

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

CORA LEE HOBBS-JACKSON,

Plaintiff-Appellee/Cross-Appellant,

v

LANSING BOARD OF WATER AND LIGHT,

Defendant/Cross-Appellee,

and

JANE DOE,

Defendant-Appellant.

---

UNPUBLISHED  
February 22, 2018

No. 337873  
Ingham Circuit Court  
LC No. 16-000158-CZ

Before: CAVANAGH, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM.

Defendant Jane Doe (Doe) appeals as of right an order denying her motion for summary disposition premised on governmental immunity. We affirm. Plaintiff cross-appeals an order granting the motion for summary disposition in favor of defendant Lansing Board of Water and Light (Lansing Board) on the ground that it was entitled to governmental immunity. We affirm.

Plaintiff owned a home located in the city of Lansing. Defendant Lansing Board is a municipally owned utility and defendant Doe is its employee. According to plaintiff's complaint, on February 23, 2015, defendant Doe was working at a home next to plaintiff's home and needed water. Defendant Doe attempted to get water from an outside water spigot on plaintiff's house, but found it to be frozen. She then used a gas blowtorch on plaintiff's spigot in an attempt to thaw it. However, the flames from the blowtorch caught the house on fire and plaintiff's home burned down; it was completely destroyed and all of her possessions were lost. Plaintiff brought this action, averring that neither defendant was entitled to governmental immunity. In Count I, plaintiff alleged that defendant Doe was grossly negligent; thus, she was not immune from liability and her employer, defendant Lansing Board, was vicariously liable for her gross negligence. In Count II, plaintiff alleged a negligence claim.

Subsequently, defendants filed a motion for summary disposition under MCR 2.116(C)(7), arguing that plaintiff's claims were barred by governmental immunity. Defendants

explained that plaintiff's neighbor's water service line was frozen on the day at issue, as well as on the day before. To promptly restore water service, defendants use a "hose over procedure." That is, a hose is attached to a spigot on a house that still has water service and then the same hose is attached to a spigot on the house that has a frozen water service line. In this case, on the day before the fire, defendant Doe asked plaintiff if she could use her water spigot to help plaintiff's neighbor and plaintiff agreed. However, defendant Doe found that plaintiff's outdoor water spigot was frozen so she used a Mapp gas torch to thaw it. Thereafter, the hose was attached and the "hose over procedure" completed, restoring plaintiff's neighbor's water service.

The next day, however, plaintiff's neighbor's water service line was frozen again. Although plaintiff was not home, defendant Doe once again attempted to use plaintiff's outdoor water spigot but the hose on the spigot was frozen. She then used a Mapp gas torch to thaw the area so that she could perform the "hose over procedure." Defendant Doe had not brought the fire extinguisher that was in the trunk of her vehicle to plaintiff's house. After connecting the hose at the neighbor's house, defendant Doe returned to plaintiff's house to turn the water on and found that the house was on fire. She attempted to put the fire out, but was unsuccessful and the fire department had to be called. The fire department later determined that the gas torch ignited the cardboard behind the aluminum siding, which ignited the wood wall of plaintiff's house.

Defendants argued in their motion for summary disposition that the fire was accidental and they were both entitled to dismissal. In particular, the claims against defendant Lansing Board should be dismissed because, under MCL 691.1407(1), it was immune from tort liability if engaged in the exercise or discharge of a governmental function and, clearly, the general activity of providing water service to residents was such a governmental function. Although plaintiff attempted to characterize defendant Lansing Board's actions as falling within the "proprietary function" exception to governmental immunity, such claim fails. Defendant's provision of the water utility was not for the primary purpose of producing a pecuniary benefit; rather, the funds received were used to operate and maintain the water utility, including through improvements to infrastructure—as set forth in the attached affidavit of Heather Shawa, defendant's chief financial officer. Defendants also attached the city charter to its motion. Further, defendants argued, the law is well-established that a governmental agency like defendant Lansing Board cannot be held vicariously liable for the tortious actions of its employees. Accordingly, defendant Lansing Board was entitled to governmental immunity and summary disposition in its favor.

Defendants further argued that plaintiff's claims against defendant Doe must be dismissed under MCL 691.1407(2) because, contrary to plaintiff's claims, defendant Doe's act of using the gas torch on plaintiff's frozen spigot was not "so reckless as to demonstrate a substantial lack of concern for whether an injury results." See MCL 691.1407(8)(a). Accordingly, defendants argued, defendant Doe was also entitled to governmental immunity and summary disposition in her favor.

