STATE OF MICHIGAN

COURT OF APPEALS

JOHN CHEEK,

Plaintiff-Appellee/Cross-Appellant,

v

TOWNSHIP OF CLINTON, CLINTON TOWNSHIP FIRE DEPARTMENT and CLINTON TOWNSHIP FIRE CHIEF MICHAEL C. PHY,

Defendants-Cross-Appellees,

and

FIREFIGHTER JOHN DOE, a/k/a TIMOTHY DUNCAN,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
July 22, 2010

No. 289403
Macomb Circuit Court
LC No. 2008-000616-NZ

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

PER Curiam.

Defendant, Timothy Duncan, appeals as of right from an order denying defendants' motion for summary disposition on the gross negligence claim against him. Plaintiff cross-appeals as of right (1) an order granting summary disposition to defendants on all counts and claims (except for the gross negligence claim against defendant Duncan), and (2) an order denying his motion to amend Count I of his complaint and assert gross negligence claims against David McIntyre, the chief training officer of defendant Clinton Township Fire Department ("defendant Fire Department"), and John Shea, battalion commander of defendant Fire Department. For the reasons set forth in this opinion, we affirm the rulings made by the trial court.

I.

The events that give rise to the current action occurred on February 8, 2007. Plaintiff, who owned a Subway sandwich franchise, testified that he arrived at work on that day sometime between 8:00 and 9:00 a.m. At some point before the lunch rush began at 11:00 a.m., two

Clinton Township firemen, whose names plaintiff did not remember, "came in and asked to use the water spigot in the back." Plaintiff informed them that he did not know how to turn it on, but he would show them where the inside on/off valve was, "and if they could figure out how to turn it on, they're more than welcome to use it." Plaintiff then took the firefighters to the back of the store to show them where the on/off valves were on the inside wall, and told them, "I'm not sure which one turns it on." According to his deposition testimony, plaintiff did not walk outside with the firefighters to show them where the spigot was, and furthermore, he had never used the spigot nor seen a hose attached to the spigot. When he left the firefighters, they were still inside the back of the Subway, trying to figure out how to operate the on/off valve.

About three and a half hours after this encounter with the firefighters, plaintiff went to the door at the rear of the store to take out the garbage. According to plaintiff, when completing this task, he would typically "open the door with my right hand, drag the trash behind me with my left hand, and head straight towards the trash can." According to plaintiff, as he opened the door and dragged the trash bin behind him, "I take a half step out and I fall. . . . I just stepped out with my right foot and the next thing I know I was on the ground." When asked if he was looking forward when he exited through the back door, plaintiff responded, "no," because he was looking behind him, "looking for where I was going to grab the trash container." He acknowledged that he was not actually looking at the area where he was about to step. He did see the ice "all around" him after he fell, describing it as: ". . . a very clear sheet of ice. How thick it was, I don't know." He also did not know how wide the ice sheet extended. When he fell, most of his body was outside of the store, but a portion was still inside – from just below his shoulders to head. Thus, he did not believe he was in a good position to look at the ice that was on the sidewalk.

Defendant Duncan testified that he was responsible for training exercises that occurred on February 1, 2, and 8, 2007, at the former Ping On restaurant, located in the same shopping plaza as the Subway, wherein the team engaged in block wall breach training and jackhammer training. On the two prior training days, Duncan had access to an engine to get water, but when asked why, on February 8, 2007, he did not have access to an engine that could furnish the necessary water source, defendant Duncan explained: "what's coming to the scene is particular to whatever stations are coming for training that day. The first couple days it was I think – I believe Engine 3 that had the capacity to supply it. The middle days and the end days would have been other apparatus that don't have that capability." When he arrived at the training site on February 8, 2007, and began to set up, defendant Duncan realized that they were not going to have a proper water supply, "so I was going to check to see if we could, you know, get another source. Otherwise, if we weren't going to be able to get another source, my thought was it was going to have to be canceled." Defendant Duncan acknowledged that he then entered plaintiff's store to ask permission to use the spigot to provide a water source.

