STATE OF MICHIGAN

COURT OF APPEALS

MARIEELANA ALDERMAN, a/k/a MARIE ELANA ALDERMAN,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED
November 12, 1999

No. 211255
Ingham Circuit Court
LC No. 97-016826 CM

Before: Holbrook, Jr., P.J., and Smolenski and Collins, JJ.

PER CURIAM.

Plaintiff appeals of right from orders setting aside a default entered by plaintiff and granting summary disposition to defendant pursuant to MCR 2.116(C)(7) based on defendant's assertion of governmental immunity. This case concerns plaintiff's claim that a sexual assault that was committed by a prison inmate, and that occurred during the course of plaintiff's employment in a prison, resulted from defendant's failure to properly dassify the prison inmate and thereby insure his placement in a facility with a higher level of security where he could not have injured plaintiff. We affirm.

Plaintiff first contends that the trial court abused its discretion in setting aside the default because defendant failed to file a timely responsive pleading. This Court reviews the trial court's decision to set aside a default for an abuse of discretion. *Huggins v MIC General Ins Corp*, 228 Mich App 84, 86; 578 NW2d 326 (1998). "[T]he policy of this state generally favors the meritorious determination of issues and, therefore, encourages the setting aside of defaults." *Id.*

MCR 2.603(D) provides in relevant part:

> (1) A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

> (2) Except as provided in MCR 2.612, if personal service was made on the party against whom the default was taken, the default, and default judgment if one has been entered, may only be set aside if the motion is filed
>
> (a) before entry of judgment, or
>
> (b) if judgment has been entered, within 21 days after the default is entered.

In *Huggins, supra* at 87, this Court stated that the "good cause" sufficient to warrant setting aside a default includes:

> (1) a substantial defect or irregularity in the proceeding on which the default was based, (2) a reasonable excuse for failure to comply with requirements that created the default, or (3) some other reason showing that manifest injustice would result if the default were allowed to stand. [Citations omitted.]

However, in *Alken-Ziegler, Inc v Waterbury Headers Corp*, __ Mich __; __ NW2d __ (Docket No. 111783, decided 10/12/99), slip op at 10-14, our Supreme Court stated that this three-prong formulation used by the courts has blurred the separate inquiries of "good cause" and "meritorious defense." The Court further stated that while the first two prongs of the "good cause test" accurately reflect its decisions, the third prong, i.e., showing manifest injustice," is problematic:

> …The difficulty has arisen because, properly viewed, "manifest injustice" is not a discrete occurrence such as a procedural defect or tardy filing that can be assessed independently. Rather, manifest injustice is the result that would occur if a default were to be allowed to stand where a party has satisfied the "meritorious defense" and "good cause" requirements of the court rule. When a party puts forth a meritorious defense and then attempts to satisfy "good cause" by showing (1) a procedural irregularity or defect, or (2) a reasonable excuse for failure to comply with the requirements that created the default, the strength of the defense obviously will affect the "good cause" showing that is necessary. In other words, if a party states a meritorious defense that would be absolute if proven, a lesser showing of "good cause" will be required than if the defense were weaker, in order to prevent manifest injustice. [*Id.* at 14.]

In its brief in support of its motion to set aside the default, defendant explained that its failure to timely respond to plaintiff's complaint occurred because it reasonably assumed that the date the complaint was served was the date specified by the Governor's legal counsel in a letter requesting representation by the attorney general. Defendant also filed an affidavit asserting its meritorious defense of governmental immunity as required by MCR 2.603(D)(1). Under the facts of this case, and given defendant's absolute defense of governmental immunity, we agree that defendant set forth a reasonable excuse for failure to comply with the requirements that created the default. Accordingly, we conclude that defendant satisfied the requirements of the court rule and the trial court did not abuse its discretion in setting aside the default.

Plaintiff also contends that, even if the trial court correctly decided to set aside the default, it erred in granting summary disposition because defendant waived the affirmative defense of governmental immunity by failing to raise it in the first responsive pleading. "Governmental immunity under MCL 691.1401 *et seq.*; MSA 3.996(101) *et seq.* is an affirmative defense and must be stated in a defendant's responsive pleading." *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 134; 545 NW2d 642 (1996). "However, the plaintiff must allege facts justifying application of an exception to governmental immunity in order to survive a motion for summary disposition." *Id.* The applicability of governmental immunity is a question of law that this Court reviews de novo on appeal. *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995). This Court also reviews de novo the legal issue of whether a motion for summary disposition was properly granted. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

MCR 2.116(C)(7) provides that a defendant may be entitled to dismissal of a lawsuit where the plaintiff's claim is barred because of immunity granted by law.