Plaintiff responded to defendants' motion for summary disposition, arguing that defendants were not entitled to summary disposition. First, defendant Lansing Board was engaged in a proprietary function and, thus, was not entitled to governmental immunity. See *Coleman v Kootsillas*, 456 Mich 615, 620-621; 575 NW2d 527 (1998). Defendant Lansing Board provided electrical and water utility services not just to the residents of the city of

Lansing, but also to residents of East Lansing and other surrounding townships. Plaintiff referred to defendant's financial reports attached to her brief, noted that defendant gave the city of Lansing treasurer \$20,608,093, and stated: "To put into context 10.7% of all of Lansing's budget funds and 18.7% of Lansing's general fund came from [defendant's] profits in the year [it] burned the plaintiff's home down." Plaintiff argued that defendant Lansing Board's financial reports established that it was engaged in a proprietary function in that the profits generated by it were more than just self-sustaining. In other words, defendant Lansing Board was engaged in a commercial business for profit—like other utility companies—and therefore waived the right to assert governmental immunity. Further, defendant Lansing Board can be held vicariously liable for the actions of defendant Doe who committed the tort at issue while engaged in a proprietary function. But, at minimum, a question of fact existed as to whether defendant Doe's actions in applying a gas torch to plaintiff's house constituted gross negligence precluding the assertion of governmental immunity. Accordingly, plaintiff argued, defendants' motion for summary disposition should be denied.

Following oral arguments on defendants' motion for summary disposition, the trial court held that defendant Lansing Board was entitled to governmental immunity and dismissed plaintiff's claims against it. The court noted that defendant was providing water service to a resident of the city of Lansing consistent with the city charter which is an activity that was normally supported by taxes and fees, and was not engaged in the activity primarily to produce a pecuniary profit, i.e., it was a governmental, not a proprietary, function. The trial court also granted the motion as to the negligence claim against defendant Doe. However, the trial court denied the motion as to plaintiff's gross negligence claim against defendant Doe, stating that a question of fact existed whether her conduct demonstrated a sufficient lack of concern for whether an injury would result under these circumstances; thus, it was an issue for the jury. Thereafter, defendant Doe filed this appeal challenging the trial court's denial of her motion and plaintiff filed a cross-appeal challenging the trial court's dismissal of defendant Lansing Board.

Plaintiff argues that defendant Lansing Board was not entitled to governmental immunity because it was engaged in a proprietary function when plaintiff's house was burned down. We disagree.

We review de novo a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(7), as well as the applicability of governmental immunity. *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999); *Baker v Waste Mgt of Mich, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995). Governmental immunity is a characteristic of government so to survive such a motion, the plaintiff must have alleged facts establishing that an exception to governmental immunity is applicable. *Mack v Detroit*, 467 Mich 186, 198; 649 NW2d 47 (2002). If the facts are undisputed and reasonable minds could not differ regarding the legal effect of those facts, whether a claim is barred by governmental immunity may be decided by the trial court as a matter of law. *Grahovac v Munising Twp*, 263 Mich App 589, 591; 689 NW2d 498 (2004).

The governmental tort liability act, specifically MCL 691.1407(1), grants broad immunity to governmental agencies for all tort liability whenever they are engaged in the exercise or discharge of a governmental function. See *Nawrocki v Macomb Co Rd Comm*, 463

Mich 143, 156; 615 NW2d 702 (2000). Exceptions to governmental immunity are limited and are to be narrowly construed. *Id.* at 158.

MCL 691.1413 sets forth the proprietary function exception to governmental immunity, in relevant part:

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.

Thus, to be considered a proprietary function, an activity must be conducted primarily for the purpose of producing a pecuniary profit, and not normally be supported by taxes or fees. *Coleman*, 456 Mich at 621. To discern whether the activity was conducted primarily for the purpose of producing a profit, we must determine the governmental agency's intent. *Id.* The existence of a profit is relevant, but not dispositive of that intent. *Id.*, quoting *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 258; 393 NW2d 847 (1986). Where the profit is deposited and spent is also indicative of intent. *Id.* at 259. In other words, if the profit is deposited into the general fund and then spent on something other than the expenses associated with the activity at issue, a pecuniary motive may be indicated. *Id.* On the other hand, if the profits are used to support the activity at issue or if the activity is self-sustaining, a nonpecuniary purpose may be indicated. *Id.*; *Herman v Detroit*, 261 Mich App 141, 145; 680 NW2d 71 (2004).

In this case, defendant Lansing Board argued that its operation of the water utility did not constitute a proprietary function and supported its argument with a copy of the city charter and the affidavit of its chief financial officer. A motion brought under MCR 2.116(C)(7) may be supported by affidavits or other documentary evidence. *Maiden*, 461 Mich at 119. Chapter 2 of the city charter provides for the establishment of defendant Lansing Board and empowers it with the exclusive management of the city's public utilities. With regard to defendant Lansing Board's funds, the city charter provides, in relevant part:

#### 5-204 Withdrawal Of Funds

.1 The funds and revenues of the Board of Water and Light shall be deposited in the City Treasury and shall be credited only to the funds and accounts of the Board of Water and Light. They shall not be withdrawn or used for any other purpose whatsoever. The Board shall have and exercise full control over all of the funds of the Board of Water and Light in the City Treasury.

