STATE OF MICHIGAN

COURT OF APPEALS

SHERIF CUNMULAJ and DAWN CUNMULAJ, Plaintiffs-Appellants, v KRISTEN CHANEY and HAROLD SCHOTT, Defendants-Appellees.	UNPUBLISHED February 12, 2009 No. 282264 Ingham Circuit Court LC No. 07-000031-NZ
SHERIF CUNMULAJ and DAWN CUNMULAJ, Plaintiffs-Appellants, v MICHIGAN STATE UNIVERSITY, Defendant-Appellee.	No. 282265 Court of Claims LC No. 07-000073-MK

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

PER CURIAM.

Plaintiffs, owners of an injured horse, appeal as of right an order granting summary disposition to defendants. The horse was allegedly injured while in the care of defendant Michigan State University's (MSU) veterinary hospital, and plaintiffs allege financial losses as a result. Plaintiffs have filed a suit alleging negligence against all three defendants and a separate suit alleging breach of implied contract against MSU. These suits are consolidated here. We affirm.

MSU was granted summary disposition on the ground that plaintiffs failed to comply with the statutory notice requirement in MCL 600.6431, the Court of Claims Act. The trial court held that plaintiffs were bound by the requirement in subsection 3 of the statute because they were alleging damage to property. 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).

MCL 600.6431 provides:

> (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.
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> (2) Such claim or notice shall designate any department, commission, board, institution, arm or agency of the state involved in connection with such claim, and a copy of such claim or notice shall be furnished to the clerk at the time of the filing of the original for transmittal to the attorney general and to each of the departments, commissions, boards, institutions, arms or agencies designated.
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> (3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

MCL 600.6431(3) applies in this case because plaintiffs allege damage to their property. Horses, like cattle, which are income-generating animals, or pets are personal property. In *State Mut Cyclone Ins Co v O & A Electric Coop*, 381 Mich 318, 325; 161 NW2d 573 (1968), our Supreme Court deemed that death of cattle constituted damage to property in a decision focusing on the statute of limitations for property damages. More recently in *Koester v VCA Animal Hosp*, 244 Mich App 173, 176; 624 NW2d 209 (2000), we stated "[p]ets have long been considered personal property in Michigan jurisprudence" and held that a party cannot recover emotional damages for the loss of personal property. Contrary to plaintiff's argument it is immaterial that the horse at issue was apparently an income-generating asset (as a race horse) rather than a pet because personal property encompasses " 'everything that is the subject of ownership, not coming under denomination of real estate.' " *People v Fox* (*After Remand*), 232 Mich App 541, 554; 591 NW2d 384 (1998), quoting Black's Law Dictionary (6th ed), p 1217.

In addition, MCL 600.6431(3) applies to claims that sound in tort or in contract. Plaintiffs contend that their claim of breach of contract against MSU must comply only with MCL 600.6431(1), which requires that a notice or claim be filed within one year with the office of the clerk of the Court of Claims. On June 19, 2007, within one year of the horse's second discharge from the hospital in July 2006, the Court of Claims received a notice of intent to file a claim alleging "breach of contract and damage to personal property" from plaintiffs. Plaintiffs attempt to argue that contract claims are not subject to MCL 600.6431(3) by focusing on the difference between contracts and torts. MCL 600.6431 is silent as to a distinction between torts and contracts for the notice requirements and subsection 3 plainly limits the notice requirement to within six months for all actions arising out of damage to personal property. This Court must ascertain the Legislature's intent according to its words, not its silence, and here, its words are

clear and unambiguous. *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999). Plaintiffs' claims are subject to the six-month limit.

Defendants contend that, in light of recent case law, plaintiffs were required to strictly comply with the notice requirement according to the plain language of MCL 600.6431(3) and "file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event" and that plaintiffs did not strictly comply. Recently, in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), our Supreme Court strictly construed the notice requirement in the highway defect section of the Government Tort Liability Act (GTLA),[1] regardless of whether the governmental agency shows prejudice. In that case, the plaintiff alleged injury due to a highway defect and failed to serve notice on the Washtenaw County Road Commission within 120 days, as required by the GTLA. Our Supreme Court stated the following:

> This Court previously held in *Hobbs v Dep't of State Hwys*, 398 Mich 90, 96; 247 NW2d 754 (1976), and *Brown v Manistee Co Rd Comm*, 452 Mich 354, 356-357; 550 NW2d 215 (1996), that absent a showing of actual prejudice to the governmental agency, failure to comply with the notice provision is not a bar to claims filed pursuant to the defective highway exception. Those cases are overruled. [*Rowland, supra* at 200.]

