

STATE OF MICHIGAN
COURT OF APPEALS

SHIRLEY MILLEDGE,

Plaintiff-Appellant,

v

A-1 BUILDERS, INC.,

Defendant/Third-Party Plaintiff-
Appellee,

and

CITY OF DETROIT,

Defendant-Appellee,

and

E. B. ROOFING, CO., OLIVER HOME
IMPROVEMENT, INC., PHILIP GUADAGNI,
MAJESTIC HEATING AND COOLING, INC.,
JENKINS CONTRACTING SERVICES, INC.,
JOHN BROWN, JOHN MANNING, d/b/a
MANNING'S DOORS, INC., BUCKINGHAM
ELECTRIC, INC., and DONALD
WHEELWRIGHT,

Third-Party Defendants.

UNPUBLISHED
February 10, 2009

No. 281010
Wayne Circuit Court
LC No. 05-528372-CH

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right an order dismissing her claims against defendant, A-1 Builders, Inc. ("A-1"), because she failed to comply with a discovery order under MCR

2.313(B)(2)(c).¹ Plaintiff also appeals an earlier order granting summary disposition under MCR 2.116(C)(7) to defendant, the city of Detroit, because plaintiff's negligence claims were barred by governmental immunity.² Finally, plaintiff challenges a subsequent order denying her motion for reconsideration. We affirm.

This case arises out of plaintiff's participation in the city of Detroit's Minor Home Repair Program ("MHRP"). The MHRP is a federally-funded program that provides home repairs for low-income homeowners. The city of Detroit's Planning and Development Department ("PDD") reviews MHRP applications, assists applicants in locating skilled contractors, and distributes the funding to contractors for completed work. Homeowners pay nothing for the repairs, but they must agree to a self-reducing two-year lien on their homes for the amount of the construction.

Plaintiff was accepted for MHRP funding. PDD selected A-1 as the contractor. Then, plaintiff and A-1 contracted for the completion of \$42,810 in repairs.

Ultimately, PDD paid A-1 \$43,207 for work on plaintiff's home. However, plaintiff contested the quality of A-1's work. PDD inspected the home, agreed that additional repairs were necessary and approved a \$12,538 estimate from a different contractor. Before the repairs could be made, however, PDD required plaintiff to revise her application for MHRP funding.³ Also, PDD required plaintiff to agree to a lien for the value of the completed work. She refused and PDD closed her case. Plaintiff subsequently sued A-1 and city of Detroit for negligence and breach of contract. She claimed that city of Detroit negligently selected an unqualified contractor and failed to monitor the work.

Plaintiff's first claim on appeal is that the trial court improperly granted city of Detroit's motion for summary disposition, finding it immune to her negligence claims. She argues that the city of Detroit's acts giving rise to the case were ultra vires. She also argues that the proprietary function exception barred governmental immunity. We disagree. This Court may review plaintiff's unpreserved claims if consideration is necessary to a proper determination of the case or if the question is one of law and all the facts necessary for its resolution have been presented. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). This Court reviews de novo the applicability of governmental immunity and a trial court's order granting summary

¹ This same order dismissed A-1's third-party claims.

² In plaintiff's statement of questions presented, she challenges the trial court's order granting city of Detroit's motion for summary disposition of her contract claim. However, plaintiff does not address the contract claim in her argument. Therefore, the trial court's order dismissing plaintiff's breach of contract claim is not properly before this Court. *Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002) ("this Court will not search for authority to support a party's position, and the failure to cite authority in support of an issue results in its being deemed abandoned on appeal.").

³ City of Detroit alleged that plaintiff inaccurately reported the number of occupants in the home and their incomes.

disposition pursuant to MCR 2.116(C)(7). *Roby v City of Mount Clemens*, 274 Mich App 26, 28; 731 NW2d 494 (2006).

Under the governmental tort liability act, MCL 691.1407(1), a governmental agency is shielded from tort liability if it is engaged in the exercise or discharge of a governmental function. *Roby, supra*, p 29. The term “governmental function” is broadly construed, and the statutory exceptions to immunity are narrowly construed. *Maskery v University of Michigan Board of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003). MCL 691.1401(f) defines a governmental function as an “an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.” *Roby, supra*, p 29. In contrast, ultra vires activity is that which is not expressly or impliedly authorized by law. *Coleman v Kootsillas*, 456 Mich 615, 619; 575 NW2d 527 (1998).

