STATE OF MICHIGAN

COURT OF APPEALS

CRYSTAL LEDUKE, Personal Representative of the ESTATE OF BRANDON DAVID CHAMBERS,

Plaintiff-Appellee,

v

CITY OF SOUTH HAVEN,

Defendant-Appellant,

and

KATE HOSIER and WILLIAM BRENNER,

Defendants.

UNPUBLISHED
September 17, 2025
10:54 AM

No. 371030
Van Buren Circuit Court
LC No. 2022-072271-NO

Before: PATEL, P.J., and BOONSTRA and CAMERON, JJ.

PER CURIAM.

In this appeal raising the issue of governmental immunity, defendant, the City of South Haven ("the City"),[1] appeals as of right the order denying its motion for summary disposition under MCR 2.116(C)(7) (claim barred by governmental immunity) and (10) (no genuine issue of material fact). We reverse and remand for the trial court to enter an order granting summary disposition to the City.

I. BACKGROUND AND PROCEDURAL HISTORY

The City operates and manages several beaches, including South Beach, which is situated along the coast of Lake Michigan. In September 2020, plaintiff's decedent drowned while swimming along South Beach. Plaintiff filed suit, asserting, in relevant part, premises-liability and negligence claims against the City. Plaintiff pleaded in avoidance of governmental immunity under the proprietary function exemption, arguing the City operated its beaches for a profit and

[1] Defendants Kate Hosier and William Brenner are not parties to this appeal.

was therefore not entitled to immunity in this case. Plaintiff highlighted the fact that the City comingled the money it earned from the beach (the "beach funds") in a general account and presented an expert witness who testified that several unidentified transfers in the general account had no basis and were evidence of the City's intent to profit from its beaches.

The City moved for summary disposition under MCR 2.116(C)(7) and (10), arguing that its operation of South Beach was a government function, and, thus, governmental immunity applied. It argued the proprietary function exception did not apply, because its operation of its beaches was self-sustaining and its primary purpose for operating the beaches was not to create a profit. The trial court denied the motion, relying heavily on the expert's testimony in finding that a genuine issue of material fact existed as to whether the City was using its beaches for profit. The trial court denied the City's motion for reconsideration. This appeal followed.

II. STANDARDS OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *El-Khalil v Oakwood*, 504 Mich 152, 159; 934 NW2d 665 (2019). Under MCR 2.116(C)(7):

> [A] motion for summary disposition may be raised on the ground that a claim is barred because of immunity granted by law. When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [*Dextrom v Wexford Co*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010) (citations omitted).]

"Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient." *McNeill-Marks v Midmichigan Med Ctr-Gratiot*, 316 Mich App 1, 16; 891 NW2d 528 (2016).[2]

III. ANALYSIS

The City argues that trial court erred by denying its motion for summary disposition because there was no question of fact that the proprietary function exception to governmental immunity did not apply. We agree.

[2] While the City moved for summary disposition under MCR 2.116(C)(7) and (10), the parties' arguments below all concerned whether the City was immune from suit. Thus, we consider this issue under MCR 2.116(C)(7).

Under the Michigan governmental tort liability act (GTLA), MCL 691.1401 *et seq*., a governmental agency is generally immune from tort liability "if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). One of the exceptions to this immunity is the proprietary function exception, which 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. No action shall be brought against the governmental agency for injury or property damage arising out of the operation of proprietary function, except for injury or loss suffered on or after July 1, 1965. [MCL 691.1413.]

"Therefore, to be a proprietary function, an 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." *Herman v Detroit*, 261 Mich App 141, 145; 680 NW2d 71 (2004) (quotation marks and citation omitted). At issue in this case is the first prong: whether the City primarily operated its beaches for the purpose of producing a pecuniary profit.

When determining whether a governmental agency's primary purpose is to produce pecuniary profit, courts should consider (1) whether profit is actually generated, and (2) where the profit is deposited and how it is spent. *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998). Regarding the second consideration, our Supreme Court has explained:

> 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*. at 621-622, quoting *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 259; 393 NW2d 847 (1986).]

This Court has clarified that "[w]hether an activity is proprietary does not depend on whether the activity actually generates a profit, although the existence of a profit is relevant to the intent of the governmental entity." *Harris v Univ of Mich Bd of Regents*, 219 Mich App 679, 690; 558 NW2d 225 (1996). But governmental entities should not be penalized for their "legitimate desire to conduct an activity on a self-sustaining basis." *Hyde*, 426 Mich at 259.

The City's finance director and tax assessor testified that, while the beach fund was deposited into the City's general fund and the City's beaches had consistently generated a profit between 2017 and 2021, the beaches were not operated for profit and the beach fund was not used to fund any other capital improvements, expenses, or operations for the City. It was a "self-sustaining" entity and was not supported by taxes. If, at the end of the fiscal year, there was a profit generated by the beach funds, the entire profit would stay in the beach fund and be rolled over into the next fiscal year. Although beach funds were admittedly used to pay administrative

fees, motor pool expenses, and police department fees, these payments were for work or expenses associated with beach operation. The City used a specialized financial software to keep track of the beach funds within the general funds, and no experts could identify any nonbeach-related transfers when reviewing the City's accounting records. This evidence is sufficient to establish that the beaches were not operated for the primary purpose of generating a profit.