Daniel DeBeul testified that he was the owner of the store located next to plaintiff's store. A few hours prior to plaintiff's fall, DeBeul was sitting in his store in an area by the back door where he has a desk and television. He heard noise and saw the firemen hook up the hose to the spigot and then turn it on. At this point, DeBeul observed a fine mist start spraying toward his truck, and he described the mist as "a pretty good one." According to DeBeul, "I walked there to see, it was very cold, very cold wind chill factor, to see if it was running down the back of my truck to freeze the tailgate. I was going to move the truck [but] it wasn't. [The firefighter]

walked back over where they were doing some sort of training at the end building. They were going to tear it down anyway. He went about his business after he turned the water on and he went on his way."

DeBeul did not see plaintiff fall, but he heard him while sitting at a desk in the back. When plaintiff fell, DeBeul heard his body hit the ground, followed by moaning. DeBeul got up and saw plaintiff lying on the ground. Plaintiff then tried to crawl back in the building. DeBeul instructed plaintiff to wait while he went to tell the firefighters that plaintiff had fallen on the ice. According to DeBeul, "I even had to be careful when I walked over to get the firemen because it was so slippery in there. It was like a sheet of ice all the way from the spigot to the back of my truck. I mean, it was hard to see. It was like black ice is, because of the mist it was [a] real thin coating of ice."

Firefighter Stockwell, who was participating in the training exercise, testified that as he was helping plaintiff after the fall, either he or one of the other firefighters asked what happened, and plaintiff "said he should have been more careful, that he knew that there was some ice back there when he was taking the trash out." Stockwell did not, however, prepare any sort of incident report that memorialized this statement.

Plaintiff filed a complaint against defendants, alleging counts of gross negligence, ordinary negligence, intentional nuisance, and nuisance per se. On October 20, 2008, defendants filed a motion for summary disposition, pursuant to MCR 2.116(C)(7), arguing that (1) the ordinary negligence, intentional nuisance, and nuisance per se counts should be dismissed because the training in which the firefighters were engaged was a government function, (2) no gross negligence exception to governmental immunity can be asserted against a governmental agency, (3) the gross negligence claim against defendant Chief Phy cannot be sustained because he did not owe plaintiff a duty, and (4) the alleged conduct of the individual defendants was not the proximate cause of plaintiff's injury.

On November 17, 2008, the trial court heard arguments on defendants' motion for summary disposition and plaintiff's motion to amend the complaint. The trial court ruled that it was granting the motion in part and denying it in part, explaining:

> I'm going to grant the motion, find that training exercise is a governmental function for a fire department. . . . [A]nd hold that government immunity bars all claims except for the gross negligence claim except against the individual firefighter, Mr. Duncan. I don't know if the complaint needs to be amended on that point.
>
> As it relates to the gross negligence claim, there is conflicting testimony about whether the hose was misting when it was hooked up. I think there is a factual dispute there. There's testimony on both sides. In light of the weather conditions, there was no discussion of this, but apparently the spigot was fairly close to the door. It obviously created a dangerous situation that resulted in the plaintiff's injuries. I believe there are substantial issues with the claim, as [defendants' counsel] has highlighted, including whether . . . plaintiff was contributorily negligent, not watching where he was going. There also may be an issue of

> whether the plaintiff had prior knowledge that the hose, or that the spigot was having an issue, and therefore, would have been on notice of that issue.
>
> I'm going to permit the amendment to the extent it's necessary to clarify the gross negligence claim. I'm not persuaded that the complaint should be amended to include the new defendants. I also believe that any claim against them would be barred by . . . governmental immunity. So I will not allow additional claims against the training chief [McIntyre] and the at-the-time battalion commander Shea to be asserted, because they were in a supervisory role and their actions are protected by the immunity.

II.