City of Detroit’s charter provides for a department that will act as a local public agency for purposes of federally funded urban renewal and similar projects. Detroit Charter, § 7-501. Accordingly, city of Detroit designated PDD to distribute HUD funding through the MHRP. Although the charter does not expressly mandate the many powers of PDD, it is implied that its distribution of funds to low-income homeowners needing home repairs would include the power to review applicants, assess necessary home repairs, select contractors with winning bids, and pay contractors for completed work. Indeed, plaintiff conceded PDD’s authority to select a contractor when she signed a contractor release form. Given these implied powers, city of Detroit was engaged in a governmental function when PDD selected and paid A-1 for plaintiff’s home repairs. *Roby, supra*, 29, citing MCL 691.1401(f). Consequently, city of Detroit was shielded from plaintiff’s claim that it was negligent in selecting and monitoring A-1. *Id.* Therefore, the trial court properly granted city of Detroit’s motion for summary disposition pursuant to MCR 2.116(C)(7).

Contrary to this conclusion, plaintiff alleges that city of Detroit’s selection of and payment to A-1 constituted ultra vires acts. For instance, plaintiff claims that city of Detroit committed “[f]raud, [w]aste, and [a]buse” of federal funding. She claims that it was improper to pay A-1 for “blotched” work. She also notes that A-1 estimated the project would cost \$43,810, but city of Detroit ultimately paid A-1 \$43,207. Plaintiff claims that the difference between these amounts, \$603, is “hidden in the City’s undercover enterprise, or coffer.” Finally, plaintiff claims that city of Detroit’s acts were motivated by its intent to retaliate against her for a prior lawsuit against city of Detroit’s police department.

Governmental immunity applies to a governmental agency even when it improperly performs a general governmental function that is authorized by law. *Richardson v Jackson County*, 432 Mich 377, 385; 443 NW2d 105 (1989). Again, city of Detroit’s selection of and payment to A-1 was a governmental function. Therefore, even if the selection and payment were improper as plaintiff claims, governmental immunity applies. *Roby, supra*, 29, citing MCL 691.1401(f). City of Detroit’s improper execution of a governmental function authorized by law would not make its acts ultra vires. Therefore, plaintiff’s argument for the ultra vires exception to governmental immunity fails.

In addition to her ultra vires claim, plaintiff relies on the proprietary function exception to governmental immunity. Under the proprietary function exception, a defendant that is engaged in a governmental function may be precluded from governmental immunity if the function is

proprietary in nature. *Coleman, supra*, pp 620-621, citing MCL 691.1413. To constitute a proprietary function, “[t]he activity (1) must be conducted primarily for the purpose of producing a pecuniary profit, and (2) it cannot be normally supported by taxes and fees.” *Id.*, p 621.

To determine if an activity is conducted primarily for the purpose of producing a pecuniary profit, this Court may consider whether it actually generates profit. *Coleman, supra*, p 621. This factor is not dispositive, but may be relevant to the agency’s intent. *Id.* This Court may also consider where the profit is deposited and where it is spent. *Id.*

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.*]

Pursuant to the first prong of the proprietary function test, the primary purpose of MHRP is to distribute federal funds to low-income homeowners for repairs. *Coleman, supra*, p 621. The primary purpose is not to produce a pecuniary profit. Participating homeowners pay nothing. Instead, city of Detroit uses federal funds from HUD to pay for the repairs.

Plaintiff asserts that city of Detroit resembles a business because it selects contractors with “low-ball bidding” practices. However, the general manager of PDD, Jannie Warren, stated that contractors are selected considering the amount of the bid and its acceptability, the contractors’ present availability to complete the project, and their experience with the required repairs. This practice does not suggest intent to profit, but rather, intent to use federal funds in the most appropriate manner.

Plaintiff also asserts that a profit was generated from her project. She claims that A-1 profited because PDD paid it for incomplete or unsatisfactory work. There are no facts to suggest that A-1 did not complete work valued at \$43,207. In her deposition, Warren stated payments would not have been made to A-1 unless the repairs had been approved and completed. In any event, whether A-1 profited is not relevant to the question of city of Detroit’s proprietary intent.

Alternatively, plaintiff claims city of Detroit profited from the \$603 that was estimated for her project, but not paid to A-1. However, city of Detroit countered that neither PDD, nor its individual employees, “pocket[ed]” federal funds. Instead, funds allotted to plaintiff’s project, but determined to be unnecessary, would have been used to repair homes for other “worthy and qualified applicants.” Following *Coleman, supra*, p 621, plaintiff failed to demonstrate proprietary intent because the unnecessary funds allotted to her project were not placed in city of Detroit’s general fund or used for unrelated functions, but instead, solely funded other MHRP applicants.

Pursuant to the second prong of the proprietary function test, MCL 691.1413 does not require that “[t]he activity need only be one which is normally supported by taxes or fees.” *Hyde v University of Michigan Bd of Regents*, 426 Mich 223, 260 n 32; 393 NW2d 847 (1986). In this case, MHRP was funded by HUD, not city of Detroit’s tax revenue or fees. Nevertheless, federal

tax revenue arguably created and funds HUD. Therefore, the second prong of the test is not satisfied. Given that the primary purpose of MHRP was not proprietary and the urban renewal was supported by taxes, plaintiff's argument for the proprietary purpose exception to governmental immunity fails.