In denying the City's motion for summary disposition, the trial court found that the affidavit and testimony of plaintiff's expert forensic accountant sufficed to create a question of fact regarding the primary purpose of operating the City's beaches. Plaintiff's expert questioned several transfers and fees detailed in the City's financial records, claiming that they were subjective in nature or that it was unclear what the funds were used for. On the basis of these transfers, as well as other fees, advertising expenditures, and the lack of expenses associated with beach safety, plaintiff's expert concluded that the City's primary purpose for operating its beaches was for profit.

When later asked about his conclusions, plaintiff's expert admitted he did not have enough information to definitively determine that the beach funds were used for nonbeach purposes. The expert was simply unsure whether the fees and transfers were related to the beach operations because he was unable to review any documentation explaining their purpose. Furthermore, the City's finance director and tax assessor explained the purpose of many of the questioned transfers, all of which were related to the operation of the beaches. But plaintiff's expert disregarded the finance director's testimony because he could not "verify" her claims. Most importantly, plaintiff presented *no evidence*—aside from the expert's speculative opinion—demonstrating that beach funds were actually included in the questioned transfers or that the funds were actually used for nonbeach purposes. This is unlike *Dextrom*, 287 Mich App at 423-424, where there was concrete evidence that a landfill's profits were used to fund nonlandfill-related projects. Because "mere conjecture or speculation is insufficient[]" to create a genuine issue of material fact, *McNeill-Marks*, 316 Mich App at 16, and there was no evidence showing that beach funds were actually used to fund unrelated activities, expenses, or projects, the trial court erred by denying the City's motion for summary disposition.[3]

We reverse and remand for the trial court to enter an order granting the City's motion for summary disposition. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Thomas C. Cameron

[3] Because the trial court erred in denying the City's motion in the first instance, we need not address the City's other argument on appeal regarding whether the trial court erred in denying its motion for reconsideration.

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PATEL, P.J. (*dissenting*).

I would conclude that there is a genuine issue of material fact whether the proprietary-function exception to governmental immunity is applicable in this matter. Accordingly, I respectfully dissent.

Summary disposition under MCR 2.116(C)(7) is proper when a claim is barred because of immunity granted under the law. *Moraccini v City of Sterling Heights*, 296 Mich App 387, 391; 822 NW2d 799 (2012). We must consider all documentary evidence in a light most favorable to the nonmoving party under MCR 2.116(C)(7). *Id.* "If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide." *Id.* (cleaned up). "But when a relevant factual dispute does exist, summary disposition is not appropriate." *Id.*

Under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.*, a governmental agency is generally immune from tort liability unless an exception applies. One such exception is the proprietary-function exception, which 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. . . . [MCL 691.1413]

Thus, to be deemed a proprietary function, an activity (1) "must be conducted primarily for the purpose of producing a pecuniary profit," and (2) "cannot normally be supported by taxes or fees." *Dextrom v Wexford Co*, 287 Mich App 406, 421; 789 NW2d 211 (2010) (cleaned up). In this case, the parties' dispute centers on whether the City of South Haven operates its beaches primarily to produce a pecuniary profit. Relevant considerations in determining whether a governmental agency's primary purpose was to produce a pecuniary profit include: (1) "whether a profit is actually generated," and (2) "where the profit generated by the activity is deposited and how it is spent." *Id*. (cleaned up). "If profit is deposited in the general fund or used on unrelated events, the use indicates a pecuniary motive[.]" *Herman v City of Detroit*, 261 Mich App 141, 145; 680 NW2d 71 (2004).

The City does not dispute that the beaches have consistently generated a profit from 2015-2020. Rather, it argues that the beach revenue was not used to fund any other capital improvements, expenses, or operations for the City. But the City produced limited financial information to support its position—it primarily relied on self-serving testimony and basic financial statements. Plaintiff's financial expert, David J. Hammel, identified a number of expenditures in the financial statements that were subjective in nature and could not be correlated to actual expenses incurred in managing the beaches. These expenditures were returned to the City's general fund through various fees, an optional payment in lieu of taxes transfers, and "other contractual services."

Michelle Argue, the City's finance director and assessor, testified that the beach fund was only used for beach-related services. She maintained that annual profits remain in the beach fund and are rolled into the next fiscal year. But when Argue was questioned about various figures included in the financial statements, she was unable to provide an explanation. For example, the City's statement of activities for the year ended June 30, 2020, reflects that "parks and beach," which is one of the City's "business-type activities,"[1] had $515,854 in expenses, collected $686,882 in charges for services, had $50,000 in operating grants and contributions, and a net revenue of $221,028. Argue did not know whether the expenses were strictly for beaches or if nonbeach parks were included in "parks and beach." Argue also could not explain the source of the $50,000 in operating grants and contributions. When Argue was asked whether the $221,028 net revenue stayed in the beach fund at the end of the year or whether an amount was transferred into the general fund, she responded, "I don't recall a specific summary."

