

STATE OF MICHIGAN
COURT OF APPEALS

ALBERT GARRETT, GREGORY DOCKERY
and DAN SHEARD,

UNPUBLISHED
August 19, 2008

Plaintiffs-Appellees,

V

CITY OF DETROIT, DETROIT CITY COUNCIL
and DETROIT BUILDING AUTHORITY,

Nos. 269809; 273463
Wayne Circuit Court
LC No. 05-521567-CL

Defendants-Appellants.

Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

In Docket No. 269809, defendants appeal as of right the trial court's order denying their motion for summary disposition based on governmental immunity and granting plaintiffs' request for a preliminary injunction. In Docket No. 273463, defendants appeal on delayed leave granted¹ the trial court's denial of their motion for summary disposition based on plaintiffs' lack of standing and the preemption of plaintiffs' claims by state law and plaintiffs' collective bargaining agreements (CBAs). We reverse the order denying summary disposition to defendants based on governmental immunity and we remand for entry of a judgment in defendants' favor, consistent with this opinion.

I. Facts and Procedural History

Plaintiffs filed suit based on defendants' alleged violation of the city of Detroit's Privatization Ordinance. The ordinance is designed to allow the privatization of public services while preserving the jobs of city employees and maintaining the rights of city residents. Detroit Ordinances, § 18-5-100 *et seq.* Prior to soliciting private bids for service contracts, the requesting city department or official must prepare a report "detailing the need for such services" and submit the report for the city council's consideration and approval. Detroit Ordinances, §§ 18-5-103, 18-5-104(a).

¹ *Garrett v Detroit*, unpublished order of the Court of Appeals, entered November 7, 2006 (Docket No. 273463).

The Privatization Ordinance allows city employees whose jobs will be terminated by the privatization of a service to compete to provide the service in a “last-chance bid” provision.

Upon approval of the City Council of a request to solicit bids for a proposed service contract, the regular City employees who will be affected by the proposed service contract, and their collective bargaining representative, shall be afforded a reasonable opportunity to organize, prepare and submit a bid, whether a quote or other response, to provide the subject services after having been provided all of the direct and indirect costs for the provision of such services by the City. Any bid prepared by such affected employees shall be the last bid submitted after the affected employees or the collective bargaining representative have had an opportunity to view a list of all companies submitting bids. [Detroit Ordinances, § 18-5-104(b).]

Ultimately, the city council must approve of any contract that results in the privatization of a city service by a two-third-majority vote. The city council must certify that it “has determined that the availability and quality of the subject services would likely equal or exceed the quality of the subject services that could be provided by regular City employees,” including cost and efficiency considerations. Detroit Ordinances, § 18-5-105.

In enacting the Privatization Ordinance, the city granted affected employees or their collective bargaining representatives the right to pursue a “private right of action” in the circuit court but “only after the City Council has approved a contract.” In such a lawsuit, the court must determine whether the city substantially complied with the Privatization Ordinance. Detroit Ordinances, § 18-5-109. Monetary relief is limited to reimbursement to “affected employees for lost wages due to displacement or termination as a direct result of letting the contract.” *Id.*

Plaintiffs filed a class action lawsuit and contended that the city had privatized various public services without complying with the last-chance bid procedure and without voting to waive the ordinance’s requirements. Defendants filed a motion for summary disposition asserting that (1) plaintiffs’ claims were barred by governmental immunity, (2) plaintiffs lacked standing to file a private cause of action under the Privatization Ordinance, and (3) plaintiffs’ claims were preempted by the Public Employee Relations Act (PERA), MCL 423.201 *et seq.*, and the employees’ CBAs with the city. The trial court denied defendants’ motion on all grounds and defendants appealed to this Court.

II. Governmental Immunity

A. Standard of Review

We review a trial court’s determination regarding a motion for summary disposition *de novo*. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). Defendants based their motion for summary disposition on MCR 2.116(C)(8) and MCR 2.116(C)(10); however, summary disposition based on governmental immunity is properly raised under MCR 2.116(C)(7). 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.” *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). In

making this determination, well-pleaded allegations are accepted as true and construed in favor of the nonmoving party. *Dampier v Wayne Co*, 233 Mich App 714, 720; 592 NW2d 809 (1999).

B. Analysis

1. Plaintiffs' Claim Sounds in Tort

The trial court denied defendants' motion for summary disposition after determining that plaintiffs' claims sound in contract. Thus, the trial court concluded defendants were not entitled to governmental immunity. We disagree.

