contract claim by plaintiff, we note that plaintiff's complaint does not state a separate breach of contract claim. Rather, plaintiff's allegations concerning a contractual obligation owed by defendant to plaintiff pertain to plaintiff's claim of a "duty" owed by defendant to plaintiff as an element of her negligence claim. Even assuming arguendo that defendant did owe plaintiff a duty to remove the ice and snow from the parking lot where plaintiff was injured and that plaintiff presented a proper negligence claim, defendant was nevertheless entitled to summary disposition based on the trial court's determination, with which we agree, that defendant was not engaged in a proprietary function and is protected by governmental immunity.

We affirm.

/s/ E. Thomas Fitzgerald

/s/ Joel P. Hoekstra

/s/ Jane E. Markey