

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

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RITA LOWE and RUSSELL LOWE,

Plaintiffs-Appellees,

v

THREE RIVERS AREA HOSPITAL, d/b/a  
THREE RIVERS AREA SPECIALTY CLINIC,

Defendant-Appellant.

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UNPUBLISHED

March 1, 2005

No. 250994

St. Joseph Circuit Court

LC No. 02-000871-NO

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendant Three Rivers Area Hospital appeals as of right from the trial court's denial of its motion for summary disposition in this governmental immunity case. We reverse.

I. Facts and Procedural Background

Defendant is a nonprofit hospital owned and operated by the Three Rivers Area Hospital Authority.<sup>1</sup> The Three Rivers Area Specialty Clinic (the Center) is owned by TRAH Properties, a nonprofit corporation formed by defendant to hold title to and collect income produced by the Center. The Center is located on land owned by defendant and shares a common parking lot with the main hospital. The Center houses both private and hospital-employed physicians, as well as hospital administrative facilities.

Plaintiff Rita Lowe sustained injuries when she slipped in the parking lot while walking to the Center. Plaintiff filed suit, alleging that defendant failed to maintain the premises in a reasonably safe condition and to warn of the unsafe condition. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). Defendant argued that it was a governmental agency engaged in the exercise of a governmental function, and that the maintenance of the parking lot did not fall within the proprietary function exception to governmental immunity. The trial court denied defendant's motion, concluding that the operation of the Center was a proprietary function, and that a question of fact existed as to

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<sup>1</sup> The Authority was formed pursuant to the Joint Hospital Authority Act, MCL 331.1 *et seq.*

whether the portion of the parking lot in which plaintiff fell was used primarily by persons visiting the Center.

## II. Summary Disposition

We review a trial court's decision on a motion for summary disposition *de novo*.<sup>2</sup> As we reverse the trial court's denial of defendant's motion based on governmental immunity, we need only consider that ground on appeal. A motion under MCR 2.116(C)(7) "tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties."<sup>3</sup> In making this determination, well-pleaded allegations are accepted as true and construed in favor of the nonmoving party.<sup>4</sup>

## III. Governmental Immunity

Absent an exception, a governmental agency is immune from tort liability for injuries caused while the agency was engaged in a governmental function.<sup>5</sup> "A governmental function is 'an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.'"<sup>6</sup>

The proprietary function exception to governmental immunity 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.<sup>7</sup>

To be a proprietary function, an activity: (1) must be conducted primarily for the purpose of producing a profit; and (2) cannot normally be supported by taxes or fees.<sup>8</sup>

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<sup>2</sup> *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

<sup>3</sup> *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003), quoting *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998).

<sup>4</sup> *Dampier v Wayne Co*, 233 Mich App 714, 720; 592 NW2d 809 (1999).

<sup>5</sup> *Maskery*, *supra* at 613, citing MCL 691.1407(1).

<sup>6</sup> *Id.* at 613-614, quoting MCL 691.1401(f). Plaintiff concedes that the Hospital Authority is a governmental agency, and that its operation of the hospital is a governmental function. MCL 691.1401(b) and (f); MCL 331.1(2).

<sup>7</sup> MCL 691.1413.

<sup>8</sup> *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998); *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 258; 393 NW2d 847 (1986).

In determining whether the governmental agency's primary purpose is to produce a pecuniary profit, the court must consider: (1) whether an activity actually generates a profit, and (2) where the profit is deposited and the manner in which it is spent.<sup>9</sup> In considering the first prong, the "focus . . . should be on the primary intended purpose of the governmental activity and how the activity is normally funded."<sup>10</sup> The fact that the agency continues to operate at a loss is not conclusive evidence of the agency's intent, but neither is the fact that the agency continually generates a profit.<sup>11</sup> Removing a governmental agency's immunity merely because it generated a profit in some years would encourage poor financial management.<sup>12</sup> In considering the second prong, the court should consider whether the function was a revenue-generating device—that is, whether the profits are deposited in the government's general fund and used to finance unrelated government functions.<sup>13</sup> However, if the profits are "used only to pay current and long-range expenses involved in operating the activity, this could indicate" that the primary purpose was not to generate a profit.<sup>14</sup> Furthermore, to be excluded from the proprietary function exception, an activity need not actually be supported by taxes or fees if it is of a kind normally supported by taxes or fees.<sup>15</sup>

In determining whether an activity is a governmental function, "the focus must be on the general activity, not the specific conduct involved at the time of the tort."<sup>16</sup> As noted previously, plaintiff concedes that the operation of a hospital is a governmental function. Plaintiff contends, however, that defendant's operation of the Center was a proprietary function as some physicians paid rent to TRAH Properties, which remitted those funds to defendant. The record evidence does not show that defendant established TRAH Properties primarily for the purpose of producing a profit. Any profits were used by defendant for the hospital's general operations, not returned to the state or taxpayers.<sup>17</sup> The Center did not generate a large profit that was used to pay for unrelated government projects or to reduce taxes.<sup>18</sup> Any revenues merely contributed to defendant's ability to be self-sustaining.<sup>19</sup> Hospital systems can become large entities with various facilities in many areas.<sup>20</sup> The fact that defendant leased space in one of those facilities

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<sup>9</sup> *Coleman, supra* at 621, quoting *Hyde, supra* at 258-259.

<sup>10</sup> *Hyde, supra* at 231.

<sup>11</sup> *Coleman, supra* at 621, quoting *Hyde, supra* at 258.

<sup>12</sup> *Hyde, supra* at 258.

<sup>13</sup> *Coleman, supra* at 621, quoting *Hyde, supra* at 259.

<sup>14</sup> *Id.*

<sup>15</sup> *Herman v Detroit*, 261 Mich App 141, 145; 680 NW2d 71 (2004).

<sup>16</sup> *Pardon v Finkel*, 213 Mich App 643, 649; 540 NW2d 774 (1995).

<sup>17</sup> See *Hyde, supra* at 256, 259.

<sup>18</sup> See *Coleman, supra* at 622.

<sup>19</sup> See *Hyde, supra* at 258-259.

<sup>20</sup> See *id.* at 256.

does not destroy its entitlement to governmental immunity. The Center is managed in the daily operations of the hospital by defendant's employees and houses defendant's doctors and administrative offices.

Furthermore, the maintenance of the parking lot was controlled by defendant, which was owned in its entirety by defendant. The maintenance of a parking lot for a hospital operated by a hospital authority is expressly permitted by statute.<sup>21</sup> Therefore, defendant's maintenance of the parking lot also constituted the exercise of a governmental function.<sup>22</sup> As defendant was engaged in a governmental function and its primary purpose was not to produce a profit, the trial court improperly denied defendant's motion for summary disposition based on governmental immunity.

Reversed.

/s/ Brian K. Zahra  
/s/ Janet T. Neff  
/s/ Jessica R. Cooper

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<sup>21</sup> MCL 331.1(2).

<sup>22</sup> MCL 491.1401(f).