[1] The statement identifies "business-type activities" as electric utility, water utility, wastewater utility, marina, and parks and beach. "Governmental activities" are identified as general government, public safety, public works, health and welfare, culture and recreation, and interest on long-term debt.

The 2020 year-end statement reflects a transfer of $680,804 from "business-type activities" to "governmental activities." Argue was asked about this transfer:

> *Q*. [A]t the very bottom there's Transfers/Internal Activities, $680,804. What is that?
>
> *A*. I don't recall what makes that.
>
> *Q*. Is there someone within the City that would know that was involved with the transfer that might know better than you?
>
> *A*. I don't know.
>
> *Q*. Okay. But from looking at this document you wouldn't know where it was transferred to or from?
>
> *A*. I know that administration fees would be involved with that.
>
> *Q*. Would you be able to say . . . how much of that 680,000, if any, came from the beach fund?
>
> *A*. I don't know.
>
> *Q*. Are you able to say that . . . the beach fund is not part of that amount?
>
> *A*. I don't recall.

Viewing this evidence and testimony in the light most favorable to plaintiff, a reasonable juror could conclude that the City's beach revenue is funding other governmental activities in the City

Argue also could not explain how the City's motor pool expenses were shared between the City's departments. She testified that the City used vehicles and equipment for the beaches, but stated that the vehicles have multiple uses for various tasks throughout the City. She did not know how many vehicles were used for the beaches or where the vehicles were used in the City each day. She further acknowledged that a vehicle may be used on the beach one day and in another department another day. The financial documents reflect that the motor pool fees fluctuated from $15,906 in 2017, $42,755.09 in 2018, $19,843 in 2019, $50,000.04 in 2020, and $18,478 in 2021. But, as Hammel testified, there was no explanation for the drastic fluctuation or how the fees were calculated. Hammel opined that the fees were subjective because "[s]omebody had to make a decision" as to the amount of fees to be charged, and there was no evidence presented to support the fee calculations. Given the subjective nature of these fluctuating fees, a reasonable juror could conclude that the beach revenue is funding the City's nonbeach-related motor pool expenses.

The financial documents include categories for "admin fees—general fund" and "police depart fees—general fund." Argue explained that the figures for those categories reflected the annual sums that were transferred from the beach fund to the pooled general fund for fees incurred

in administering the beach fund[2] and for police department personnel at the beaches. Argue claimed that the administrative fees and policing fees were strictly for beach-related services. However, Argue did not explain how those fees were calculated. Absent supporting documentation regarding the calculations, Hammel asserted that these "fees" were subjective. Given the subjective nature of these fees, a reasonable juror could conclude that the beach revenue is funding other governmental activities in the City.

Hammel identified another subjective figure in the City's financial documents—the "payment in lieu of taxes." Argue explained, "[B]ecause the properties are exempt, and otherwise if they were not owned by the government and exempt, then they would be taxed. So payments in lieu of taxes, essentially that, to cover what would be owed and taxed if it weren't exempt property." The financial documents reflect that the payment in lieu of taxes increased from $13,560 in 2017 to $21,958 in 2021. But there was no explanation or supporting documentation regarding the annual calculation. Further, Hammel opined that the payment was optional. Given the subjective nature of these optional "payments," a reasonable juror could conclude that the beach revenue is funding other governmental activities in the City.

There were several other arbitrary figures included in the financial documents. For example, there were charges for "other contractual services" of $130,684.01 in 2017, $106,587.78 in 2018, $148,931.29 in 2019, $56,736.72 in 2020, and $74,042.06 in 2021. However, the record does not reflect any explanation for these charges. There is also an unidentified liability of $47,648 "due to other funds" in 2019 and an unidentified transfer of $43,506 out of the beach fund into the general fund in 2020.

Jeffrey Bagalis, the City's accounting expert, provided no additional insight other than stating that Argue and the City's manager both testified that all of the fees and expenses were beach-related. In other words, because they stated it, it must be true.

A court "is not permitted to assess credibility, or to determine facts" in analyzing whether a genuine issue of material fact exists. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "Instead, the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists . . . ." *Id*. When necessary, a trial court may conduct an evidentiary hearing and make findings of fact and law to determine whether the proprietary-function exception applies, which is what the trial court was prepared to do in this case. *Dextrom*, 287 Mich App at 432. Viewing the financial documents and testimony in the light most favorable to plaintiff, I would conclude that there is a genuine issue

[2] Argue explained, "That's to cover the administrative work such as in the finance department that has to account for all the money and pay all the bills for the beach fund."

of material fact whether the City's operation of the beaches was conducted primarily to produce a pecuniary profit. Accordingly, I would affirm the trial court's denial of the City's motion for summary disposition under MCR 2.116(C)(7) and (10).

/s/ Sima G. Patel