

STATE OF MICHIGAN
COURT OF APPEALS

VIRGINIA A. ORMANIAN and NORMA
ASTOURIAN, individually and on behalf of all
similarly situated individuals,

UNPUBLISHED
July 19, 2005

Plaintiffs-Appellants,

v

MICHIGAN GAMING CONTROL BOARD,

No. 254225
Court of Claims
LC No. 03-000220-MZ

Defendant-Appellee.

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition to defendant under MCR 2.116(C)(7) (immunity granted by law). We affirm.

I

We review the trial court's grant of summary disposition under MCR 2.116(C)(7) de novo. *Tarlea v Crabtree*, 263 Mich App 80, 87; 687 NW2d 333 (2004). To avoid summary disposition under MCR 2.116(C)(7) based on governmental immunity, a plaintiff must allege facts justifying the application of an exception to such immunity. *Tarlea, supra* at 87-88. This Court gives consideration to documentary evidence submitted by the parties in determining whether a defendant is entitled to governmental immunity. *Id.* at 87. Summary disposition may be granted under MCR 2.116(C)(7) if, based on the evidence presented, reasonable minds could not differ regarding the applicability of governmental immunity. *Id.* at 88.

II

Plaintiffs first argue that the trial court erred by concluding that defendant was engaged in the discharge or exercise of a governmental function with regard to plaintiffs' claims in this case. We conclude that plaintiffs are not entitled to relief based on this issue.

MCL 691.1407(1) provides that a governmental agency has immunity from tort liability when it "is engaged in the exercise or discharge of a governmental function." MCL 691.1401(f) defines the state as being involved in a governmental function when engaged in "an activity that is expressly or impliedly mandated or authorized by . . . statute" Most, if not all, of

plaintiffs' claims relate to defendant's conduct under MCL 432.225 in maintaining its list of "disassociated persons," which is essentially a list of people who have voluntarily identified themselves as problem gamblers and have requested to be placed on this list.¹ MCL 432.225 expressly mandates defendant to create the disassociation list, to collect and process applications to be placed on the list, and to forward and publish the list to casino licensees. Thus, defendant's conduct in maintaining the list and sharing the list with casinos is plainly a governmental function.

However, plaintiffs assert on appeal that because no statute expressly authorized defendant to fail to investigate casino licensees with regard to this matter, defendant's failure to do so was not a governmental function. This actually amounts to a claim that defendant's activity in this regard was ultra vires. However, the mere "failure to perform a regulatory condition" does not rise to the level of ultra vires activity. *Richardson v Jackson Co*, 432 Mich 377, 387; 443 NW2d 105 (1989). The alleged failure of defendant to investigate casinos is not outside the scope of its governmental functions for purposes of a governmental immunity analysis. Further, with regard to plaintiffs' claims involving the alleged violation of the right to privacy, defendant's sharing of the relevant personal information with the casinos was specifically authorized by MCL 432.225(6) and, thus, constituted a governmental function.

Finally, with regard to plaintiffs' remaining claims of fraud and misrepresentation, even assuming that these claims allege activity outside the scope of defendant's governmental functions, the trial court did not err by granting summary disposition in favor of defendant with regard to the claims. Plaintiffs' claims of fraud were inadequate to survive summary disposition because they failed to state with particularity the alleged fraudulent circumstances. MCR 2.112(B)(2); *Kassab v Michigan Basic Property Ins Ass'n*, 185 Mich App 206, 213; 460 NW2d 300 (1990), rev'd in part on other grounds 441 Mich 433 (1992). Moreover, plaintiffs' claims were based on statements regarding the future that constituted mere opinions and cannot support a misrepresentation claim. *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998); *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997).

III

Plaintiffs also argue that the trial court erred by holding that the proprietary function exception to governmental immunity was inapplicable to this case. We disagree. To fall within the proprietary function exception to governmental immunity, an activity "(1) must be conducted primarily for the purpose of producing a pecuniary profit; and (2) it cannot be normally supported by taxes and fees." *Herman v Detroit*, 261 Mich App 141, 145; 680 NW2d 71 (2004), quoting *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998).

¹ We will hereafter refer to this list as the "disassociation list." In connection with a request to be placed on the disassociation list, a person is statutorily required to sign a form expressing agreement (1) to a criminal complaint for trespass being filed against that person if he or she enters a casino in Michigan, and (2) to defendant confiscating any money that person wins in a casino. MCL 432.225(4)(e)(i) and (ii). MCL 432.225 is presumably intended to provide problem gamblers with a means to reduce their incentive to participate in casino gambling.

Plaintiffs contend that defendant administers the disassociation list to enable casino licensees to prey on problem gamblers and thereby increase the state's revenue. This argument is frivolous. The only support for the contention offered by plaintiffs is the claim that because casino personnel greeted them by name on unspecified dates, defendants must have shared the list with the casinos and, because the casinos did not bar plaintiffs' entry, defendant must be administering the disassociation list to generate income from self-admitted problem gamblers. This assertion is patently speculative and unreasonable. Even assuming, for purposes of discussion, that casino personnel actually gleaned plaintiffs' personal information from the disassociation list to encourage them to gamble, plaintiffs have not cited any authority to support a theory that a wrongful act by a third party may be imputed to a state agency to transform a non-proprietary function into a proprietary one.

Furthermore, defendant charges no fee for a person to join the disassociation list, and the only money collected by defendant in connection with the list would be unlawful winnings seized from a disassociated person and applied to the compulsive gaming prevention fund under MCL 432.225(15). The use of winnings for this narrow purpose indicates that the primary purpose of defendant's activity in regard to the disassociation list is not to make a profit. See *Herman, supra* at 145 (noting that how profit is spent is indicative of intent and that the depositing of profit in the general fund or its use on "unrelated events" indicates a pecuniary motive). Rather, as is readily apparent, the primary purpose of the disassociation list and defendant's activity related to that list, as called for by MCL 432.225, is to attempt to reduce compulsive or problem gambling.² In particular, by placing themselves on the disassociation list, with the attendant possibility of facing a criminal trespass charge for entering a casino and forfeiting any gambling winnings in a casino, see MCL 432.225(4)(e), problem gamblers can obtain a strong disincentive to engage in casino gambling. Accordingly, the Court of Claims did not err in ruling that the proprietary function exception did not apply to this case.³

Given that our above holdings are dispositive of the proper outcome of this case, it is unnecessary to reach plaintiffs' argument regarding the scope of MCL 432.225(14).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Patrick M. Meter

/s/ Donald S. Owens

² Moreover, the purpose of defendant's activities in general is not to generate a profit but rather to license, regulate, and enforce casino gambling. See, e.g., MCL 432.204(1).

³ With regard to plaintiffs' alternative argument that they should be allowed to amend their complaint with regard to this matter, that issue is not properly presented to this Court because it was first raised on appeal in plaintiff's reply brief. MCR 7.212(G); *Check Reporting Services, Inc v Michigan Nat'l Bank*, 191 Mich App 614, 628; 478 NW2d 893 (1991). Thus, we decline to address the issue.