

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Counter-Defendant-
Appellant,

v

FISHER HOTEL, a/k/a FISHER HOTEL
ANNEX, a/k/a 4520 & 4626 BRYANT STREET,
FLINT, EXECUTIVE PROPERTY
DEVELOPMENT, L.L.C., and MKD
INVESTMENT, L.L.C.,

Defendants/Counter-Plaintiffs-
Appellees,

and

ALL RESIDENTS,

Defendants.

UNPUBLISHED

March 25, 2008

No. 274009

Genesee Circuit Court

LC No. 05-082755-CZ

Before: Whitbeck, C.J., and White and Zahra, JJ.

WHITBECK, C.J. (*dissenting*).

The majority here has concluded that this case should be remanded to allow the Fisher Hotel defendants to amend their countercomplaint to add a gross negligence claim against plaintiff, People of the State of Michigan. I do not agree that this procedural step is necessary. Rather, I would dispose of this case now on the merits. I would reverse the trial court's orders denying the People's motion for summary disposition and granting the Fisher Hotel defendants leave to amend. And I would direct the trial court to enter a new order dismissing the Fisher Hotel defendants' countercomplaint.

As the majority correctly states, the People did not argue below that the gross negligence exception to governmental immunity did not apply to it as a governmental agency. And this omission does render this specific contention unpreserved for purposes of this Court's appellate review. However, I would nevertheless review this unpreserved issue because it brings before us

a question of law for which all the necessary facts have been presented.¹ This Court reviews a trial court's decision on a motion for summary disposition, as well as questions of law generally, under the de novo standard of review.²

MCL 691.1407(2), which sets forth the gross negligence exception to governmental immunity, specifically states as follows:

Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) *The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.*^[3]

In *Gracey v Wayne Co Clerk*, this Court, interpreting subsection (c), stated as follows:

The gross-negligence exception to governmental immunity states that it applies to officers, employees, members, or volunteers of governmental agencies. The cardinal rule of statutory construction is to ascertain and give effect to the intention of the Legislature. The exception does not state that it applies to the governmental agencies themselves. Express mention in a statute of one thing implies the exclusion of other similar things. . . . Here, had the Legislature intended to include governmental agencies in the gross negligence exception to governmental immunity, it easily could have used the appropriate, general language.^[4]

¹ *Pro-Staffers, Inc v Premier Mfg Support Services, Inc*, 252 Mich App 318, 324; 651 NW2d 811 (2002).

² *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

³ (Emphasis added).

⁴ *Gracey v Wayne Co Clerk*, 213 Mich App 412; 540 NW2d 710 (1995), overruled in part on other grounds *American Transmissions v Attorney General*, 454 Mich 135, 142-143; 560 NW2d 50 (1997) (internal citations omitted).

Therefore, it is well established that the gross negligence exception to governmental immunity applies only to individuals, not to government agencies.

MCL 600.3805 authorizes a prosecuting attorney to maintain an action for equitable relief “in the name of the state of Michigan” to abate a nuisance described under MCL 600.3801.⁵ Despite any vagueness in the pleadings below, I believe that it is not subject to reasonable dispute that in bringing its nuisance claim, the People were entitled to immunity as a governmental agency.⁶

The Michigan Court Rules require that a party be given an opportunity to amend its complaint, “unless the evidence then before the court shows that amendment would not be justified.”⁷ An amendment is not justified when it would be futile.⁸ The majority concludes that this case should be remanded so that the Fisher Hotel defendants can amend their complaint to add a claim of gross negligence against the People. However, such amendment will only be followed by the People’s motion to dismiss based on the foregoing immunity principles. The amendment will therefore be futile.

Additionally, I would refuse to remand for amendment of the countercomplaint based on speculation that additional individual parties might be named.

In sum, I believe that the interests of judicial economy would be better served by simply ordering dismissal of the Fisher defendants’ countercomplaint.

/s/ William C. Whitbeck

⁵ MCL 600.3801 states as follows:

Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, or used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of any controlled substance as defined in . . . section 333.7104 of the Michigan Compiled Laws, or of any vinous, malt, brewed, fermented, spirituous, or intoxicating liquors or any mixed liquors or beverages, any part of which is intoxicating, is declared a nuisance, and the furniture, fixtures, and contents of the building, vehicle, boat, aircraft, or place and all intoxicating liquors therein are also declared a nuisance, and all controlled substances and nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. Any person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any building, vehicle, or place used for any of the purposes or acts set forth in this section is guilty of a nuisance.

⁶ See MCL 691.1401(d).

⁷ MCR 2.116(I)(5). See also MCR 2.118(A)(2), which states “[A] party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.”

⁸ *Casey v Auto Owners Ins Co*, 273 Mich App 388, 401; 729 NW2d 277 (2006).