STATE OF MICHIGAN

COURT OF APPEALS

RICHARD PRYOR,

Plaintiff-Appellant/Cross-Appellee,

v

ROBERT CLEGG, ROBERT ROSE, MAYOR OF LANSING and CITY OF LANSING,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
May 18, 1999

No. 200720
Ingham Circuit Court
LC No. 96-083850 NZ

Before: White, P.J., and Markman and Young, JJ.

PER CURIAM.

Plaintiff appeals as of right and defendants cross-appeal from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). We affirm.

Plaintiff argues that the circuit court erred by concluding (1) that the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.;* MSA 19.418(1) *et seq.*, was inapplicable to his purchase; and (2) that he was presumed to have knowledge of a city council resolution and the authority of defendants' agents. Although plaintiff argues that these conclusions were erroneous, he fails to provide any legal authority to support his position. A "party may not leave it to this Court to search for authority to sustain or reject" a position, or merely announce a position, *Schadewald v Brule*, 225 Mich App 26, 34; 570 NW2d 788 (1997), and leave it to this Court to discover and rationalize the basis for his claims, *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). Because these arguments are not adequately developed, they are

"considered abandoned on appeal." *Check Reporting Services, Inc v Michigan National Bank-Lansing*, 191 Mich App 614, 628; 478 NW2d 893 (1991).

With regard to plaintiff's claims that defendants engaged in deceptive "trade or commerce" under the MCPA, we first note that "trade or commerce" is defined as follows:

> . . . the conduct of a business providing goods, property or service primarily for personal, family, or household purposes *and includes* the advertising, solicitation,

> offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity. [MCL 445.902(2)(d); MSA 18.418(2)(d) (emphasis added).]

Plaintiff argues that proper interpretation of this provision reveals an intent to provide protection for three distinct groups. The purpose of statutory interpretation is to "ascertain and give effect" to legislative intent. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). Although judicial construction is not permitted if the plain and ordinary meaning of a statute's language is clear, it is permitted when reasonable minds may differ regarding the meaning of the statute. *Id*. In addition, every word or phrase of the statute must be accorded its plain and ordinary meaning, MCL 8.3a; MSA 2.212(1), and given effect, *Gebhardt v O'Rourke*, 444 Mich 535, 542; 510 NW2d 900 (1994). Because the provision provides no language regarding the creation of three groups, we decline to speculate regarding probable intent, *In re Schnell*, 214 Mich App 304, 310; 543 NW2d 11 (1995), or to read anything into the statute that is not evident from its language, *In re Marin*, 198 Mich App 560, 564; 499 NW2d 400 (1993). Although plaintiff also argues that use of the term "and" evidences an intention to create three groups, we recognize that the term "and" is often misused. *Auto-Owners Ins v Stenberg Bros, Inc*, 227 Mich App 45, 50-51; 575 NW2d 79 (1997). This conclusion is evidenced by the fact that the term "include," a term of limitation or enlargement, immediately follows the term "and," *Frame v Nehls*, 452 Mich 171, 178-179; 550 NW2d 739 (1996), evidencing an intent to further define the preceding phrases, see *Gebhardt*, *supra* at 542. Therefore, we conclude that the circuit court did not err by concluding that this provision fails to provide protection for three distinct groups.

Regarding protection under the MCPA, this Court has previously concluded that the clear legislative intent of the "[MCPA] was to protect consumers in their purchases of goods which are primarily used for personal, family or household purposes." *Noggles v Battle Creek Wrecking, Inc*, 153 Mich App 363, 367; 395 NW2d 322 (1986). In addition, although Michigan courts are not compelled to follow federal precedent, it may be turned to for guidance. *Radtke*, *supra* at 381-382. Of particular note is federal interpretation of this provision, specifically concluding that the MCPA was "not intended to cover commercial transactions." *National Union Fire Ins Co v Arioli*, 941 F Supp 646, 656 (ED Mich, 1996); see also *Robertson v State Farm Fire & Casualty Co*, 890 F Supp 671, 680 (ED Mich, 1995).

Regarding plaintiff's argument that the circuit court erred by concluding that he was presumed to have knowledge of the city resolution and the authority of defendants' agents, we first recognize that a city resolution, like a city ordinance, "once legally adopted becomes binding upon" all citizens and may not be waived by city officials. *White Lake Twp v Amos*, 371 Mich 693, 699; 124 NW2d 803 (1963). In addition, given that a contracting party is presumed to have knowledge of the accuracy of representations by a city employee and of public resolutions, *Warholak v Northfield Twp Supervisor*, 57 Mich App 360, 363; 225 NW2d 767 (1975), and the clear statement inviting the purchaser in this matter to make an inspection, we conclude that the circuit court did not err by concluding that plaintiff had constructive knowledge of the resolution and the authority of defendants' agents.

Plaintiff next claims that the circuit court erred by concluding that defendants were entitled to governmental immunity with regard to his claims of fraud. Regarding governmental agencies:

> Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed. [MCL 691.1407(1); MSA 3.996(107(1).]

A "governmental function" constitutes "an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f); MSA 3.996(101)(1)(f); *Coleman v Kootsillas*, 456 Mich 615, 619; 575 NW2d 527 (1998). In this case, the governmental function is defined in terms of the sale of the property, i.e., the general activity, as opposed to the alleged fraudulent conveyance, i.e. the specific conduct. *Smith v Dep't of Public Health*, 428 Mich 540, 608-609; 410 NW2d 540 (1987), aff'd sub nom *Will v Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). However, the "intentional use or misuse" of governmental authority, i.e., an ultra vires activity, is not a governmental function and not entitled to immunity. *Marrocco v Randlett*, 431 Mich 700, 707-708; 433 NW2d 68 (1988). Although plaintiff argues that defendants exceeded the legal authority to sell the subject property under the city resolution by fraudulently misrepresenting the terms and conditions associated with that sale, we note that under Mich Const 1963, art 7, § 22:

> . . . each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section. [*Id.*]

In addition, a city may, through its charter, provide for the following:

> (1) For the installation and connection of sewers and waterworks on and to property within the city. [MCL 117.4b(2); MSA 5.2075(2).]
>
> (2) For the maintenance, development, operation, of its property and upon the discontinuation thereof to lease, sell or dispose of the same subject to any restrictions placed thereupon by law. [MCL 117.4e(3); MSA 5.2078(e).]
>
> (3) For the use, regulation, improvement and control of the surface of its streets. [MCL 117.4h(1); MSA 5.2081(h).]

(4) For the enforcement of all such local, police, sanitary and other regulations as are not in conflict with the general laws. [MCL 117.4i(9); MSA 5.2082(9).]

(5) For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to constitution and general laws of this state. [MCL 117.4j(3); MSA 5.2083(3).]

Given that the sale of the property, MCL 117.4e(3); MSA 5.2078(3), regulations regarding sewers, MCL 1174b(2); MSA 5.2075(2), regulations regarding street surfaces, MCL 117.4h(1); MSA 5.2081(h), and their enforcement, MCL 117.4i(9); MSA 5.2082(9), are authorized by constitution and statute, we conclude that the sale of property, along with its terms and conditions, constituted a governmental function and not an ultra vires activity. MCL 691.1401(f); MSA 3.996(101)(1)(f). The circuit court properly concluded that defendant city was entitled to governmental immunity.

Plaintiff next argues that defendants were not entitled to governmental immunity because their activity constituted a proprietary function under MCL 691.1413; MSA 3.996(113), which provides:

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. [*Id*.]

However, an activity constituting a proprietary function is narrowly construed as one: (1) "conducted primarily for the purpose of producing a pecuniary profit"; and (2) not normally "supported by taxes and fees." *Coleman*, *supra* at 621. Because Resolution Number 363 specifically provided that the auction of lots forty and forty-one were "for the purpose of expanding [the] Turner-Dodge House facilities" project and plaintiff alleged that the transaction involved only $400, we conclude that this transaction was not "conducted primarily for the purpose of producing a pecuniary profit," *Coleman*, *supra* at 621, and therefore, that the proprietary function exception is inapplicable to the immediate action.

Regarding plaintiff's argument that defendant employees were not entitled to governmental immunity, we first note that under MCL 691.1407(2); MSA 3.996(107)(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 . . . and each member of a board, council, commission, or statutorily created task force of a governmental agency shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while in the course of employment or service or 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 it the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. [*Id*.]

When reasonable jurors could reach different conclusions regarding whether conduct constituted gross negligence, a question of fact exists for a jury. MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). However, if reasonable minds could not differ, the issue may be determined by summary disposition. *Vermilya, supra* at 83. Although this Court has concluded that "ommissive" conduct may be sufficient to constitute gross negligence, *Tallman v Markstrom*, 180 Mich App 141, 144; 446 NW2d 618 (1989), we conclude that defendants' failure to provide plaintiff with specific information regarding the city resolution and the limited scope of their authority did not rise to this level. Given that it was plaintiff's obligation to acquire information regarding a public resolution and the scope of a governmental agents' authority, we conclude that the ommissive nature of defendants' conduct did not constitute gross negligence.[1] Given that the circuit court properly concluded that the MCPA was inapplicable to plaintiff's claims, that plaintiff was presumed to have knowledge of the city resolution and the scope of authority of defendants' agents, and that defendants were entitled to immunity with regard to plaintiff's claims of fraud, we find that the circuit court did not err by awarding defendants summary disposition, and implicitly denying plaintiff summary disposition. *Spiek, supra* at 337.

Affirmed.

/s/ Helene N. White
/s/ Stephen J. Markman

Judge Robert P. Young, Jr. not participating.

[1] Although plaintiff asserted that a document prepared by defendants for plaintiff's signature expressly provided that storm drain and/or curbs would not be required, neither the document referred to nor anything else in the record supports that such an affirmative representation was made.