

STATE OF MICHIGAN
COURT OF APPEALS

TOWNSHIP OF ATTICA,

Plaintiff-Appellant,

v

TIMOTHY KIRKLIN and RACHEL KIRKLIN,

Defendants-Appellees.

UNPUBLISHED

April 25, 2006

No. 258234

Lapeer Circuit Court

LC No. 99-027821-CE

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted the trial court's order denying its motion for summary disposition. We reverse the decision of the trial court and remand for entry of summary disposition in favor of plaintiffs.

In essence, this case involves plaintiff seeking to deny defendant from seeking damages that defendant never requested. To compound the unique nature of the matter, the relief requested by plaintiff involves an issue that plaintiff failed to include in its statement of questions involved. Plaintiff argues that the trial court erred in allowing defendants to pursue damages when they failed to file a counter-claim or affirmative defenses. However, plaintiff's counsel failed to state this argument in its "statement of questions involved," as required by MCR 7.212(C)(5). Thus were we to strictly adhere to MCR 7.212(C)(5) we would be forced to rule that this argument is not properly before this Court. Nevertheless, this Court may consider it because it is one of law, and the record is factually sufficient. *Van Buren Twp v Garter Belt, Inc.*, 258 Mich App 594, 632; 673 NW2d 111 (2003). Further, this issue is not properly preserved for appellate review because the trial court did not address it. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). However, it is a question of law, and all the facts necessary for its resolution have been presented. *Id.* at 599. We review this issue for plain error. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), applying *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Generally, a "trial court does not have the authority to grant relief based on a claim that was never pleaded in a complaint or requested at any time before or during trial." *Reid v Dep't of Corrections*, 239 Mich App 621, 630; 609 NW2d 215 (2000). However, a party may move to amend its pleadings to conform to the proofs unless it would surprise or prejudice the opposing

party. *Id.* Alternatively, issues not raised in the pleadings may be “tried by express or implied consent of the parties” and “treated as if they had been raised by the pleadings.” MCR 2.118(C)(1).

Defendants did not file a counter-claim for damages, and neither party raised the issue of damages. During the “miscellaneous hearing,” the trial court asked the township supervisor who was responsible for “the resources and money and time and effort” that defendants had invested into the barn. Defendants never pursued an evidentiary hearing on the issue of damages. Rather, the trial court continued the matter for an evidentiary hearing regarding whether defendants suffered “any monetary losses as a result of the actions” of plaintiff. The issue was never tried or treated as if it had been raised in the pleadings. See MCR 2.118(C)(1). Therefore, the trial court lacked the authority to allow defendants to pursue damages, and it committed plain error in denying plaintiff’s motion for summary disposition. Because this error exposed plaintiff to liability for damages, it affected plaintiff’s substantial rights. See *Kern, supra* at 336.

Plaintiff next contends that governmental immunity protects it from liability for damages incurred in reliance on the permit. Governmental immunity is a question of law that this Court reviews de novo. *Pierce v City of Lansing*, 265 Mich App 174, 176; 694 NW2d 65 (2005). This Court reviews de novo a trial court’s decision on a motion for summary disposition. *Haliw v Sterling Heights*, 464 Mich 297, 301; 627 NW2d 581 (2001).

Plaintiff argues that the trial court erred in holding that plaintiff created a nuisance per se, which it recognized as a viable exception to governmental immunity. Pursuant to MCL 691.1407(1), “a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function[.]” Attica Township Zoning Ordinance, § 1513 provides, “Any building or structure which is erected, altered or converted, or any use of premises of land which has begun or changed subsequent to the time of passage of this Ordinance, and in violation of any of the provisions thereof is hereby declared to be a public nuisance per se” A nuisance per se is defined as “an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained.” *Li v Feldt (After Second Remand)*, 439 Mich 457, 476-477; 487 NW2d 127 (1992) (Cavanagh, CJ).

In April 2002, the Michigan Supreme Court held that trespass-nuisance was not an exception to governmental immunity. *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). However, that decision applies only to cases filed on or after April 2, 2002, and the instant action was filed in December 1999. As this Court has noted, it remains unclear whether a nuisance per se exception to governmental immunity exists for cases filed before *Pohutski*. *McDowell v Detroit*, 264 Mich App 337, 347; 690 NW2d 513 (2004); *Haaksma v Grand Rapids*, 247 Mich App 44, 56; 634 NW2d 390 (2001). However, we need not decide the issue whether a nuisance per se exception exists for cases filed before *Pohutski*.

Attica Township Zoning Ordinance, § 1513 categorizes a violation of the zoning ordinance as a public nuisance per se. Michigan courts do not recognize public nuisance as an exception to governmental immunity. *Li, supra* at 462; *Dykstra v Dep’t of Transportation*, 208 Mich App 390, 392; 528 NW2d 754 (1995); *Zwolinski v Dep’t of Transportation*, 205 Mich App 532, 539; 517 NW2d 852 (1994). Further, plaintiff did not erect, alter, or convert the pole barn at issue in the instant case. Plaintiff did not create the nuisance; rather, it issued a building

permit upon which defendants relied in constructing the barn. Even assuming that nuisance per se is a viable exception to governmental immunity; defendants have failed to demonstrate that plaintiff created any such nuisance. Accordingly, the trial court erred in denying plaintiff's motion for summary disposition.

Plaintiff's remaining arguments concern whether the gross negligence and proprietary function exceptions to governmental immunity apply. MCL 691.1407(2) provides an individual employee immunity from tort liability for property damage that occurs in the course of employment or service if: (1) the employee who issued the permit was acting or reasonably believed that she was acting within the scope of her authority; (2) she was "engaged in the exercise or discharge of a governmental function[;]" and (3) her conduct "does not amount to gross negligence that is the proximate cause of the injury[.]"

Because the trial court did not address any of these arguments, they are not preserved for appellate review. *Brown, supra* at 599. Although governmental immunity is an issue of law, the lower court file does not contain any testimony or affidavits from the employee who issued the building permit, rendering us unable to determine whether these exceptions apply. *Id.* Further, review of these issues is not necessary for a proper determination of the case. *Id.*

Reversed and remanded for entry of summary disposition in favor of plaintiffs. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Bill Schuette

/s/ Stephen L. Borrello