Both *Hobbs* and *Brown* addressed governmental liability for injuries resulting from highway defects. The trial court in the instant case improperly stated *Rowland* has broad applicability and applied it in this case to find that plaintiffs failed to strictly comply with MCL 600.6431(3). *Rowland* deals only with a specific section of the GTLA that addressed public highway defects. There are countless other statutory notice requirements codified by our Legislature that are not mentioned in *Rowland*. There is no reason to extend our Supreme Court's holding to overturn the previous standard of substantial compliance with statutory notice requirements in other statutes.

Nevertheless, plaintiffs did not substantially comply with the notice requirement. The substantial compliance standard was applied in *Meredith v City of Melvindale*, 381 Mich 572, 580-581; 165 NW2d 7 (1969), where our Supreme Court stated that "[t]his Court is committed to the rule requiring only substantial compliance with the notice provisions of a statute or ordinance." *Id.* at 580. However, in that case, the plaintiff met the standard because a very specific and detailed letter was sent to the government entity. The decision stated as follows:

> Certainly, the receipt of such a notice—stating the day, the place, the activity, and the serious injuries to the minor boy; reciting that the father had unsuccessfully attempted to contact the city attorney; giving the father's phone number where he could be contacted; and asserting that the father had suffered great financial expense—should have alerted the city attorney and his employer, the City of Melvindale, that an accident had occurred which should be

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[1] MCL 691.1401 *et seq.*

> investigated. This alone, in the judgment of this Court, would be sufficient to constitute substantial compliance with the charter. [*Id.* at 580-581.]

In the instant case, plaintiffs assert that, even if they were required to provide notice within six months under MCL 600.6431(3), they did substantially comply with this requirement because plaintiffs' counsel sent a FOIA request to the College of Veterinary Medicine at MSU on August 7, 2006, within six months of the horse's injury. The request stated as follows:

> Re: Honor the Cash
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> Gentlemen:
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> Pursuant to and in accordance with the applicable provisions of the Michigan Freedom of Information Act, please provide the undersigned with a copy of any and all documents of every nature and kind relating to the care, treatment and investigation of the horse's injury while said horse was in the care of your facility.

The letter was from plaintiffs' attorney on his professional letterhead and made reference to the horse's injury but it does not amount to substantial compliance with MCL 600.6431(3) because the letter did not involve any implication that plaintiffs intended to file a claim against defendants, but merely that plaintiffs were investigating the injury to the horse. It was merely a request for information, much unlike the detailed information in the letter in *Meredith*. Plaintiffs have not indicated that upper level management or MSU's counsel's office was made aware of the FOIA request or that it was interpreted to imply an impending lawsuit. Although the trial court erred in requiring strict compliance with the notice requirement, plaintiffs did not meet their burden to substantially comply with the requirement and their claims were properly dismissed.

Next, the trial court stated that there was not enough information on the record to grant summary disposition on the issue of proprietary exception to governmental immunity to defendant MSU.

The GTLA provides that, in general, governmental agencies engaged in governmental functions are immune from tort liability. MCL 691.1407. It provides in part:

> (1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.
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> (2) 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:
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> (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.
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> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
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> (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.
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> * * *
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> (7) As used in this section:
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> (a) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. [MCL 691.1407].

The statute defines "governmental function" as

> an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. Governmental function includes an activity, as directed or assigned by his or her public employer for the purpose of public safety, performed on public or private property by a sworn law enforcement officer within the scope of the law enforcement officer's authority. [MCL 691.1401(f).]

In *Harris v Univ of Mich Bd of Regents*, 219 Mich App 679, 684; 558 NW2d 225 (1996), we held that, [a]ccording to well-established case law, this definition is to be broadly applied and requires only that there be some legal basis, statutory, constitutional or otherwise, for the activity the governmental agency was engaged in. Also, we look to the general activity being performed, rather than the specific conduct involved when the alleged injury or property damage 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. It 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. [MCL 691.1413.]

The test for whether an agency is engaged in a proprietary function requires that "[t]he 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). "[T]he fact that the activity consistently generates a profit may evidence an intent to produce a profit." *Id*. (citation omitted). However, that "is not sufficient to make the activity proprietary because generating a profit must be the *primary* motive." *Harris, supra* at 690 n 2 (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.

