

STATE OF MICHIGAN
COURT OF APPEALS

SUGAR CREEK OUTFITTERS, LTD.,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.

UNPUBLISHED

June 4, 2002

No. 236059

Court of Claims

LC No. 98-017113-CZ

Before: Griffin, P.J., and Hood and Sawyer, JJ.

MEMORANDUM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm.

Plaintiff alleges that the trial court improperly granted summary disposition where a parole agent did not tell plaintiff about a parolee's status and prior offenses, and the parolee allegedly embezzled, stole, and converted property from plaintiff. Defendant's parole agent accepted the parolee's transfer from Wisconsin, but allegedly did not enforce the conditions of parole. An appellate court reviews the grant or denial of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The application of governmental immunity presents a question of law that we review de novo. *Baker v Waste Management of Michigan, Inc.*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

Plaintiff alleges that the gross negligence exception to governmental immunity, MCL 691.1407(2)(c), applies. Assuming without deciding that any alleged omission by defendant's employee was "conduct so reckless as to demonstrate a substantial lack of concern for whether injury results," MCL 691.1407(2)(c), plaintiff cannot establish that this breach of duty was "the proximate cause" of its injuries. *Robinson v City of Detroit*, 462 Mich 439, 458-462; 613 NW2d 307 (2000). "The proximate cause" is defined as "the immediate efficient, direct cause preceding the injury." *Id.* at 462. The alleged embezzlement by the parolee was the immediate proximate cause of plaintiff's injury, not the actions of defendant's employee. Accordingly, the trial court properly granted summary disposition of this exception.

Plaintiff next alleges that the ultra vires activity exception to governmental immunity applies. However, the omission of an act, even an intentional omission, cannot constitute an ultra vires act. *Epperson v Crawford Co Road Comm*, 196 Mich App 164, 167; 492 NW2d 455 (1992). Accordingly, the alleged failure to advise plaintiff of the parolee's background may not

serve as the basis for liability, and the trial court properly granted summary disposition of this claim.

Lastly, plaintiff alleges that it was a third-party beneficiary to the agreement to transfer the parolee from Wisconsin to Michigan. While governmental immunity does not apply to contract claims, *Koenig v South Haven*, 460 Mich 667, 675; 597 NW2d 99 (1999), the existence and construction of a contract presents a question of law for the court. *Meagher v Wayne State University*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997); *Kauffman v The Chicago Corp*, 187 Mich App 284, 287; 466 NW2d 726 (1991). As a matter of law, the agreement to transfer the parolee and interstate compact addressing probation and parole, MCL 798.101, cannot be construed as a contract to which plaintiff was an intended third-party beneficiary. *Id.* Accordingly, the trial court properly dismissed plaintiff's complaint.

Affirmed.

/s/ Richard A. Griffin

/s/ Harold Hood

/s/ David H. Sawyer