STATE OF MICHIGAN

COURT OF APPEALS

PEGGY JENKINS, Personal Representative of the Estate of DELROY JOHNSON, Deceased, and LARRY KOPP, Personal Representative of the Estate of MICHAEL TURNER, Deceased,

Plaintiffs-Appellees,

v

CITY OF DETROIT,

Defendant-Appellant.

UNPUBLISHED
November 6, 2001

No. 215116
Wayne Circuit Court
LC No. 94-417320-NO

SHIRLEY P. MARICAL, Personal Representative of the Estate of VIOLA MAY MULL, Deceased,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant.

No. 215117
Wayne Circuit Court
LC No. 94-418025-NO

CHERYL BROWN, Personal Representative of the Estate of HERMAN HOLT, Deceased,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant.

No. 215118
Wayne Circuit Court
LC No. 95-515825-NO

Before: McDonald, P.J., and Whitbeck and Collins, JJ.

PER CURIAM.

Defendant City of Detroit ("defendant" or "the City") appeals as of right the judgment entered in favor of plaintiffs following a bench trial. We reverse.

These consolidated cases arose from a tragic fire that occurred on June 2, 1992, at 88-90 Pingree (the Pingree property) in Detroit. Robert and Janie Nelson (the Nelsons) were operating an unlicensed adult foster care (AFC) facility at that address.[1] The fire resulted in the deaths of, among others, plaintiffs' decedents. At the time of the fire, the City held legal title to the Pingree property. The Nelsons, who had previously lost title to the Pingree property for nonpayment of taxes, purchased the Pingree property from the City in April 1985 under a land contract.

Plaintiffs filed complaints naming the City as a defendant. They alleged, among other things, that the Pingree property constituted a nuisance in fact and a nuisance per se. They claimed that defendant was liable as owner of the property and "as the sovereign municipality" because of its failure to cure violations of state law and its own housing and fire codes when the property was sold and afterward. Further, they contended that in entering into the land contract with the Nelsons, defendant engaged in a proprietary function.

Trial testimony showed that the Nelsons purchased the Pingree property through a program run by defendant that allowed persons to reacquire property they previously owned. Defendant acquired a number of properties from the State of Michigan that had reverted to the state for nonpayment of taxes. Defendant determined the amount of back taxes owing, added an administrative fee, and offered to sell title back to the former owner by land contract with defendant. The evidence showed that the Nelsons entered into such a contract with defendant in April 1985, that the land contract never was recorded, and that the Nelsons made payments, including interest, on the contract through January 1987. However, they made no payments after that January 1987 and were in default at the time of the fire. Trial testimony also showed that although the cause of the fire was unrelated to any fire code violations, there were code violations within the building that contributed to the loss of life, including the lack of enclosed stairwells and the absence of outside exits from either the second or third floors. Evidence showed that such safety features are required in group homes.

At the conclusion of the trial, the court found defendant liable for damages suffered by plaintiffs as a result of the fire at the Pingree property. The court found that the building was a nuisance per se for which defendant was responsible as the owner. The court also determined that defendant transferred the building to the Nelsons knowing of the Nelsons' intended use of the building, that fire code violations existed, and that defendant failed to enforce its own fire code. The court concluded that governmental immunity did not apply in this case because there exists a nuisance per se exception to governmental immunity. The court further found that

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[1] In August 1979, the Nelsons were permanently enjoined from operating an AFC facility at the Pingree property and at three other locations in the City of Detroit.

defendant's sale of the Pingree property to the Nelsons constituted a proprietary function, another exception to governmental immunity.

Defendant argues on appeal that the trial court erred as a matter of law in imposing liability on defendant, because none of the theories of liability presented by plaintiffs was viable under the facts of this case and, in any event, the City was immune from any liability that would otherwise attach.

We agree with defendant that governmental immunity barred plaintiffs' tort claims; thus, we address that issue first. This Court reviews a trial court's factual findings for clear error, *Bracco v Michigan Technological University*, 231 Mich App 578, 585; 588 NW2d 467 (1998), but reviews de novo the trial court's application of the facts to the relevant law. *Brandon Charter Twp v Tippett*, 241 Mich App 417, 421-422 n 1; 616 NW2d 243 (2000). "When a trial court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct." *Bracco, supra.*

MCL 691.1407(1), before it was amended by 1999 PA 241, sets forth the general scope of governmental immunity in this case:

> 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.

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). "[T]he term 'governmental function' is to be broadly construed and the statutory exceptions thereto . . . are to be narrowly construed." *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998).

Defendant argues that it was entitled to governmental immunity because enforcement of its fire code constitutes a governmental function under MCL 29.8, MCL 117.3(j) and (k), and MCL 125.31 *et seq.*, and its real estate and urban planning activities are authorized by the Detroit City Code. Plaintiffs contend that the trial court properly found that the Pingree property constituted a nuisance per se, that there exists a nuisance per se exception to governmental immunity, and that the proprietary function exception to governmental immunity, MCL 691.1413, also applies in this case. We address the proprietary function exception first. The statute provides, in pertinent part, as follows:

> The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees. [MCL 691.1413.]

Thus, in order to be considered a proprietary function, an activity (1) must be conducted primarily for the purpose of producing a pecuniary profit, and (2) cannot normally be supported

by taxes or fees. *Hyde v University of Michigan Bd of Regents*, 426 Mich 223, 258; 393 NW2d 847 (1986). Whether an activity actually generates a profit is not dispositive, but the existence of a profit is relevant in determining the governmental agency's intent. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 97-98; 494 NW2d 791 (1992). If profit is deposited in a general fund or used on unrelated events, the use indicates a pecuniary motive, but use to defray expenses of the activity indicates a nonpecuniary purpose. *Taylor v City of Detroit*, 182 Mich App 583, 587; 452 NW2d 826 (1989).

In *Coleman, supra* at 622, the Supreme Court found that the primary purpose of the operation of a landfill by the City of Riverview was to produce a pecuniary profit. The Court noted that the City of Riverview's operation of a landfill was "an unusual case, one in which the government has chosen to run a commercial enterprise for the purpose of reaping a pecuniary profit." *Id.* at 623, n 11. The Court found that during an eight year period of operation, the landfill generated a profit exceeding seven million dollars, that the profits were used to fund other city projects, including "the expansion of the fire hall and the purchase and modifications of a building to house city hall," and that "the profits also helped fund city operations such as the police and fire departments, the city library, the city ski hill, and the department of public services." *Id.* at 622. The court also found that the City of Riverview's millage rate had "steadily declined . . . due, in part, to the availability of landfill revenue that was transferred to the general fund." *Id.*

The *Coleman* Court also considered the nature of the City of Riverview's operation of a landfill and concluded that it satisfied the second prong of the proprietary function test:

> In this case, it is more than the operation of a municipal landfill. It is the operation of a commercial landfill that accepts garbage, not merely from the city of Riverview, but from communities as distant as Ontario, Canada. An enterprise of such vast and lucrative scope is simply not normally supported by a community the size of the city of Riverview either through taxes or fees. [*Id.* at 622-623.]

Here, in support of their argument that the primary purpose of defendant's real estate activities in general, and its sale of the Pingree property specifically, was to produce a pecuniary profit, plaintiffs presented evidence that defendant obtained the Pingree property and a number of others for only a dollar, the purchase price offered to buyers such as the Nelsons included taxes for years that title to the property was held by the state, defendant charged a ten percent administrative fee to purchasers, it charged interest on unpaid balances, and, in the case of the Pingree property, it received funds from the insurance company for demolition of the house and payoff of the land contract when the property burned. Plaintiffs also showed that the proceeds from the sale of the properties were deposited in defendant's general fund.

The trial court's findings do not indicate that it considered whether the *primary purpose* of defendant's sale of the properties in question was to generate a pecuniary profit. Rather, it appears from the record that the trial court concluded that defendant was engaged in a proprietary function on the basis of its finding that the City realized a profit from the sale.[2] However, as

[2] When asked whether the it was finding that defendant was engaged in a proprietary function, (continued…)

noted above, whether an activity actually generates a profit is not dispositive. *Adam, supra*. Further, simply because defendant received money as a result of the sale of the properties does not mean that it realized a profit. Testimony showed that a portion of the payments made by the people who repurchased the properties consisted of taxes that had gone unpaid. Defendant was recouping taxes that it was previously owed on the properties, and also paying county taxes out of the payments made by the Nelsons and others who repurchased properties. Also, although testimony showed that the proceeds from the sales of properties were deposited into defendant's general fund, unlike *Coleman*, here there was no evidence offered to show that the funds deposited as a result of the sale of homes through defendant's planning and development department financed unrelated activities. We conclude that the evidence presented does not support a finding that the *primary purpose* of defendant's sale of tax reverted properties to prior holders of title was to generate a pecuniary profit and, to the extent that the trial court found that profit was defendant's primary purpose, it clearly erred.

Moreover, urban development and stabilization of neighborhoods are the sorts of activities normally funded through taxes. Nancy Trecha, principal development specialist in property management for the real estate division of the planning and development department of the City, testified that the mission of that division "is to procure, sell, manage and maintain city owned real estate for the purpose of developing and stabilizing neighborhoods and promoting relocation assistance to those citizens displaced through governmental actions." She also said that the activities of the real estate division of the planning and development department included managing its inventory of tax-reverted properties, processing evictions, relocating displaced residents, boarding up vacant properties, and demolishing abandoned buildings. Further, that the offers of repurchase were made to the prior owners of title who were residing in Detroit, and not to the general population, indicates that the sales were not essentially commercial in nature. See *Coleman, supra* at 622-623; *Taylor, supra* at 588.

In sum, the evidence does not support the conclusion that defendant was engaged in a proprietary function when it sold the Pingree property back to the Nelsons. Accordingly, the trial court erred in finding that the proprietary function exception to governmental immunity applies in this case.

(…continued)

the trial court responded as follows:

> Yes. Not only were they getting interest on the land contract, but when the building burned, they not only got the balance paid off on the land contract, they also got five thousand dollars ($5,000.00) worth of interest. That sounds like a proprietary function to me.
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> * * *
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> The selling of that building was definitely for a profit. It was not a governmental function, but a proprietary function.

Defendant also argues that the court erred in finding that the Pingree property constituted a nuisance per se and that there exists a nuisance per se exception to governmental immunity. Because we conclude that the Pingree property was not a nuisance per se, we need not consider whether there exists a common law nuisance per se exception to governmental immunity.

Defendant first contends that the trial court abused its discretion in allowing plaintiffs, at the conclusion of trial, to amend their complaint to include a nuisance per se claim, because defendant was not on notice that nuisance per se would be an issue at trial. We note, however, that plaintiffs Jenkins and Kopp included a nuisance per se allegation in their amended complaint filed August 12, 1994. The court, however, did not address that allegation in its summary disposition ruling. In any event, the trial court did not abuse its discretion in allowing plaintiffs to amend their complaint to include a nuisance per se claim. Plaintiff Brown's counsel asserted during opening statements that plaintiffs would show that the Pingree property constituted a nuisance per se, defendant did not object, and plaintiffs, relying on evidence presented at trial, argued during their closing that defendant was liable under a nuisance per se theory. Because the issue was "tried by express or implied consent of the parties," MCR 2.118(C)(1), the trial court did not abuse its discretion in allowing amendment of the pleadings to conform to the evidence.

"As our case law has long recognized, a nuisance per se is 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). The Supreme Court has further explained as follows:

> "'From the point of view of their nature, nuisances are sometimes classified as nuisances *per se* or at law, and nuisances *per accidens* or in fact. A nuisance at law or a nuisance *per se* is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. Nuisances in fact or *per accidens* are those which become nuisances by reason of circumstances or surroundings, and an act may be found to be a nuisance as a matter of fact where the natural tendency of the act is to create danger and inflict injury on person or property. The number of nuisances *per se* is necessarily limited, and by far the greater number of nuisances are nuisances *per accidens.*'" [*Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 152-153; 422 NW2d 205 (1988), quoting *Rosario v City of Lansing*, 403 Mich 124, 132-133; 268 NW2d 230 (1978) (opinion of Fitzgerald, J.), quoting *Bluemer v Saginaw Oil Service, Inc*, 356 Mich 399, 411; 97 NW2d 90 (1959).]

"'[U]nlike the nuisance in fact, nuisance per se is not predicated on the want of care, but is unreasonable by its very nature.'" *Li, supra* at 477, quoting *Hadfield, supra* at 208 (Boyle, J. concurring).

The building on the Pingree property did not constitute a nuisance at all times and under all circumstances. It was not inherently dangerous; rather, the evidence showed that its condition became dangerous when the Nelsons began using the home as an adult foster care facility and failed to properly maintain the house in that capacity, i.e., they failed to comply with fire code requirements for group homes. Because the Pingree property was not unreasonable by its very

nature, but the danger it posed was a function of circumstance and want of care, the property did not constitute a nuisance per se.

Finally, defendant contends that the trial court did not impose liability on the basis that defendant maintained a dangerous building in violation of MCL 125.528, but to the extent that plaintiffs maintain that it did, any such ruling was in error because defendant did not have possession or control of the building.

The record does not indicate that the trial court imposed liability on the basis that defendant violated the Michigan Housing Law, MCL 125.401 *et seq.* Although the court's ruling on defendant's motion for summary disposition clearly left the statutory claim for trial, the court never addressed the state housing law in its findings. Rather, its ruling appears to be premised entirely on its findings that defendant owned the Pingree property and that the building constituted a nuisance per se. Generally, this Court will not address an issue that was not decided below. *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266, 278; 568 NW2d 411 (1997). However, because plaintiffs raised the issue below, and it is a question of law and the facts necessary for its resolution have been presented, we will address it. *Carson Fischer Potts and Hyman v Hyman*, 220 Mich App 116, 119; 559 NW2d 54 (1996); see also *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

Plaintiffs contend that because defendant held legal title to the Pingree property as the land contract vendor, it was liable under MCL 125.536 and MCL 125.538,[3] for the damages that resulted from the Pingree fire. However, in *Morrison v Brown*, 360 Mich 460; 104 NW2d 223 (1960), where a legal owner/land contract vendor had no right under its contract with the landlord/land contract vendee to inspect the premises or interfere with the possession, right of control, and management of the premises by the landlord, *id.* at 464, the Supreme Court held that the legal owner was not liable under MCL 125.401 *et seq.* for injuries sustained by a tenant's mother when she was burned because a water heater malfunctioned. *Id.* at 462, 466. The Court stated:

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[3] MCL 125.536 provides, in pertinent part, as follows:

> (1) When the owner of a dwelling regulated by this act permits unsafe, unsanitary or unhealthful conditions to exist unabated in any portion of the dwelling, whether a portion designated for the exclusive use and occupation of residents or a part of the common areas, where such condition exists in violation of this act, any occupant, after notice to the owner and a failure thereafter to make the necessary corrections, shall have an action against the owner for such damages he has actually suffered as a consequence of the condition. . . .

MCL 125.538 provides as follows:

> It is unlawful for any owner or agent thereof to keep or maintain any dwelling or part thereof which is a dangerous building as defined in [MCL 125.539].

> The theory is untenable that the legislature intended to impose a duty, and liability for nonobservance, on the holder of the legal title to a building for failure to inspect and make reasonable repairs when the right to the possession, management, and control of such building is legally in another. [*Id.* at 466.]

Plaintiffs distinguish *Morrison* on the basis that there was no evidence that the legal owner in that case had knowledge of any defects in the property and he had no right to inspect the premises, while in this case, defendant knew of the existing code violations when it sold the property to the Nelsons, knew because of its subsequent inspections that the violations had not been corrected, and had the right to possession and control of the property because the Nelsons were in default on the land contract. We do not find this distinction persuasive.

The *Morrison* Court's interpretation of the word "owner" focuses on possession and control. See also *Oxenrider v Gvoic*, 340 Mich 591, 601; 66 NW2d 80 (1954). Although the land contract gave defendant the right to take immediate possession of the premises if the Nelsons failed to perform any part of the contract, at the time of the fire, defendant had not exercised its right of possession and the Nelsons were still in possession and control of the building. Further, any right that defendant had to enter the premises to inspect or enforce the fire or building codes, it had by virtue of its status as a governmental entity, not as land contract vendor. Because defendant did not have possession or control of the Pingree property at the time of the fire, it is not liable under MCL 125.536 and MCL 125.538 for damages suffered by plaintiffs.

Reversed.

/s/ William C. Whitbeck
/s/ Jeffrey G. Collins

Judge Gary R. McDonald not participating.