> A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. . . . Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. [*Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).]

This Court reviews all affidavits, pleadings, and other documentary evidence submitted by the parties and construes the pleadings in favor of the plaintiff; however, a motion under MCR 2.116(C)(7) will only be granted if no factual development could provide a basis for recovery. *Romska v Opper*, 234 Mich 512, 515; 594 NW2d 853 (1999), lv pending.

Here, the clerk defaulted defendant pursuant to MCR 2.603(A)(1). As a result, defendant could not proceed with the action until the court set aside the default. MCR 2.603(A)(3). Because defendant was defaulted, the time for filing a responsive pleading or taking other action as permitted by law or the court rules commenced when the trial court set aside the default. MCR 2.108(A)(1), (E). In lieu of filing a responsive pleading, defendant moved for summary disposition under MCR 2.116(C)(7), and specifically alleged that plaintiff's claim was barred by governmental immunity. Because defendant filed a timely motion for summary disposition, and the trial court granted the motion, defendant was not required to file a responsive pleading. See MCR 2.108(C)(1), which provides in pertinent part that "[I]f a motion under MCR 2.116 made before filing is *denied*, the moving party must serve and file a responsive pleading within 21 days after notice of the *denial*." (Emphasis added).

Defendant having properly raised the defense of governmental immunity under MCR 2.116(C)(7) as a bar to plaintiff's lawsuit, the question then becomes whether plaintiff alleged sufficient facts to justify application of an exception to defendant's immunity. Plaintiff did not name defendant's employee who allegedly misclassified the prison inmate as a party to this suit, but rather chose to

proceed against defendant. It is a "fundamental principle that governmental agencies are statutorily immune from tort liability '[e]xcept as otherwise provided.'" *Vargo v Sauer*, 457 Mich 49, 56; 576 NW2d 656 (1998). MCL 691.1407; MSA 3.996(107) provide a broad grant of immunity subject to narrowly drawn statutory exceptions. *Id.* MCL 691.1407(1); MSA 3.996(107)(1) provides, in relevant part:

> Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the governmental agency is engaged in the exercise or discharge of a governmental function.

In addition, MCL 691.1401(f); MSA 3.996(101)(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."

Here, plaintiff alleged that an employee of the DOC who was responsible for prisoner classification, misclassified an inmate who later sexually assaulted her. However, we conclude that plaintiff's allegation fails to avoid defendant's statutory immunity. Governmental immunity embraces all activities that are incidents of operating a prison. *Russell v Dep't of Corrections*, 234 Mich App 135, 137; 592 NW2d 125 (1999). Specifically, the DOC is statutorily responsible for the administration of the prison system, MCL 791.204; MSA 28.2274, and this includes rulemaking authority. MCL 791.206; MSA 28.2276. Because the activity of classifying prisoners constituted "the exercise or discharge of a governmental function," MCL 691.1401(f); MSA 3.996(101)(f), we conclude that defendant and its employee responsible for prisoner classification were engaged in a governmental function. Accordingly, we conclude that defendant is immune for the alleged misclassification of the prisoner pursuant to MCL 691.1407; MSA 3.996(107).

Finally, we reject plaintiff's contention on appeal that defendant lacks governmental immunity due to the gross negligence of its employee that allegedly misclassified the prisoner. Plaintiff did not include the employee as a defendant in this suit or even allege that the employee was grossly negligent. Because plaintiff failed to allege facts justifying the gross negligence exception, her complaint does not survive defendant's motion for summary disposition. Furthermore, and more importantly, while a governmental employee's gross negligence is an exception to the employee's claim of governmental immunity, that employee's gross negligence is not an exception to an agency's governmental immunity. MCL 691.1407(1)-(2); MSA 3.996(107)(1)-(2). The five statutory exceptions imposing tort liability on governmental agencies are: the failure to maintain highways, MCL 691.1402; MSA 3.996(102); negligent operation of a government-owned vehicle by a government officer, agent or employee, MCL 691.1405; MSA 3.996(105); failure to repair and maintain public buildings, MCL 691.1406; MSA 3.996(106); injuries arising out of the ownership or operation of a public hospital or county medical facility, MCL 691.1407(4); MSA 3.996(107)(4); and, the performance of a proprietary, as opposed to a governmental function, MCL 691.1413; MSA 3.996(113). *Vargo, supra* at 57 n 7-8. See also *Gracey v Wayne Co Clerk*, 213 Mich App 412, 420-421; 540 NW2d 710 (1995), overruled on other grounds *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143; 560 NW2d

50 (1997) (the gross negligence exception to governmental immunity does not state that it applies to the governmental agencies themselves).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski
/s/ Jeffrey G. Collins