Next, plaintiff makes passing references to vicarious liability and respondeat superior. However, she does develop these arguments by applying the theories to her case. Therefore, plaintiff's claim is not properly before this Court. *Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002).

Similarly, on appeal, plaintiff implies that city of Detroit's individual employees are liable for negligence and not entitled to immunity. However, plaintiff did not preserve this argument for the trial court's consideration by alleging individual liability in her pleadings. *Attorney Gen v Pub Service Comm*, 243 Mich App 487, 494; 625 NW2d 16 (2000). Nevertheless, plaintiff claims that the trial court should have imposed the immunity requirements for individual governmental employees under MCL 691.1407(2).⁴ However, only the agency immunity requirement, governmental function, was at issue. Thus, plaintiff's claim that the trial court applied the improper "standard of review" fails.

Alternatively, plaintiff requests that this Court remand for her to amend the complaint to include city of Detroit's individual employees' liability. However, plaintiff did not file a motion with the trial court to amend her complaint. Again, plaintiff fails to cite authority indicating that she is entitled to remand for such a motion. Because this Court will not search for authority to support a party's position, plaintiff's request for an amendment to her complaint is abandoned. *Flint City Council*, *supra*, p 393 n 2.

Plaintiff also contends that the trial court erred in granting city of Detroit's motion for summary disposition prior to the completion of discovery. We disagree.

"Generally, a motion for summary disposition is premature if granted before discovery on a disputed issue is complete." *Oliver v Smith*, 269 Mich App 560, 567; 715 NW2d 314 (2006), quoting *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003). "However, summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Id.*, quoting *Peterson*, *supra* p 25.

⁴ MCL 691.1407(2) provides:

Governmental employees are immune from liability for injuries they cause during the course of their employment if they are acting or reasonably believe they are acting within the scope of their authority, if they are engaged in the exercise or discharge of a governmental function, and if their conduct does not amount to gross negligence that is the proximate cause of the injury or damage. [See *Love v City of Detroit*, 270 Mich App 563, 565; 716 NW2d 604 (2006).]

In plaintiff's case, the discovery deadline passed on May 8, 2007. Afterward, plaintiff did not request additional discovery from the parties. As we concluded, *supra*, the facts obtained from completed discovery do not support the ultra vires or proprietary function exceptions. Furthermore, on appeal, plaintiff does not articulate how further discovery will uncover factual support for an additional exception to governmental immunity. Absent an articulated "reasonable chance" for such factual support, we conclude that summary disposition was not premature. *Oliver, supra*, p 567, quoting *Peterson, supra*, p 25.

Plaintiff next claims on appeal that the trial court improperly granted A-1's motion for dismissal pursuant to MCR 2.313(B)(2)(c). We disagree. This Court reviews a trial court's imposition of discovery sanctions pursuant to MCR 2.313(B)(2)(c) for an abuse of discretion. *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

MCR 2.313(B)(2)(c) authorizes a trial court to "enter an order dismissing a proceeding or rendering a judgment by default against a party who fails to obey an order to provide discovery." *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000). Such a drastic sanction requires the trial court's careful consideration of the circumstances of the case. *Id.* The plaintiff's failure to facilitate discovery must not be accidental or involuntary. *Id.* Instead, the failure should be flagrant and wanton. *Id.* To determine the appropriate sanction, trial courts should consider the following factors:

(1) Whether the violation was wil[l]ful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the [other party]; (4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such actual notice; (5) whether there exists a history of [the party's] engaging in deliberate delay; (6) the degree of compliance by the [party] with other provisions of the court's order; (7) an attempt by the [party] to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), overruled in part on other grounds *Dimmitt & Owen Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 628; 752 NW2d 37 (2008).]

In January 2007, Judge John D. O'Hair, acting for Judge Robert L. Ziolkowski, entered a discovery order.⁵ The order required plaintiff to submit a description of her damages by January 26, 2007. The order also required the parties to agree to an inspection date. Finally, the order scheduled discovery to close on May 8, 2007.

⁵ Judge Ziolkowski recused himself following a grievance by plaintiff. Judge Warfield Moore replaced him, but also subsequently recused himself. Judge Moore's replacement, Judge Gershwin Allen Drain, entered the orders now challenged on appeal.

