

STATE OF MICHIGAN
COURT OF APPEALS

MARK A. KIELB,

Plaintiff-Appellee,

v

WAYNE STATE UNIVERSITY BOARD OF
GOVERNORS,

Defendant-Appellant.

UNPUBLISHED
October 2, 2012

No. 305927
Court of Claims
LC No. 07-000148-MZ

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Defendant appeals as of right from a Court of Claims order denying in part its motion for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity). We affirm.

Plaintiff is the former president of DNA Software, Inc, a corporation he created in December 2000 for the purpose of commercializing patentable material held by Wayne State University (“WSU”). According to plaintiff, in the fall of 2000, he met with members of WSU’s Technology Transfer Office (“TTO”) regarding certain scientific patentable material and was told that if he created a corporate entity, WSU would enter into a licensing agreement with that corporate entity to market the material. Plaintiff alleged that based on such representations he created DNA Software, Inc. and entered into a licensing agreement with respect to the patentable material. The licensing agreement provided WSU with shares of stock in DNA Software, Inc. (“DNAS”) as well as a share in any royalties made by use of the material. The license agreement also contained a termination clause providing for termination by defendant in the event that DNAS committed any material breach, provided that DNAS received 60 days notice and still failed to cure the breach within the notice period. In 2004, defendant communicated to plaintiff its belief that plaintiff had not complied with the licensing agreement. After attempts to resolve the disagreements, defendant terminated the license agreement in November 2004.

Plaintiff initiated the instant lawsuit on December 12, 2006. The gist of plaintiff’s complaint is that defendant, not he, violated the terms of the agreement and that defendant made misrepresentations in connection with the patentable material. For example, plaintiff asserted that unbeknownst to plaintiff, defendant had already disclosed the material to the public such that defendant was not/would not be granted a patent for the material developed and sold by DNAS. Plaintiff thus brought claims against defendant for breach of contract, detrimental reliance,

promissory estoppel, unjust enrichment, equitable estoppel, fraudulent misrepresentation, silent fraud, fraud, gross negligence, and reckless or intentionally tortious conduct. Defendant moved for summary disposition and the trial court granted summary disposition in defendant's favor as to plaintiff's contract based claims. The trial court denied summary disposition, however, as to plaintiff's claims sounding in tort, finding that defendant was not entitled to governmental immunity with respect to the same.

Defendant first argues on appeal that it is entitled to governmental immunity on plaintiff's tort claims and that the proprietary function exception to immunity is inapplicable. Defendant also argues that the trial court erred by applying an incorrect standard for determining whether the proprietary function exception applied.¹ We disagree.

We review de novo the grant or denial of a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "In deciding a motion brought pursuant to MCR 2.116(C)(7), a court may consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties." *McLean v McElhaney*, 289 Mich App 592, 597; 798 NW2d 29 (2010). Further, "[i]f the pleadings or documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Id.* "However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate." *Dybata v Wayne Co*, 287 Mich App 635, 637-638; 791 NW2d 499 (2010).

Absent a statutory exception, 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). A public university such as defendant Wayne State University is a governmental unit subject to the governmental immunity act. MCL 691.1401(g). A "governmental function" is statutorily defined as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(b). Further, "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 v Univ of Michigan Bd of Regents*, 219 Mich App 679, 684; 558 NW2d 225 (1996), quoting *Pawlak v Redox Corp*, 182 Mich App 758, 764; 453 NW2d 304 (1990) (emphasis in original).

While "governmental function" is subject to broad construction, "statutory exceptions are to be narrowly construed." *Maskery v Bd of Regents of Univ of Michigan*, 468 Mich 609, 614; 664 NW2d 165 (2003). One such exception involves a governmental agency's performance of a proprietary function. "The immunity of the governmental agency shall not apply to actions . . . arising out of the performance of a proprietary function . . ." MCL 691.1413. A proprietary function is "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." MCL 691.1413.

¹ Although the trial court did find that the TTO's licensing activity constituted a proprietary function, the court also found that issues of fact remained regarding defendant's royalty-sharing arrangement with its professor.

When determining whether a governmental agency's primary purpose is to produce pecuniary profit, a court should consider (1) whether profit is actually generated, and (2) where the profit is deposited and how it is spent. *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998). With regard to the second consideration, our Supreme Court has explained:

If the profit is deposited in the governmental agency's general fund or used to finance unrelated functions, this could indicate that the activity at issue was intended to be a general revenue-raising device. If the revenue is used only to pay current and long-range expenses involved in operating the activity, this could indicate that the primary purpose of the activity was not to produce a pecuniary profit. [*Id.* at 621-622, quoting *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 258; 393 NW2d 847 (1986)(citations omitted by *Coleman*).]

However, this Court has clarified that “[w]hether an activity is proprietary does not depend on whether the activity actually generates a profit, although the existence of a profit is relevant to the intent of the governmental entity.” *Harris*, 219 Mich App at 690.

The statutory definition of proprietary function also requires that the activity must not be normally supported by taxes or fees. MCL 691.1413. “When deciding whether an activity satisfies the second part of the proprietary function test, it is important to consider the type of activity under examination.” *Coleman*, 456 Mich at 622-623.

Here, there was evidence presented that the licensing agreement between DNAS and defendant was entered into by defendant primarily for pecuniary profit. Defendant took a 7.5 percent ownership stake in DNAS, and may have negotiated a 46.25 percent stake for its professor. The license agreement itself provides a schedule of royalty payments to be made by DNAS to defendant on the basis of profits from commercial sales of licensed products. Further, there is evidence that profit was actually generated, because the termination agreement between DNAS and defendant required DNAS to pay \$87,000 in royalties and other expenses to defendant. Although actual profit need not be shown in order to prove that the agreement was entered into primarily for a pecuniary purpose, the payment is relevant to defendant's intent to make a pecuniary profit through the licensing agreement.

Nothing in a philosophy statement found on defendant's website definitively establishes whether profit was generated and how any profit generated was used or would be used. The fact that defendant refers to licensing through the TTO as a “business activity” in the statement is certainly evidence that a purpose of the licensing agreement was to produce pecuniary profit. However, the other objectives listed seem to cut against the argument that the primary purpose was pecuniary. Given this ambiguity, the philosophy statement, although informative as to defendant's intent, is certainly not dispositive. Nevertheless, taken in the light most favorable to plaintiff, the evidence shows that defendant entered the licensing agreement primarily for pecuniary profit.

No evidence has been provided with respect to the second criterion, whether the activity is generally supported by taxes or fees. It is well-established that public universities receive substantial support from state taxes. See *Harris*, 219 Mich App at 691. Defendant argues that

because intellectual property created by public universities is afforded statutory protection, the Legislature has recognized a legal basis for defendant creating such material, and that consequently, “activities undertaken with respect to the intellectual property constitute a governmental function.” Defendant, however, does not actually address whether licensing activities by a public university are supported by taxes or fees and it is unclear from the record whether the TTO and its licensing activities are supported by taxes or fees, or if it is self-sufficient. Defendant being the moving party, it has the burden of establishing its position. After reviewing the evidentiary record, we conclude that summary disposition was properly denied because the evidence presented sufficiently establishes that defendant engaged in the licensing at issue primarily for pecuniary profit.

Defendant next argues that plaintiff has failed to state a claim upon which relief may be granted with regard to his claims of gross negligence and recklessness or intentionally tortious conduct because the gross negligence exception to governmental immunity applies to individual government employees only and does not extend to governmental agencies and because the reckless/intentionally tortious conduct claim is not a recognized exception to governmental immunity. We disagree.

As previously indicated, MCL 691.1407(1) provides that “a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise of a governmental function.” As also previously indicated, plaintiff asserted and we found, that his tort claims survived summary disposition because the proprietary function exception to governmental immunity applied. Plaintiff’s claims of gross negligence and reckless or intentionally tortious conduct are tort claims covered under the proprietary function exception—they are not separate exceptions to governmental immunity. Thus, whether a governmental agency itself falls within the gross negligence exception to governmental immunity is irrelevant. Nothing in the statute as a whole prevents a plaintiff from bringing a gross negligence claim, or a reckless or intentionally tortious conduct claim against a governmental agency, provided that one of the exceptions to immunity applies.

Finally, defendant argues that plaintiff did not comply with the notice requirement set forth in MCL 600.6431 in bringing his claims against defendant. We need not address this issue, however, because it has been waived.

Statutory notice provisions constitute affirmative defenses. *Rowland v Washtenaw Co Road Comm*, 477 Mich 197, 201; 731 NW2d 41 (2007). Under MCR 2.111(F), affirmative defenses must be stated in a party’s responsive pleading under a separate and distinct heading, or such defenses are subject to waiver. A review of the lower court record shows that defendant never pleaded the notice issue as an affirmative defense. Moreover, defendant readily admits that the issue was not raised in its motion for summary disposition and was raised for the first time in its motion for reconsideration. However, defendant asserts that it “complied with MCR 2.111(F) by asserting statute of limitations and governmental immunity as an affirmative defense.” However, a statutory notice provision is markedly different than a statute of limitations. Indeed, each is imposed for different purposes. *American States Ins Co v Dep’t of Treasury*, 220 Mich App 586, 599; 560 NW2d 644 (1996). Moreover, governmental immunity is not considered an affirmative defense. See, *Mack v City of Detroit*, 467 Mich 186; 649 NW2d

47 (2002). Accordingly, we determine that appellate review of the issue has been waived. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008).

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot