STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL BEARD,

Plaintiff-Appellant,

v

CITY OF ST. CLAIR SHORES and PATE, HIRN & BOGUE, INC.,

Defendants-Appellees.

UNPUBLISHED
October 8, 1999

No. 206605
Macomb Circuit Court
LC No. 96-001397 NO

Before: Zahra, P.J., and Saad and Collins, JJ.

PER CURIAM.

Plaintiff appeals from two orders granting defendants, City of St. Clair Shores ("the City") and Pate, Hirn & Bogue, Inc. ("Pate"), summary disposition in this negligence action. We affirm.

Plaintiff's employer, Salvatore Excavating Company ("Salvatore"), was the general contractor for the City's sanitary and storm sewer replacement project. Plaintiff was injured on the project as he stood at the bottom of a trench, trying to uncover a gas line. In his complaint, plaintiff alleged that the City, as the owner of the site, and Pate, as the engineer, were negligent in allowing plaintiff to work in a ten-foot trench which was inadequately supported. Plaintiff further alleged that the work activity was inherently dangerous and, therefore, neither the City nor Pate could delegate the responsibility of providing a safe work environment to Salvatore. Plaintiff also alleged that the City and Pate retained control over the work site.

The trial court granted the City's motion for summary disposition pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10). It found that the work activity was not inherently dangerous and that the City was engaged in a governmental function. The court granted Pate's motion for summary disposition pursuant to MCR 2.116(C)(10), on the basis that Pate did not owe plaintiff a duty to provide a safe work environment.

Plaintiff first argues on appeal that the trial court erred in granting summary disposition to the City. We disagree. Appellate review of a motion for summary disposition is de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). Pursuant to MCR 2.116(C)(7), a

defendant may be granted summary disposition on the ground that a plaintiff's claim is barred by immunity granted by law. *Smith v Kowalski,* 223 Mich App 610, 616; 567 NW2d 463 (1997). The applicability of governmental immunity also is reviewed de novo on appeal. *Baker v Waste Mgt of Michigan, Inc,* 208 Mich App 602, 605; 528 NW2d 835 (1995).

MCL 691.1407(1); MSA 3.996(107)(1) provides, in pertinent part, as follows:

> Except as otherwise provided in this act, 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.

A governmental agency is defined as "the state, political subdivisions, and municipal corporations." MCL 691.1401(d); MSA 3.996(101)(d). A governmental function is an activity that is expressly or impliedly mandated or authorized by constitution, statute, or other law. *Ross v Consumers Power Co (On Rehearing),* 420 Mich 567, 620; 363 NW2d 641 (1984); *Adam v Sylvan Glynn Golf Course,* 197 Mich App 95, 97; 494 NW2d 791 (1992); MCL 691.1401(f); MSA 3.996(101)(1)(f). This definition is to be broadly applied; it requires only that there be some constitutional, statutory, or other legal basis for the activity in which the agency was engaged. *Adam, supra*.

We agree with the trial court that operation and maintenance of a sewer system constitutes a governmental function. See *Ross, supra* at 637-638; Const 1963, art 4, §§ 51 and 52, and art 7, § 23; and MCL 123.201; MSA 5.2701. Plaintiff argues that under *Mitts v Fowlerville,* 119 Mich App 76, 78; 326 NW2d 431 (1982), operation and maintenance of a sewer system cannot be a governmental function because it is not an activity that can only be accomplished by the government. However, in *Ross, supra* at 616-617, our Supreme Court rejected such a narrow definition of governmental function in favor of the broad definition discussed above. Plaintiff also contends that governmental immunity does not apply because the City was grossly negligent in construction of the project. However, the gross negligence limitation on governmental immunity provided for in MCL 691.1407(2); MSA 3.996(107)(2), extends only to individuals, not to governmental agencies. *Gracey v Wayne Co Clerk,* 213 Mich App 412, 420; 540 NW2d 710 (1995), overruled on other grounds 454 Mich 135 (1997). Because the City was engaged in the discharge of a governmental function, plaintiff's suit against the City is barred by immunity granted by law and summary disposition under MCR 2.116(C)(7) was properly granted. As this ruling is dispositive of plaintiff's claim, we need not address whether summary disposition was proper under MCR 2.116(C)(8) or (10).