Further, the affidavit of defendant Lansing Board's chief financial officer states, in part, that the net income from the operation of the water utility was "reinvested back into the water utility via investments in the infrastructure for the water utility." The affidavit also provides:

10. The policies of the Board of Water and Light mandate that revenues from the operation of the water utility, including the sale of water, be used for direct

operation and maintenance of the water utility, including debt service, bond coverage and capital improvements.

The documentary evidence submitted by defendant Lansing Board evidences its intent that the operation of the water utility was not conducted primarily for the purpose of producing a pecuniary profit. See *Coleman*, 456 Mich at 621. Rather, all funds and revenues that were collected from the provision of the water utility were maintained separate from other city funds, were solely controlled by defendant Lansing Board, and were used to fund and maintain the water utility. See *id.*; *Herman*, 261 Mich App at 145.

Plaintiff argued in the trial court, as she does here on appeal, that the profits recovered by defendant Lansing Board were not used to fund and maintain the water utility. In support of her argument, plaintiff relies on defendant's financial reports but we are unable to follow plaintiff's explanation or verify her claim that any portion of the city's "budget funds" and "general fund" came from revenue collected by defendant Lansing Board for the provision of the water utility.<sup>1</sup> Further, plaintiff fails to support her claim that the profits generated by the operation of the water utility were, in fact, not used to fund and maintain the water utility. That is, plaintiff completely failed to show that a factual issue existed on the issue whether defendant Lansing Board's primary motive for operating the water utility was to produce a pecuniary profit. Plaintiff relies on the holding in *Coleman*, 456 Mich 615, to support her claim but that case is factually distinguishable. In *Coleman* the evidence plainly showed that the municipality's operation of a landfill generated substantial profits that were then used to fund numerous city projects. *Id.* at 622. Thus, it was clear that the landfill operation was conducted primarily for the purpose of producing a pecuniary profit. That is not the case here. Thus, as the trial court held, plaintiff failed to demonstrate that her case fell within the proprietary function exception to governmental immunity and her claims against defendant Lansing Board were properly dismissed under MCR 2.116(C)(7).

And although a governmental agency can be held vicariously liable when an employee commits a tort while engaged in a proprietary activity, *Smith v Dep't of Pub Health*, 428 Mich 540, 605 n 19; 410 NW2d 749 (1987), because defendant Lansing Board was engaged in a governmental function, it follows that defendant Doe was also engaged in a governmental function when plaintiff's house burned down. Thus, the trial court properly dismissed plaintiff's claim against defendant Lansing Board premised on a vicarious liability theory because it was barred by governmental immunity.

Defendant Doe argues that plaintiff's gross negligence claim against her should have been dismissed as barred by governmental immunity. We disagree.

---

<sup>1</sup> In her brief in response to defendants' motion for summary disposition, plaintiff referred to defendant's financial reports that were attached and stated that defendant gave the city of Lansing treasurer \$20,608,093 and then stated: "To put that into context 10.7% of all of Lansing's budget funds and 18.7% of Lansing's general fund came from [defendant's] profits in the year [it] burned the plaintiff's home down." But none of this information could be located in the referenced documents.

MCL 691.1407(2) provides, in relevant part:

Except as otherwise provided in this section . . . each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer, employee . . . while in the course of employment . . . if all of the following are met:

(a) The officer, employee . . . 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 . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

In this case, when defendant Doe caused plaintiff's house to burn down, she was in the course of her employment with defendant Lansing Board—which was engaged in the exercise of a governmental function—and she was acting within the scope of her authority. Defendant Doe claims, however, that her conduct did not amount to gross negligence. We agree with the trial court that the issue presented a question of fact for the jury to determine.

MCL 691.1407(8)(a) defines “gross negligence” as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” The challenged conduct must be “substantially more than negligent.” *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 411; 716 NW2d 236 (2006). This definition of “gross negligence” suggests “almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks.” *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004).

In this case, defendant Doe used a blowtorch in an attempt to unthaw plaintiff's outdoor water spigot. She had a fire extinguisher in the trunk of her car, but did not bring it to the side of plaintiff's house before applying the torch. The water spigot, by its very nature, protruded only inches from the side of the house. The spigot was surrounded on all sides by combustible materials. A gas torch provides for an open, possibly variable flame, and presents a significant as well as unpredictable hazard particularly in winter weather and when in such close proximity to combustible materials. There was no evidence of a guard being on the torch, or of safety measures or precautions of any kind or manner being taken. Accordingly, as the trial court held, reasonable jurors could honestly reach different conclusions as to whether defendant Doe's conduct constituted gross negligence; thus, the issue is a factual question for the jury. See *Oliver v Smith*, 290 Mich App 678, 685; 810 NW2d 57 (2010).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Joel P. Hoekstra

/s/ Jane M. Beckering