STATE OF MICHIGAN

COURT OF APPEALS

MOHAMMED NAWWAS and MYSA NAWWAS, Plaintiffs-Appellants, v STEVEN L. SINELLI, Defendant-Appellee.	UNPUBLISHED October 26, 2010 No. 292377 Washtenaw Circuit Court LC No. 08-000324-NO
MOHAMMED NAWWAS and MYSA NAWWAS, Plaintiffs-Appellants, v UNIVERSITY OF MICHIGAN REGENTS, Defendant-Appellee.	No. 292378 Court of Claims LC No. 08-000040-MZ

Before: O'CONNELL, P.J., and BANDSTRA and MARKEY, JJ.

PER CURIAM.

In these consolidated governmental immunity actions, plaintiffs appeal by right the trial court's grant of summary disposition pursuant to MCR 2.116(C)(7). We affirm.

The actions arose when plaintiff Mohammed Nawwas purchased a salad bar for his banquet hall from defendant university's Property Disposition Office (the UMPDO). Defendant Sinelli decided to load the salad bar onto a forklift such that the salad bar's cooling unit was nearest to the forklift, with the remainder of the salad bar extending away from the forklift. Sinelli instructed two men, an UMPDO employee and a friend of plaintiff's, to sit on the salad bar to hold it onto the forklift, and he instructed plaintiff to stay outside the forklift path. When Sinelli moved the forklift, the salad bar fell and hit plaintiff's arm, rupturing his left bicep tendon. Plaintiffs then brought tort actions against defendants. Defendants sought summary disposition on the ground that they were immune from suit by virtue of governmental immunity. The trial court agreed, and granted summary disposition in favor of both defendants.

This Court reviews de novo a trial court's grant of summary disposition on the basis of governmental immunity. *Tarlea v Crabtree*, 263 Mich App 80, 87; 687 NW2d 333 (2004). The government tort liability act, MCL 691.1401 *et seq.*, renders governmental agencies immune from tort liability and creates certain statutory exceptions to governmental immunity. See *Moser v Detroit*, 284 Mich App 536, 539; 772 NW2d 823 (2009). The statute granting immunity reads, "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." MCL 691.1407(1). The tort liability act defines "governmental function" in pertinent part as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). "The term 'governmental function' is . . . broadly construed." *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003).

By statute, public universities are deemed to be governmental agencies for immunity purposes. MCL 691.1401(c). A university activity is a governmental function so long as "there is *some* constitutional, statutory, or other legal basis for the activity." *Harris v Univ of Mich Bd of Regents*, 219 Mich App 679, 684; 558 NW2d 225 (1996) (internal quotations and citations omitted; emphasis in original). Our Courts have held that university activities such as construction of dormitories, installation of traffic signs, and intercollegiate athletic programs are governmental functions. *Maskery*, 468 Mich at 614; *Ward v Mich State Univ*, 287 Mich App 76, 85-86; 782 NW2d 514 (2010), lv pending; *Palmer v Western Mich Univ*, 224 Mich App 139, 142; 568 NW2d 359 (1997); *Harris*, 219 Mich App at 685-686.

On appeal, plaintiffs first contend that the trial court erred in finding that the UMPDO is a governmental function. We disagree. Construing the term "governmental function" broadly, to fulfill the protection from suit granted by our Legislature, *Maskery*, 468 Mich at 614, we find that the UMPDO's activities are within the statutory definition of governmental function. Our Constitution grants to defendant university the "general supervision of its institution and the control and direction of all expenditures from the institution's funds." Const 1963, art 8, § 5. The record demonstrates that the UMPDO operation is part of the university's asset management system. It retires items from defendant's asset management system, returning the proceeds from the sale of these items to the originating departments. Given that defendant has constitutional authority to direct and control its expenditures, the UMPDO operation has a constitutional basis and as such is a governmental function.

Plaintiffs next contend that the UMPDO is a proprietary function, and therefore, that defendant is not entitled to governmental immunity. We disagree. Unlike the grant of immunity, which is broadly construed, the exceptions to immunity are narrowly construed. *Maskery*, 468 Mich at 614. The exception at issue in this case is found in MCL 691.1413, and it provides that "[t]he 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." The statute defines proprietary function as "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." *Id.*

The testimony of defendant Sinelli and his supervisor establish that the UMPDO is a nonprofit department. The supervisor testified that the UMPDO has revenues from its sale of surplus items, and that more than 90 percent of these revenues are credited back to the

departments that originally purchased them. The supervisor further testified that the amount the UMPDO retains from the sale proceeds is insufficient to cover the UMPDO's operating costs.

Moreover, the record contains nothing to indicate that the UMPDO's revenue is a "pecuniary profit" within the meaning of the proprietary function statute. The statute does not define pecuniary profit, so we consult a dictionary for guidance in giving meaning to undefined terms. *Haynes v Neshewat*, 477 Mich 29, 36; 729 NW2d 488 (2007). The dictionary definition of "pecuniary" is "of, pertaining to, or consisting of money." *Random House Webster's College Dictionary* (1997). "Profit" has several definitions, including "pecuniary gain" and "monetary surplus left to a producer or employer after deducting wages, rent, cost of materials, etc." *Id*. Thus, a "pecuniary profit" is generated where a proprietary function involves monetary gain. The record establishes that, considering the original cost of the property it sells, UMPDO does not reap any net monetary gain from its disposition of surplus university property. Accordingly, the trial court did not err by concluding that UMPDO is not a proprietary function.

Last, plaintiffs argue that there is a question of fact as to whether defendant Sinelli was grossly negligent. We disagree. In general, a governmental employee is immune from suit if the employee is performing a government function within the scope of employment, and the employee's conduct "does not amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2). Gross negligence is defined by statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a).

Plaintiffs maintain that defendant Sinelli's violation of certain safety regulations is evidence of gross negligence. We need not decide whether defendant's conduct violated the regulations, because a regulatory violation is typically evidence only of ordinary negligence, not gross negligence. See *Poppen v Tovey*, 256 Mich App 351, 358; 664 NW2d 269 (2003); *Stanton v Battle Creek*, 237 Mich App 366, 375-376; 603 NW2d 285 (1999). Similarly, plaintiffs' other allegations of negligent conduct address ordinary negligence. Evidence of ordinary negligence does not create a factual question concerning gross negligence. *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999); *Lameau v Royal Oak*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 290059, issued July 13, 2010), slip op p 12. The record demonstrates that Sinelli took efforts to determine the best manner in which to load the salad bar, placing its heaviest component nearest the front of the forklift, that he tried to secure the salad bar on the forklift by having two men hold onto it while it was on the forklift, that he instructed plaintiff to stand to the side of the truck and to watch for guidance and clearance, and that he told plaintiff to stay outside the path of the forklift. The trial court correctly determined that the record contains nothing to support a finding that defendant Sinelli demonstrated a substantial lack of concern for injury.

We affirm. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Jane E. Markey