Plaintiff's also argues on appeal that the trial court erred in granting summary disposition to Pate pursuant to MCR 2.116(C)(10) on the basis that Pate owed no duty to plaintiff. We disagree. A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Spiek, supra*. In reviewing a trial court's decision on the motion, we consider the affidavits, pleadings, depositions, admissions and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party, *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), and grant the benefit of all reasonable doubt to that party, *Bourne v Farmers Ins Exchange*, 449 Mich 193, 197; 534 NW2d 491 (1995). Where there exists no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiff contends that under the City's contract with Salvatore, Pate was the "controlling employer" at the work site and, therefore, had a duty to ensure that construction proceeded safely. Questions regarding duty are for the court to decide as a matter of law. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397; 566 NW2d 199 (1997). Whether contract language is ambiguous also is a question of law. *Brucker v McKinlay Transport, Inc (On Remand)*, 225 Mich App 442, 447-448; 571 NW2d 548 (1997). If the contractual language is clear and unambiguous, its meaning is a question of law as well. *Id.*

The trial court found that the City's contract with Salvatore clearly and unambiguously assigned responsibility for safety at the work site to Salvatore. The court also found that although Pate was not a party to the contract, the contract defined Pate's status as engineer. Section 20 under "General Conditions" of the parties' contract provides, in pertinent part:

> In accordance with generally accepted construction practices, the Contractor shall be solely and completely responsible for conditions of the job site, including safety of all persons and property during performance of the work.
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> * * *
>
> The Contractor shall assume full responsibility for the work and take all precautions for preventing injuries to persons and property on or about the work, including furnishing all applicable safety equipment and devices and providing adequate training of his employees in the recommended use of same, . . .

Moreover, section 18 under that same heading provides, in pertinent part, that "[t]he Engineer shall not be responsible for the construction means, controls, techniques, procedures or construction safety." Although plaintiff contends that these provisions conflict with other contractual provisions allowing Pate to stop work and fire incompetent contractors or their employees, the provisions referenced by plaintiff clearly pertain to Pate's oversight of the quality of the work performed, not safety. Therefore, trial court correctly found that the contract language clearly and unambiguously assigned responsibility for safety at the work site to Salvatore and imposed no duty with regard to safety upon Pate.

Furthermore, the trial court properly disregarded the affidavit of George Bowden, which stated, in conclusory fashion without any factual basis, that Pate was the "controlling employer" at the work site and in the best position to correct any safety hazard. Affidavits submitted with regard to a motion for summary disposition, MCR 2.116(G)(3), must be made on the basis of personal knowledge and must set forth with particularity such facts as would be admissible as evidence to establish or deny the grounds stated in the motion. *SSC Associates Ltd Partnership v General Retirement System of the City of Detroit*, 192 Mich App 360, 363-364; 480 NW2d 275 (1991). "Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or lack of it) must be established by admissible evidence." *Id.*

Finally, plaintiff contends that, notwithstanding the terms of the City's contract with Salvatore, Pate is subject to liability for plaintiff's injuries because Pate retained control of the project and because

the work being performed was inherently dangerous. In other words, argues plaintiff, the responsibility for monitoring safety at the work site that plaintiff attributes to Pate was "nondelegable." Plaintiff relies, in part, on *Samodai v Chrysler Corp,* 178 Mich App 252, 255; 443 NW2d 391 (1989), where this Court explained:

> As a general rule, *an owner of property* is not liable to an employee of an independent contractor for negligence. In such situations, the actual employer of a worker is immediately responsible for job safety and for maintaining a safe work place. The two main exceptions to this general rule provide for liability if: (1) the *property owner* retains control over the work done and the contractor's activities or (2) the work is inherently dangerous—the work can reasonably be foreseen as dangerous to third parties. [Emphasis added; citations omitted.]

Plaintiff's reliance on *Samodai* and related cases is misplaced. The trial court correctly found that neither of the above exceptions could apply to Pate because Pate was simply the project engineer and never attained the status of owner or general contractor. See also *Funk v General Motors Corp,* 392 Mich 91, 101-102; 220 NW2d 641 (1974), overruled in part on another ground by *Hardy v Monsanto Enviro-Chem Systems, Inc,* 414 Mich 29; 323 NW2d 270 (1982). Furthermore, plaintiff did not successfully raise an issue of fact with regard to whether Pate, in its capacity as project engineer, ever attained the sort of control over the work site or possessed the duties or responsibilities that could be attributed to an owner or general contractor. As discussed above, Bowden's conclusory affidavit referring to Pate as the "controlling employer" is insufficient to create an issue of fact. Because Pate owed plaintiff no duty, the trial court correctly granted summary disposition in favor of Pate.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Jeffrey G. Collins