Defendant Duncan argues that the trial court erred in denying his motion for summary disposition because plaintiff cannot establish that defendant Duncan's actions amounted to gross negligence and were the proximate cause of plaintiff's injuries.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), which "provides that a party may move for summary disposition on the ground that governmental immunity bars the claim." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 278; 769 NW2d 234 (2009). This Court reviews "the trial court's ruling on a motion for summary disposition de novo. Governmental immunity is a question of law that is also reviewed de novo on appeal." *Kendricks v Rehfield*, 270 Mich App 679, 681-682; 716 NW2d 623 (2006). When a motion is brought on the grounds of governmental immunity, this Court considers "all documentary evidence filed or submitted by the parties. A plaintiff can overcome such a motion for summary disposition by alleging facts that support the application of an exception to governmental immunity." *Burise v City of Pontiac*, 282 Mich App 646, 650; 766 NW2d 311 (2009). "'[A] court must accept as true the plaintiff's well-pleaded factual allegations and construe them in the plaintiff's favor. . . . If no material facts are in dispute, 'and reasonable minds could not differ on the legal effect of those facts,' whether the plaintiff's claim is barred is a question for the court as a matter of law." *Gadigian v City of Taylor*, 282 Mich App 179, 181; 774 NW2d 352 (2008), quoting *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997). The claims in this case involve the governmental immunity act, MCL 691.1401 *et seq.* "This Court also reviews de novo questions of statutory interpretation." *State Farm Fire & Cas Co v Corby Energy Servs*, 271 Mich App 480, 483; 722 NW2d 906 (2006).

"The governmental immunity act provides 'broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function.'" *Linton v Arenac County Road Commission*, 273 Mich App 107, 111; 729 NW2d 883 (2006), quoting *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 595; 363 NW2d 641 (1984). Under the act, governmental employees are immune from suit "if they were acting within the scope of their authority, were 'engaged in the exercise or discharge of a governmental function,' and their conduct did not 'amount to gross negligence that is the proximate cause of the injury or damage.'" *Miller v Lord*, 262 Mich App 640, 644; 686 NW2d 800 (2004), quoting MCL 691.1407(2)(b) and (c).

Defendant Duncan argues that his actions do not amount to gross negligence because (1) there is no evidence that, before the hose connection was made, defendant Duncan knew there was a defect in either the spigot or the hose itself, (2) plaintiff was in charge of the premises (a Subway sandwich shop) and had control over the spigot, (3) although a nearby business owner, Daniel DeBeul, observed the mist coming from the spigot, he did not bring this to the attention of any firefighter, (4) there is no evidence that the misting was of such a nature that it could have caused ice to form where plaintiff fell, (5) plaintiff was the proximate cause of his own injuries, and (6) the ice was an open and obvious danger.

Although defendant Duncan does not dispute that he owed plaintiff a duty, he nevertheless argues that plaintiff had "control" over the spigot and DeBeul "failed" to warn defendant Duncan that the Spigot was leaking. The governmental immunity statute "does not create a cause of action and . . . a plaintiff must first establish that the governmental employee defendant owed a common-law duty to the plaintiff." *Rakowski v Sarb*, 269 Mich App 619, 627; 713 NW2d 787 (2006). "It is axiomatic that the tort of negligence consists of four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. 'Duty' is a legally recognized obligation to conform to a particular standard of conduct toward another so as to avoid unreasonable risk of harm." *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009) (internal citations omitted). Thus, if defendant Duncan owed no duty to plaintiff, then plaintiff's gross negligence claim is unenforceable as a matter of law. *Id*.

Plaintiff testified that he had never used the spigot before, and therefore, he would not have known that it had a tendency to leak. In addition, although DeBeul testified that he had noticed the spigot leaking on prior occasions, he specifically stated that these instances occurred prior to plaintiff's ownership of his store. Finally, DeBeul testified that the misting started as soon as defendant Duncan turned the water on, and therefore, DeBeul would have no reason to warn defendant Duncan. Accordingly, Duncan is correct in his assertion on appeal that the issue is not one of duty, but whether Duncan's actions amounted to gross negligence. "The determination whether a governmental employee's conduct constituted gross negligence that proximately caused the complained-of injury under MCL 691.1407 is generally a question of fact, but, if reasonable minds could not differ, a court may grant summary disposition." *Briggs v Oakland County*, 276 Mich App 369, 374; 742 NW2d 136 (2007). "Evidence of ordinary negligence does not create a question of fact regarding gross negligence." *Love v Detroit*, 270 Mich App 563, 565; 716 NW2d 604 (2006). "'Gross negligence' means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Odom v Wayne County*, 482 Mich 459; 760 NW2d 217 (2008), quoting MCL 691.1407(7)(a). "The plain language of the governmental immunity statute indicates that the Legislature limited employee liability to situations where the contested conduct was substantially more than negligent." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Gross negligence involves "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004).

In this case, if the water leaked after defendant Duncan left plaintiff's store, perhaps his actions could be considered merely negligent or not negligent at all if the spigot was faulty. In

this instance, however, DeBeul testified that the misting began immediately after defendant Duncan turned on the spigot, and furthermore, defendant Duncan walked away from the scene without taking any precautionary measures such as putting down salt or sand. Although defendant Duncan insisted that he saw no misting, should a fact finder believe DeBeul's testimony, coupled with the undisputed fact that temperatures were well below freezing on that day, it would be possible to characterize defendant Duncan's actions as "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks," 263 Mich App at 90. Accordingly, having considered all the evidence presented by the parties on appeal, we concur with the trial court that plaintiff created a question of fact as to whether the actions of Duncan constituted gross negligence.

The more difficult question presented by Duncan to this Court involves the issue of whether Duncan's actions constituted the proximate cause of plaintiff's injuries. Pursuant to MCL 691.1407(2)(c): "The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage." Our Supreme Court has instructed us that: "The phrase 'the proximate cause' is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury." *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). "Further, recognizing that 'the' is a definite article, and 'cause' is a singular noun, it is clear that the phrase 'the proximate cause' contemplates *one* cause." *Robinson*, 462 Mich at 462. See also, *Cooper v Washtenaw County*, 270 Mich App 506, 509; 715 NW2d 474, lv den 477 Mich 953 (2006).

Duncan argues that plaintiff testified that he was looking behind him toward the trash bin that he was dragging, instead of looking at the ground in front of him when he stepped out of the rear exit of his business. Plaintiff countered this assertion during oral argument by pointing to evidence that plaintiff had traversed this route on many occasions, and that "but for" the seemingly black ice in his path, would have done so again without incident. The record also reveals that even though it was winter, there had only been a trace of precipitation a few days prior to the incident, and thus, no reason for plaintiff to be on notice that icy conditions could be present. Moreover, although plaintiff did notice the ice after he fell, he described it as "a very clear sheet of ice. How thick it was I don't know." Similarly, DeBeul explained, "I even had to be careful when I walked over to get the firemen because it was so slippery in there. It was like a sheet of ice all the way from the spigot to the back of my truck. I mean, it was hard to see. It was like *black ice*, because of the mist it was [a] real thin coating of ice." These factors, coupled with plaintiff's deposition testimony that as he was exiting the building in a way that he did not believe was sufficient to notice the ice, leads us to conclude that even if plaintiff would have examined his route prior to embarking on it, a question of fact exists as to whether he would have seen the ice.

Furthermore, the testimony regarding the ice undercuts defendant Duncan's argument that the hazard was "open and obvious." Plaintiff is correct in pointing out that the instant action does not involve premises liability, and even if it did, defendant Duncan's position is incorrect. "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *O'Donnell v Garasic*, 259 Mich App 569, 573; 676 NW2d 213 (2003). This duty generally does not require the removal of open and obvious dangers. *O'Donnell*, 259 Mich App at 574. Black ice, however, is not an open and obvious danger: "The overriding principle behind the many

definitions of black ice is that it is either invisible or nearly invisible, transparent, or nearly transparent. Such a definition is inherently inconsistent with the open and obvious doctrine. Consequently, we decline to extend the [open and obvious] doctrine to black ice without evidence that the black ice in question would have been visible on casual inspection prior to the fall or other indicia of a potentially hazardous condition." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008).

As was the case in *Slaughter*, a question of fact exists as to whether plaintiff would have been on notice that ice had formed. As previously stated, there had been no signs of precipitation during the date in question, or on any day immediately preceding the date of injury. Testimony also indicated that whatever ice did exist at the time of plaintiff's fall appeared as "black ice," which had formed in a very short time frame and as noted by the trial court was located immediately outside of plaintiff's door. These factors could lead a fact finder to conclude that in addition to the plaintiff not being able to see the ice, he was also not on notice of the existence of ice.

Viewing the evidence presented in the light most favorable to plaintiff, we must conclude that Duncan's actions created the ice upon which plaintiff fell. We must also conclude that questions of fact remain as to whether plaintiff could have seen the ice, or if he had notice of the existence of ice outside his doorway. Thus, we are left with questions of fact as to whether the ice constituted the proximate cause of plaintiff's fall and subsequent injuries or whether plaintiff's actions contributed to his fall and were the proximate cause of his subsequent injuries. Such questions of fact are to be determined by the trier of fact and not this Court. *Briggs*, 276 Mich App at 374. Consequently, for all of these reasons, the trial court did not err in denying defendants' motion for summary disposition on the issue of whether defendant Duncan's actions were grossly negligent and the proximate cause of plaintiff's injuries.

III.

Plaintiff first argues on cross-appeal that the trial court erred in granting summary disposition to all defendants on all counts except for the gross negligence count against defendant Duncan, because firefighter training is not a governmental function.

Pursuant to MCL 691.1407(1), "[e]xcept as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." Defendant Clinton Township, as a "political subdivision," MCL 691.1401(b), is a "governmental agency" for purposes of governmental immunity. MCL 691.1401(d). Therefore, defendant Township, as well as defendant Fire Department,[1] are immune from tort liability if the tort claim arises from the exercise or discharge of a governmental function, unless a statutory exception applies. MCL 691.1407(1).

[1] As explained in *Omelenchuk v City of Warren*, 466 Mich 524; 647 NW2d 493 (2002), where the plaintiffs brought suit against the city of Warren and the city of Warren Fire Department, the Court stated, "[i]t is agreed that the fire department is not a separate entity from which plaintiffs
(continued…)

Plaintiff does not argue that a statutory exception applies, but rather, he argues that "the function of a fire department is to fight fires and respond to emergencies, not train its employees. Training employees is not a governmental function . . . ." We find this argument unpersuasive for several reasons. First, a "'[g]overnmental function' is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). The definition of "governmental function," "according to well-established case law . . . 'is to be broadly applied and requires only that there be *some* constitutional, statutory or other legal basis for the activity in which the governmental agency was engaged.'" *Ward v Michigan State University (On Remand)*, __ Mich App __; __ NW2d __ (Docket No. 281087, issued January 7, 2010), slip op, p 5, quoting *Harris v Univ of Michigan Bd of Regents*, 219 Mich App 679, 684; 558 NW2d 225 (1996) (emphasis in original). In addition, this Court looks "to the general activity involved rather than the specific conduct when the alleged injury occurred." *Id*.

Next, in a case cited by both parties to this appeal, *Keiswetter v Petoskey*, 124 Mich App 590; 335 NW2d 94 (1983), this Court stated, "we hold here that the training of fire fighters involves a governmental function." *Id*. at 595. Although this case was decided prior to the amendment of the governmental immunity act in 1986, 1986 PA 175, statutes and more recent authority support this conclusion. Townships are authorized by statute to establish and maintain fire departments, MCL 41.806(a), and this Court has determined that "operation of a fire department . . . is clearly a governmental function," *Curtis v City of Flint*, 253 Mich App 555, 559 n 1; 655 NW2d 791 (2002), citing *Omelenchuk v City of Warren*, 466 Mich 524; 647 NW2d 493 (2002). There is also no doubt that training is inherent in the operation of a fire department. We note that the legislature has established the Firefighters Training Council Act, MCL 239.361 *et seq*., which requires that each organized fire department designate at least one training officer or training coordinator, the name of who must be submitted to the training council. MCL 29.369(2). The act further provides that the council shall, inter alia, approve firefighter training schools, MCL 29.369(1)(b), and distribute training materials to local fire departments upon request, MCL 29.369(3). Finally, the act establishes a firefighters training fund to fulfill the purposes of the act. MCL 29.373. Thus, the act clearly intends that fire departments will provide training to their employees. Accordingly, the trial court did not err in determining that firefighter training is a governmental function.

Plaintiff next argues that the trial court abused its discretion in denying his motion to amend Count I of his complaint to add McIntyre and Shea as named defendants because, by failing to supervise the training program, the conduct of McIntyre and Shea was grossly negligent.

This Court "reviews a trial court's decision regarding a party's motion to amend its pleadings for an abuse of discretion. Thus, we defer to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion." *Wormsbacher v Phillip R Seaver Title Co*, 284 Mich App 1, 8; 772 NW2d 827 (2009). In *Wormsbacher*, 284 Mich App at 8-9, this Court held:

(…continued)

can recover. Any recovery would be from the city of Warren." *Id.* at 526 n 3.

> "MCR 2.118(A) sets forth the requirements for amendment of pleadings. Specifically, MCR 2.118(A)(2) provides that, '[e]xcept as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.' Because a court should freely grant leave to amend a complaint when justice so requires, a motion to amend should ordinarily be denied only for particularized reasons. Reasons that justify denying leave to amend include undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the defendant, or futility." *Id.* at 8 (internal citations omitted). "An amendment would be futile if it is legally insufficient on its face, and the addition of allegations that merely restate those allegations already made is futile."

As discussed above, under the governmental immunity act, government employees are immune from suit "if they were acting within the scope of their authority, were 'engaged in the exercise or discharge of a governmental function,' and their conduct did not 'amount to gross negligence that is the proximate cause of the injury or damage.'" *Miller*, 262 Mich App at 644, quoting MCL 691.1407(2)(b) and (c). "The phrase 'the proximate cause' is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury." *Robinson*, 462 Mich at 459. "[T]he phrase 'the proximate cause' contemplates *one* cause." *Id*. at 462. We concur with defendants when they argue that McIntyre's and Shea's alleged negligent supervision of defendant Duncan cannot be *the* proximate cause of plaintiff's injury. Rather, the most "immediate, efficient, and direct cause preceding" plaintiff's injury was, as discussed above and to be determined by the trier of fact, either defendant Duncan allowing a spigot to leak in sub-freezing temperatures, thereby forming what was described as a sheet of "black ice," or plaintiff's failure to look prior to exiting the building. Accordingly, adding McIntyre and Shea as named defendants would be futile and the trial court did not abuse its discretion in so ruling.

Finally, plaintiff argues on appeal that the trial court erred in granting summary disposition on the nuisance per se count against all defendants because defendant Duncan's actions in attaching the hose to the spigot, turning the water on, and walking away, created a condition that resulted in a nuisance per se.

As noted above, this Court reviews "the trial court's ruling on a motion for summary disposition de novo." *Kendricks*, 270 Mich App at 681-682. "The governmental tort liability act . . . provides only five exceptions to governmental immunity: the 'highway exception,' MCL 691.1402, the 'motor vehicle exception,' MCL 691.1405, the 'public building exception,' MCL 691.1406, the 'proprietary function exception,' MCL 691.1413, and the 'governmental hospital exception,' MCL 691.1407(4)." *Conmy v Department of Transportation*, 272 Mich App 138, 140; 724 NW2d 297 (2006). "There is a "well-settled principle that the grant of immunity afforded governmental agencies in MCL 691.1407(1) is broad, and that the statutory exceptions to that immunity are to be narrowly construed." *Curtis*, 253 Mich App at 56. "[I]t remains unclear whether a nuisance per se exception to governmental immunity exists in Michigan." *Haaksma v City of Grand Rapids*, 247 Mich App 44, 56; 634 NW2d 390 (2001).

"[A] nuisance per se is an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained." *Li v Feldt (After Second Remand)*, 439 Mich 457, 476-477; 487 NW2d 127 (1992)

(opinion by Cavanagh, C.J.). "[N]uisance per se is not predicated on the want of care, but is *unreasonable by its very nature*." *Id.* at 477 (emphasis added). The *Li* Court found that neither the operation of a traffic light nor the maintenance of a holding pond at issue in that case, "can be said to constitute an intrinsically unreasonable or dangerous activity, without regard for care or circumstances. To the contrary, both activities serve obvious and beneficial public purposes and are *clearly capable of being conducted in such a way as not to pose any nuisance at all*." *Id.* (emphasis added.) The Court explained that "[t]he very essence of the claims," was that "the underlying activities became unreasonable and dangerous under the particular circumstances of each case because the defendants allegedly exercised improper or inadequate care. Thus, regardless of whether nuisance per se might qualify as an exception to governmental immunity, neither [situation] presents a colorable claim of nuisance per se." *Id.* Likewise, in the case at bar, the operation of a spigot and hose is not an "intrinsically unreasonable or dangerous" activity, but rather, it can be "conducted in such a way as not to pose any nuisance at all." *Li*, 439 Mich at 477. Plaintiff's claim relates to the care with which defendant Duncan operated the hose and spigot, and therefore, the trial court did not err in dismissing the nuisance per se claim against all defendants.

Affirmed. Neither party having prevailed, we do not assess costs.

/s/ Richard A. Bandstra
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro