

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

---

COMMERCE CENTER PARTNERSHIP,

Plaintiff-Appellee,

v

CITY OF SAGINAW,

Defendant-Appellant.

---

UNPUBLISHED  
February 23, 2006

No. 258137  
Saginaw Circuit Court  
LC No. 03-049139-NZ

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court order denying its motion for summary disposition pursuant to MCR 2.116(C)(8). We reverse and remand for entry of an order granting defendant summary disposition under MCR 2.116(C)(7). This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The instant case arose from allegations that the municipal water system operated by defendant caused water to leak into and damage the basement of a building owned by plaintiff. Plaintiff filed a complaint seeking damages and claiming that defendant could not assert governmental immunity as a defense because the maintenance of the system constitutes a proprietary function under MCL 691.1413. Defendant thereafter moved for, but was denied, summary disposition.

On appeal, defendant asserts that the trial court erred in denying its summary disposition motion because maintenance of a municipal water system constitutes a governmental function under MCL 691.1401(f) and because defendant does not operate the system for the purpose of producing a pecuniary profit.

The decision to grant or deny summary disposition presents a question of law that this Court reviews de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Similarly, the applicability of governmental immunity is a question of law subject to de novo review. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004).

Under MCR 2.116(C)(8), a trial court properly grants a motion for summary disposition where the opposing party has failed to state a claim on which relief can be granted. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 42; 672 NW2d 884 (2003). Such motions test the

legal sufficiency of a claim based solely on the pleadings. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). When considering motions brought under MCR 2.116(C)(8), courts must accept all well-pleaded factual allegations as true and construe them in the light most favorable to the non-moving parties. *Adair v State of Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). The motions “may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.*

Michigan’s governmental immunity statute grants immunity from tort liability to agencies in “exercising or discharging governmental functions.” MCL 691.1407(1); *Weaver v Detroit*, 252 Mich App 239, 243; 651 NW2d 482 (2002). MCL 691.1401(f) defines “governmental function” as “an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.” *Coleman v Kootsillas*, 456 Mich 615, 619; 575 NW2d 527 (1998). “When a governmental agency engages in mandated or authorized activities, it is immune from tort liability, unless the activity is proprietary in nature.” *Id.* To constitute a “proprietary function” under MCL 691.1413, a governmental activity “(1) must be conducted primarily for the purpose of producing a pecuniary profit, and (2) it cannot be normally supported by taxes and fees.” *Id.*, 621.

The “operation of a municipal water supply system” constitutes a governmental function for tort immunity purposes. *Citizens Ins Co v Bloomfield Twp*, 209 Mich App 484, 487; 532 NW2d 183 (1994). But immunity for such an activity “can still be forfeited if conducted for profit in such a scope as to render it a private profit-making enterprise.” *Herman, supra*, 146. Thus, defendant in the instant case cannot be held liable for torts arising from the operation of the water system unless it provides water for the primary purpose of producing a pecuniary profit and the system is not normally supported by taxes and fees.

Plaintiff’s complaint alleges that defendant is not entitled to governmental immunity because its operation of the city water system constitutes a proprietary function. In denying defendant’s motion, the trial court correctly construed this allegation as true and examined it in the light most favorable to plaintiff. Defendant cites the affidavit of its city manager, Deborah Kimble, in support of its contention that the provision of city water is not a proprietary function. But such documentary evidence goes beyond the pleadings and thus, may not be considered when deciding a motion brought under MCR 2.116(C)(8). *Kleiman, supra*, 432. Consequently, the trial court did not err in holding that plaintiff’s complaint states a claim upon which relief may be granted.

Nevertheless, we decline to affirm the trial court’s decision denying defendant summary disposition. Rather than arguing plaintiff failed to state a claim under MCR 2.116(C)(8), defendant’s motion asserts that plaintiff’s claim is barred by the doctrine of governmental immunity. The subrule under which a party moves for summary disposition does not necessarily constrain a trial court. *Computer Network, Inc v AM General Corp*, 265 Mich App 309, 312; 696 NW2d 49 (2005). “It is well settled that, where a party brings a motion for summary disposition under the wrong subrule, a trial court may proceed under the appropriate subrule if

neither party is misled.” *Id.* Here, both parties framed the issue in terms of governmental immunity and the trial court should have considered defendant’s motion as one brought under MCR 2.116(C)(7).<sup>1</sup>

Because we review the issue de novo, we may similarly proceed under the appropriate subrule. Further, where a trial court makes a decision on a motion for summary disposition based on the wrong subrule, Michigan appellate courts will review the order under the correct rule. See *Spiek v Dep’t of Transportation*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998). Consequently, we review defendant’s motion under MCR 2.116(C)(7) to determine whether summary disposition is appropriate.

“Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law.” *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). To survive a motion asserting governmental immunity, a plaintiff must allege facts justifying the application of an exception to this doctrine. *Id.* Courts must “consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them.” *Id.*

In the instant case, Kimble’s affidavit states that defendant uses the fees collected from its customers to pay for the maintenance and continued operation of the water system. And it asserts that such charges do not generate a profit and are not “designed for pecuniary gain.” This evidence establishes that the activity does not constitute a proprietary function under MCL 691.1413 and specifically contradicts the contrary allegation set forth in plaintiff’s complaint. Consequently, we hold that defendant is entitled to governmental immunity under MCL 691.1407(1) and that the trial court erred in failing to grant defendant’s motion for summary disposition under MCR 2.116(C)(7).

Reversed and remanded for entry of an order granting summary disposition to defendant. We do not retain jurisdiction.

/s/ Stephen L. Borrello  
/s/ David H. Sawyer  
/s/ E. Thomas Fitzgerald

---

<sup>1</sup> MCR 2.116(C)(7) provides grounds for summary disposition where:

The claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.