In order to maintain their action, plaintiffs must have pleaded in avoidance of governmental immunity. "A plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Mack v Detroit*, 467 Mich 186, 204; 649 NW2d 47 (2002). Plaintiffs' complaint states the following:

> 23. The Defendant was engaged in a for-profit pecuniary function, the primary purpose of which was to generate pecuniary profit, thereby precluding statutory immunity.
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> 27. On or about June 30, 2006, Defendants Schott and Chaney breached their duty of care, in that they were grossly negligent by allowing Honor the Cash to rush into his stall, thereby being injured.
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> * * *
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> 29. The breach of Defendants' duty amounts to a willful disregard of precautions to attend to the safety of Honor the Cash, and shows a disregard of substantial risk. Therefore, Defendants have committed gross negligence and are not protected by statutory immunity.

Plaintiffs properly stated claims that fit within statutory exceptions to immunity, namely that defendants were engaged in a proprietary function and that defendants Harold Schott and Kristen Chaney were grossly negligent, which would except defendants from governmental immunity under MCL 691.1413 and MCL 691.1407(2)(c).

Whereas the trial court stated that there was not enough information in the record to grant summary disposition to defendants based on this issue, defendants are immune because the veterinary hospital is a governmental function under the GTLA. The veterinary hospital does not fall under the proprietary function exception to governmental immunity. Plaintiffs argue that because defendants run the veterinary hospital with little or no state funding, as it states on its website, and because the hospital must produce pecuniary profit to sustain itself, the first part of the proprietary function test is satisfied. Plaintiffs overlook that the primary purpose of the activity must be to produce pecuniary profit and that the "use of profits to defray the expenses of the activity itself indicates a nonpecuniary purpose." *Harris, supra* at 690 n 2 (citation omitted). Plaintiffs have not offered evidence that this was the primary purpose of the hospital. In

addition, "[a] governmental agency may conduct an activity on a self-sustaining basis without being subject to the proprietary function exception." *Id*. at 690. Therefore, evidence that the hospital's profits are used to sustain its operations does not necessarily show that defendants are engaged in a proprietary function. Defendants do not engage in running the veterinary hospital primarily for the purpose of producing a pecuniary profit, but rather to provide clinical teaching services and plaintiffs have not presented any evidence to create a genuine issue that the primary purpose may be to gain a profit.

In addition, the activity cannot be normally supported by taxes and fees to qualify as a proprietary function. However, if the hospital were not gaining any revenue, as a department of a state sponsored educational institution, it would normally be supported by student fees and taxes on the population. The hospital here is not merely a veterinary hospital, but an arm of one of the state's educational institutions. The veterinary hospital is not a proprietary function of the government and thus, defendants are immune from tort liability associated with the functioning of the hospital.

The trial court properly ruled that the gross negligence claims against the individual defendants were not adequately pled or supported and dismissed them, rendering the individual plaintiffs immune to tort liability under the GTLA. Plaintiffs did not allege facts to support that Schott and Chaney were grossly negligent in allowing the horse to "rush into his stall, thereby being injured." Although plaintiffs argued in the trial court that additional discovery will allow them to show that only gross negligence could cause the "tremendous amount of trauma" that would have occurred to cause such a serious injury[2] their claim plainly rests on the theory of res ipsa loquiter as stated in Count I of their initial complaint. Because res ipsa loquiter does not apply to establish gross negligence or wanton and willful misconduct, *Maiden v Rozwood*, 461 Mich 109, 127; 597 NW2d 817 (1999), plaintiffs have failed to meet their burden to survive a motion for summary disposition under MCR 2.116(C)(10) and summary disposition under MCR 2.116(C)(7) is also proper because defendants Schott and Chaney are immune and not exempt from immunity for tort liability under the GTLA. MCL 691.1407(1), (2)(c).

Plaintiffs have not satisfied the proprietary function test so as to survive summary disposition under MCR 2.116(C)(7) or shown that defendants Schott and Chaney were grossly negligent and therefore defendants are immune from tort liability. In addition, plaintiffs failed to satisfy the statutory notice requirement under the Court of Claims Act, and summary disposition was properly granted to defendants.

Affirmed.

/s/ David H. Sawyer
/s/ Deborah A. Servitto
/s/ Michael J. Kelly

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[2] In addition, plaintiffs point to the hospital records that note a "2 inch gas [sic]" on the horse's hip and contrast that with a picture of the horse's wound which they allege to be much larger, indicating a possible "cover-up" of the seriousness of the wound.