STATE OF MICHIGAN

COURT OF APPEALS

BRUCE W. DEADY and KATHRYN A. DEADY, Plaintiffs-Appellants,	UNPUBLISHED December 8, 2000
v	No. 216435 Wayne Circuit Court
LIVONIA PUBLIC SCHOOLS, Defendant-Appellee.	LC No. 98-831418-NI

Before: Bandstra, C.J., and Fitzgerald and D. B. Leiber*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs were on school grounds for a musical event. While leaving the grounds, Mr. Deady encountered a long guardrail separating a parking lot from an athletic field. He did not see the center pedestrian opening and the side pedestrian opening was blocked by a pile of dirt. He therefore decided to step on and over the rail. The rail, which was not attached to a support post standing in front of it, collapsed beneath him and he fell and broke his leg.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997). "When reviewing a grant of summary disposition based on a finding that the claim is barred by governmental immunity, all documentary evidence submitted by the parties is to be considered. All well-pleaded allegations are accepted as true and construed in favor of the nonmoving party." *Glancy v Roseville*, 216 Mich App 390, 391-392; 549 NW2d 78 (1996), aff'd 457 Mich 580 (1998).

Governmental agencies are immune from tort liability when engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); MSA 3.996(107)(1). A school district is a governmental agency. MCL 691.1401(b), (d); MSA 3.996(101)(b), (d). A governmental function "is an activity that 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)(f). A

* Circuit judge, sitting on the Court of Appeals by assignment.

school district has a statutory right to acquire, construct, and maintain school property. MCL 380.11a(3)(c); MSA 15.4011a(3)(c); MCL 380.401a(1); MSA 15.4401a(1).

Plaintiffs claim that the guardrail constituted a nuisance per se. We will assume that a nuisance per se is an exception to governmental immunity, our Supreme Court having yet to decide the issue. *Fox v Ogemaw Co*, 208 Mich App 697, 698; 528 NW2d 210 (1995). "[A] nuisance per se is an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained." *Li v Feldt (After Second Remand)*, 439 Mich 457, 476-477; 487 NW2d 127 (1992) (Cavanagh, C.J.). "A nuisance per se … arises from inherent danger even under the best of care. The statement that a nuisance is 'per se' means only that it does not arise out of negligent conduct. In other words, unlike nuisance in fact, nuisance per se is not predicated on the want of care, but is unreasonable by its very nature." *Hadfield v Oakland Co Drain Comm*, 430 Mich 139, 208; 422 NW2d 205 (1988) (Boyle, J.) (citation omitted).

The maintenance of a guardrail marking the boundary of a parking lot is not intrinsically unreasonable. It serves a beneficial purpose by preventing people from driving in areas where vehicular traffic is not allowed. It was only unreasonable and dangerous under the circumstances of this case because plaintiff decided to step on it in a spot where, due to the failure to bolt the rail to its support post, it was unable to support his weight. Because it was not "a nuisance at all times and under all circumstances regardless of location or surroundings," *Summers v Detroit*, 206 Mich App 46, 49; 520 NW2d 356 (1994), plaintiffs failed to present "a colorable claim of nuisance per se." *Li, supra*.

Plaintiffs have abandoned their claim that defendant was engaged in a proprietary function, MCL 691.1413; MSA 3.996(113), by failing to brief the merits of the issue. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). In any event, we find the claim to be without merit. Plaintiffs' claim did not arise out of the musical event because it had no connection to Mr. Deady's injury. In addition, the mere fact that defendant charged a fee "does not transform an obvious governmental function into a proprietary one." *Coen v Oakland Co*, 155 Mich App 662, 667; 400 NW2d 614 (1986) (footnote omitted).

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Dennis B. Leiber