Relying on MCR 2.313(B)(2)(c), the trial court dismissed plaintiff's claims against A-1 because she failed to comply with Judge O'Hair's discovery order. The trial court found that an inspection had not occurred even though Judge O'Hair's order required its completion by May 8, 2007. The trial court accepted that one inspection was rescheduled by defendants and third-party defendants because of a conflict with a status conference scheduled for the same day. However, the facts demonstrate that the primary responsibility for the failed inspection rested with plaintiff's willful refusals. *Bass, supra*, p 26. At least four inspections were scheduled and noticed. However, plaintiff either failed to attend or filed objections to each of them. Despite Judge O'Hair's order that an inspection was necessary, plaintiff subsequently claimed that her personal videotaping of the home would adequately document the damages in place of the inspection. The trial court noted that plaintiff's refusals were significant because an inspection was essential to the nature of her claims. Plaintiff's history of willfully refusing to comply with the inspection weighed in favor of the imposition of a sanction. *Id.*

The trial court also concluded that plaintiff failed to comply with Judge O'Hair's June 26, 2007, deadline for the description of damages. Under *Bass, supra*, p 26, a trial court should consider whether the plaintiff's violation was willful or accidental. Three days before the description deadline, plaintiff's attorneys moved to withdraw. Arguably, plaintiff's noncompliance could have been an accidental consequence of the breakdown of her attorney-client relationship. Nevertheless, plaintiff retained a new attorney on February 9, 2007. However, she failed to submit the description until May 8, 2007. Thus, plaintiff's failure to timely cure the defect weighed in favor of the imposition of a sanction. *Id.*

In sanctioning a plaintiff, a trial court may additionally consider the plaintiff's history of refusing to comply with discovery requests. *Bass, supra*, p 26. In this case, plaintiff repeatedly refused to comply with deposition requests. Plaintiff failed to attend scheduled and noticed depositions on November 2, 2006, and December 4, 2006. On January 16, 2007, plaintiff attended the deposition, but her counsel terminated it prematurely. Afterward, A-1 sent several letters to plaintiff's attorney requesting convenient dates to reschedule the deposition. However, neither the attorney nor plaintiff responded. Again, the parties scheduled the continuation of plaintiff's deposition for May 14, 2007, and June 25, 2007, but plaintiff failed to attend. Only one of plaintiff's absences had been excused. Therefore, this history of refusing to comply with requests for her deposition weighed in favor of the imposition of a sanction. *Id.*

The trial court also found that the delay resulting from plaintiff's actions caused the case to be two years old and prejudiced the other parties. It noted that the case had been repeatedly continued and adjourned for the completion of discovery, but "really almost nothing happened." This prejudice also weighed in favor of the imposition of a sanction. Because the trial court carefully considered the circumstances of the case and found that *Bass* factors weighed in favor of the imposition of a sanction, we conclude that dismissal pursuant to MCR 2.313(B)(2)(c) was not outside the range of principled outcomes. *Barnett, supra*, p 158. Therefore, the trial court did not abuse its discretion.

Contrary to this conclusion, plaintiff notes that, on May 8, 2007, Judge Ziolkowski verbally instructed her to submit a description of damages to her attorney for distribution to the opposing parties. Consequently, plaintiff maintains that this instruction demonstrated Judge Ziolkowski's intent to adjourn Judge O'Hair's discovery deadlines. However, courts speak through their written orders. Until a judgment or order is written and signed, it is not effective.

See *In re Gazella*, 264 Mich App 668, 677; 692 NW2d 708 (2005). Judge Ziolkowski did not reduce the instruction to a written order, and therefore, this instruction did not supercede Judge O'Hair's discovery order. Thus, the trial court did not abuse its discretion when it relied solely on that order.

Plaintiff next asserts that the trial court's bias abrogated her due process rights. However, plaintiff fails to cite any authority regarding the interplay between bias and due process. Therefore, this argument is not properly before this Court. *Flint City Council, supra*, p 393 n 2. Nevertheless, plaintiff's claims fail to overcome the heavy presumption of judicial impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996).

Plaintiff also contends that the trial court erred when it denied her motion for rehearing or reconsideration of the orders granting summary disposition to City of Detroit and dismissing A-1's claims on the basis that plaintiff had not demonstrated palpable error. We disagree. This Court reviews a trial court's decision on a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Under MCR 7.208A, a trial court may not set aside or amend an order while an appeal from that order is pending. *Hill v City of Warren*, 276 Mich App 299, 307, 740 NW2d 706 (2007). Plaintiff filed her claim of appeal on October 2, 2007. This appeal was pending when plaintiff filed her October 9, 2007, motion for rehearing or reconsideration. This Court had not remanded for consideration of the motion. Consequently, the trial court lacked authority to consider plaintiff's motion to set aside the orders, and the trial court did not abuse its discretion when it denied plaintiff's motion, albeit for the wrong reason. *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006) (This Court "will not reverse the lower court when it reaches the correct result, albeit for the wrong reason.") Moreover, because the trial court lacked authority to consider plaintiff's motion, this Court need not address plaintiff's additional claims regarding palpable error and the necessity of a hearing or more thorough order.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray