# STATE OF MICHIGAN

# COURT OF APPEALS

---

LOUIS J. EYDE LIMITED FAMILY PARTNERSHIP and GEORGE F. EYDE LIMITED FAMILY PARTNERSHIP,

Plaintiffs-Appellees,

v

CHARTER TOWNSHIP OF MERIDIAN, MERIDIAN TOWNSHIP PLANNING COMMISSION, MERIDIAN TOWNSHIP BOARD OF TRUSTEES, and MERIDIAN TOWNSHIP ZONING BOARD OF APPEALS,

Defendants-Appellants.

UNPUBLISHED
June 17, 2004

No. 248312
Ingham Circuit Court
LC No. 02-000593-CZ

---

Before: Hoekstra, P.J., and O'Connell and Donofrio, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's order denying their motion for summary disposition on the basis of governmental immunity and granting plaintiffs' motion for partial summary disposition. MCR 7.202(7)(a)(v). We affirm.

On appeal, defendants argue that the trial court erred in denying their motion for summary disposition. Specifically, defendants maintain that it was error for the trial court to conclude that plaintiffs could proceed with their claim that defendants tortiously interfered with plaintiffs' business expectancy because the denial of a special use permit (SUP) to erect a communications tower on plaintiffs' property is a governmental function and the contract for the erection of another communication tower on township property is not proprietary. Consequently, defendants assert that plaintiffs have not and cannot demonstrate that their case falls within one of the exceptions to governmental immunity. We disagree.

We review a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "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 under this subsection, the plaintiff must allege facts justifying the application of an exception to governmental immunity. *Id.* "We 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.*; MCR 2.116(G)(5).

We begin by addressing whether the township's agreement with HLH Towers, LLC (HLH), was proprietary, and thus excepted defendants from governmental immunity.

Tort immunity is broadly granted to governmental agencies in MCL 691.1407(1). However, the governmental immunity act sets forth six exceptions to immunity, which must be narrowly construed, *Maskery v University of Michigan Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003), including the proprietary function exception. MCL 691.1413 sets forth the proprietary function exception to governmental immunity and provides:

> 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.

Our Supreme Court has held that the definition of proprietary function is clear and unambiguous. *Hyde v University of Michigan Bd of Regents*, 426 Mich 223, 257; 393 NW2d 847 (1986). To be a proprietary function, an activity must: (1) be conducted primarily for the purpose of producing a pecuniary profit; and (2) not normally be supported by taxes and fees. *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998); *Hyde, supra* at 258.

The first prong of the proprietary function test has two relevant considerations. First, whether an activity actually generates a profit is not dispositive, but the existence of profit is relevant to the governmental agency's intent. *Coleman, supra*. An agency may conduct an activity on a self-sustaining basis without being subject to the proprietary function exemption. *Hyde, supra* at 258-259; *Codd v Wayne Co*, 210 Mich App 133, 136; 537 NW2d 453 (1995). Second, where the profit is deposited and where it is spent indicate the governmental agency's intent. If profit is deposited in the general fund or used on unrelated functions, the use indicates a pecuniary motive, but use to defray expenses of the activity indicates a nonpecuniary purpose. *Coleman, supra*; see also *Hyde, supra* at 258-259.

With respect to the second relevant consideration, whether the activity is "normally supported by taxes or fees," *Coleman, supra* at 621, 622, to be excluded from the proprietary function exception to immunity an activity need not actually be supported by taxes or fees if it is a kind normally supported by taxes or fees. *Hyde, supra* at 260 n 32.

The record in this case establishes that the lease agreement between the township and HLH could generate millions of dollars of revenue with the township liable for little or no cost or expenses, and that the funds would be deposited into the township's general fund to be used for functions unrelated to the communications tower. Defendants maintain that despite the potential significant revenue stream that this contract may produce, profit was not the primary purpose for entering into the agreement. Rather, defendants maintain that the primary purposes for the agreement with HLH include to lessen the impact of communication towers on residential property, to reduce the number of towers in the township, and to provide for an aesthetic design

with the lowest height possible. Although we cannot discount completely that these may have been additional factors that caused the township to enter into the agreement with HLH, we nonetheless are firmly of the opinion that the substantial profit to be made was the primary purpose. Otherwise, the township presumably would have found it unnecessary to require HLH to pay the significant fees required in the agreement.

With regard to the second part of the test, that the activity "cannot be normally supported by taxes and fees," *Coleman, supra* at 621, there is no evidence that taxes or fees would support such activity. As plaintiffs point out, defendant township leased its land to a private commercial entity for the construction of a cellular tower to deliver private cellular service.

In sum, even though exceptions to governmental immunity are to be narrowly construed, *Coleman, supra* at 623 n 11, we believe that the evidence presented to the trial court suffices to meet the two tests that must be satisfied to meet the definition of proprietary function, *id.* at 621.

Next, we address defendant's claim that defendants' denial of a SUP to plaintiffs' business partner AT&T Wireless PCS, LLC (AWS) so that AWS could erect a communication tower on plaintiffs' property was a governmental function. On this issue we agree with defendants. Clearly, defendants' action of deciding whether to grant a SUP to AWS is a governmental function.

However, even so, defendants are not entitled to summary disposition on grounds of governmental immunity. Plaintiffs' theory is that defendants employed the otherwise legitimate governmental function of deciding whether to grant SUP's for the improper purpose of advancing their own proprietary interests of having exclusive right to the financial benefit of an agreement to erect a communications tower. On the record before us, we are convinced that a fact question exists on this issue. Consequently, establishing that acting on applications for SUP's like that of AWS is a governmental function provides no grounds for dismissing this case.

To the extent that defendants take issue with the trial court's granting of plaintiffs' motion for partial summary disposition on the basis that governmental immunity is a characteristic of government, not an affirmative defense, we find their argument inapposite. See generally, *Mack v Detroit*, 467 Mich 186, 190, 198-201; 649 NW2d 47 (2002). The handling of plaintiffs' motion and defendants' motion were intertwined and the language used, i.e., "affirmative defense," while inaccurate, does not in itself entitled defendants to relief.

Finally, we note that defendants' claims regarding standing and who are proper parties in this action are not properly before us because the issues were not raised in defendants' statements of issues presented, *Susan R Bruley Trust v Birmingham*, 259 Mich App 619, 631 n 28; 675 NW2d 910 (2003), and more importantly, because review is limited at this time to the issue of governmental immunity, MCR 7.202(7)(a)(5) and MCR 7.203(A)(1).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell
/s/ Pat M. Donofrio