STATE OF MICHIGAN

COURT OF APPEALS

CARLA WARD and GARY WARD,

Plaintiffs-Appellees/Cross-Appellants,

v

MICHIGAN STATE UNIVERSITY,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
January 27, 2009

No. 281087
Court of Claims
LC No. 05-000187-MZ

Before: Owens, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant appeals by right the trial court's denial of its motion for summary disposition under MCR 2.116(C)(7) and (8) with regard to plaintiff's claims under the public building exception to governmental immunity. Plaintiffs cross-appeal, challenging the trial court's grant of summary disposition to defendant as to plaintiffs' claims under the proprietary function exception to governmental immunity. We affirm the grant of summary disposition to defendant as to the proprietary function exception claim but reverse the denial of summary disposition to defendant on the public building exception claim.

Plaintiffs allege that the principal plaintiff was struck in the head and injured by a hockey puck while she was a spectator during a college hockey game at defendant's ice arena. Plaintiffs contend that a defect in defendant's building caused the incident, specifically the lack of plexiglass protecting one section of spectators from the ice rink. One of defendant's employees apparently assisted plaintiff after she was injured. Critically, plaintiff did not provide formal notice of the nature of the injuries and defect after the incident as required by MCL 691.1406 in order to bring a claim under the public building exception to governmental immunity.

We review de novo both a trial court's grant or denial of a motion for summary disposition and questions of statutory interpretation. *Liptow v State Farm Mut Auto Ins Co*, 272 Mich App 544, 549; 726 NW2d 442 (2006).

Defendant argues that the trial court erred by failing to grant its motion for summary disposition because plaintiffs failed to serve defendant notice of the occurrence of the incident as required by MCL 691.1406 as a precondition to bringing suit under the public building exception to governmental immunity. Based on the Michigan Supreme Court's peremptory order in

Chambers v Wayne Co Airport Auth, ___ Mich ___; ___ NW2d ___ (Docket No. 136900, decided December 19, 2008), which was decided after the filing of the parties' briefs, we must agree. In that peremptory order, our Supreme Court reversed an opinion of this Court "for the reasons stated in the Court of Appeals dissenting opinion." *Id*. Because a peremptory order of our Supreme Court is binding precedent in this Court if it can be understood, *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002), our Supreme Court's adoption of the dissent in this Court in *Chambers* constitutes binding precedent.

In that dissent, Judge Murray expressly considered the proper application of the notice requirement for claims under the public building exception to governmental immunity as provided by MCL 691.1406. *Chambers v Wayne Co Airport Auth*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket No. 277900) (Murray, J., dissenting). In particular, Judge Murray concluded that the plaintiff failed to serve notice as required by MCL 691.1406 because an internal incident report completed by a person associated with the defendant did not comply with the plain requirements of the statute. *Id*. at 2. Judge Murray reached this conclusion because the plaintiff did not serve the notice on the defendant and further the plaintiff did not establish that the person who completed the incident report could lawfully be served with civil process directed at the defendant. *Id*. Judge Murray further stated that the failure to provide the required notice under MCL 691.1406 precluded the plaintiff from recovering for his injuries regardless of whether the defendant was actually prejudiced as a result. *Id*.

When we apply MCL 691.1406 to the present case, plaintiffs' claim under the public building exception to governmental immunity is barred. First, plaintiffs through counsel acknowledge that they failed to provide defendant with the notice required by MCL 691.1406. Further, while it appears undisputed that one or more employees or other agents of defendant responded to assist plaintiff after the incident, this fact is simply immaterial under *Chambers* because plaintiffs' claim under the public building exception is plainly barred by their failure to serve defendant with the requisite notice regardless of whether this failure actually prejudiced defendant. Thus, the trial court's denial of defendant's motion for summary disposition must be reversed and this case remanded for entry of summary disposition in favor of defendant on that claim.[1]

Plaintiffs assert on cross-appeal that defendant is not immune from tort liability because the principal plaintiff's injury resulted from a proprietary function. We disagree.

The governmental tort liability act (GTLA) provides that, in general, governmental agencies engaged in governmental functions are immune from tort liability. MCL 691.1407(1). The GTLA defines "governmental function" as being "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f).

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[1] Because defendant is entitled to summary disposition on the public building exception claim, there is no need to consider whether defendant was also entitled to summary disposition on the basis of plaintiffs' failure to provide the required notice under the Court of Claims Act.

In *Harris v Univ of Michigan Bd of Regents*, 219 Mich App 679; 716 NW2d 1 (1996), we held that according to well-established case law "this definition is to be broadly applied and requires only that 'there be *some* constitutional, statutory or other legal basis for the activity in which the governmental agency was engaged.'" *Harris, supra* at 684 (citation omitted; emphasis in original). Also, we look to the general activity being performed, rather than the specific conduct involved when the alleged injury occurred. *Smith v Dep't of Pub Health*, 428 Mich 540, 609-610; 410 NW2d 749 (1987).

The GTLA provides an exception to governmental immunity when an agency is engaged in proprietary functions. MCL 691.1413 states 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. No action shall be brought against the governmental agency for injury or property damage arising out of the operation of proprietary function, except for injury or loss suffered on or after July 1, 1965.

To constitute a proprietary function requires 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." *Coleman v Kootsilas*, 456 Mich 615, 621; 575 NW2d 527 (1998). That the activity consistently generates a profit may evidence an intent to produce a profit. *Id*. But, that "is not sufficient to make the activity proprietary because generating a profit must be the *primary* motive." *Harris, supra* at 690 n 2 (citation omitted); (emphasis in original). Where the profit is deposited and how it is spent are relevant factors to determining the primary purpose of the activity as well. *Coleman, supra* at 621. "[U]se of profits to defray the expenses of the activity itself indicates a nonpecuniary purpose." *Harris, supra* at 690 n 2 (citation omitted).

In *Harris*, we found that the University of Michigan was engaged in a governmental function under the GTLA in its operations of its athletic department and intercollegiate gymnastics team. We stated,

> Given the broad definition of a governmental function, and in light of the history of intercollegiate athletics at Michigan universities and colleges that has historic support from the Michigan Legislature, we find that intercollegiate athletics is a governmental function for purposes of immunity. [*Harris, supra* at 685].

Plaintiffs contend that times have changed since *Harris* and indicates that expansion of athletic facilities, firing and hiring of specific coaches, and concern with team success show that defendant intends to financially profit from its athletics department. In short, plaintiffs make factual allegations about defendant's athletic program without making a meaningful legal argument. Plaintiff alleges that the department is profitable and claims that it receives $3,829,293 in revenue above its expenses, but defendant has offered an affidavit stating the ice hockey program specifically has been operating at a loss for the last 20 years. Plaintiffs also assert that the profits are used to sustain defendant, failing to recognize that "[a] governmental

agency may conduct activity on a self-sustaining basis without being subject to the proprietary function exception." *Harris, supra*, at 690 (citation omitted).

We conclude that we are bound by *Harris* to hold that defendant's operation of its ice hockey program did not constitute a proprietary function. Further, regardless of *Harris*, plaintiffs have failed to show defendant operated its ice hockey program primarily to generate a profit.

We affirm as to the proprietary function claim but reverse the denial of summary disposition to defendant on the public building exception claim. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jane E. Markey