First, plaintiffs' claim is not based in contract. The Privatization Ordinance does not create a contract between the city and its employees. There is a "strong presumption that statutes do not create contractual rights." *Studier v Michigan Pub School Employees' Retirement Bd*, 472 Mich 642, 661; 698 NW2d 350 (2005). By enacting a statute, the legislative body "merely declares a policy to be pursued until the legislature shall ordain otherwise." *Id.* (citations omitted). This premise is supported by the fact that the Legislature's main function is to enact laws to manage government affairs, not to enter into contracts. *Studier, supra* at 661.

To overcome the strong presumption that a statute does not create a contractual right, this Court must first look to the language of the statute. The statutory language must clearly reveal the Legislature's intent to be contractually bound by a statute by "plain" language that is "susceptible of no other reasonable construction." Certain phrases provide strong evidence that the Legislature intended to create a contractual right, such as expressly stating that a statute amounts to a written contract on behalf of the state, or using words such as "contract," "covenant," or "vested rights." *Studier, supra* at 662-663. Absent express language creating a contractual right, a court may also look for language allowing amendment of the rights conferred by the statute, which suggests that the Legislature did not intend to create a contractual right. *Id.* The court may also look to the "circumstances of a statute's passage" to determine the Legislature's intent. *Id.* at 663.

The plain language of Detroit Ordinances, § 18-5-104(b) does not create a contract between the city and its employees. The Privatization Ordinance reflects the city's policy to preserve the jobs of municipal employees, while making city government more cost efficient. The ordinance purports to create a procedure to meet that goal. Subsection 104(b) confers on city employees and their collective bargaining representatives the right to submit a "last-chance bid" in the competitive bidding process affecting a Detroit service contract. While the language of that subsection imposes a mandatory duty on the city to comply, the language does not create a contract between the city and its employees.

Plaintiffs further assert that their claims are contractual in nature because they are based on the employment relationship and amount to claims for wrongful separation. Plaintiffs generally titled their claims as one for "lost wages" and one for "equitable relief." The trial court reasoned that plaintiffs' claims could either be for breach of an employment contract or tortious interference with a contractual relationship. However, plaintiffs' contract claim is based on defendants' violation of a duty purportedly found in the Privatization Ordinance. Thus, plaintiffs' claim is not a contract claim at all but rather it is a claim sounding in tort that arises from an alleged ordinance violation.

Claims against a governmental entity that sound in tort must be pled in avoidance of governmental immunity. *McDowell v Detroit*, 264 Mich App 337, 355-356; 690 NW2d 513 (2004), rev'd in part on other grounds 477 Mich 1079; 729 NW2d 227 (2007). In *McDowell*, *supra* at 341-342, the plaintiff, a resident in public housing whose family was killed by faulty electrical wiring, raised several allegations based on violations of the lease agreement. This Court found that the plaintiff's "contract" claims were merely "recapitulations" of her tort claims based on the negligence of the public entity in maintaining the premises. *Id.* at 355. The same is true in this case. Plaintiffs allege that defendants violated the Privatization Ordinance, a tort claim, and allege that the violation amounted to a breach of an employment contract.

2. The Privatization Ordinance Does Not Defeat the Governmental Tort Liability Act

A governmental entity may not create a cause of action against itself in violation of the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.* In *Mack v Detroit*, 467 Mich 186, 196; 649 NW2d 47 (2002), superseded in part on other grounds *Costa v Community Emergency Med Services, Inc.*, 475 Mich 403; 716 NW2d 236 (2006), the Supreme Court affirmatively found that a city cannot create a tort cause of action against itself in contravention of governmental immunity unless the Legislature has expressly authorized such a cause of action. In *Mack*, the plaintiff retired from the Detroit Police Department due to continued sexual orientation discrimination. *Id.* The plaintiff subsequently filed suit for intentional infliction of emotional distress and alleged that the city violated § 2 of the Detroit City Charter, which prohibits discrimination based on sexual orientation. *Id.* The Supreme Court determined that the plaintiff failed to raise a claim within a statutory exception to governmental immunity. *Id.* The Court found that a plaintiff may raise a claim under the state Civil Rights Act (CRA) without pleading a claim within a statutory exception. However, the CRA does not provide protection from discrimination based on sexual orientation. *Id.* at 195-196.

Here, the City of Detroit cannot create a cause of action under the Privatization ordinance unless the state legislature has expressly authorized such a claim. Since no such legislative authority exists, plaintiffs' claim must fail as a matter of law.

Our dissenting colleague disagrees with our conclusion, reasoning that the legislature through the Bidders on Public Works Act (BPWA), MCL 123.501, has indeed authorized the private right of action found in the Privatization Ordinance. We reject this reasoning for several reasons. Initially, we note that neither the trial court nor the learned trial counsel for plaintiffs raised this argument. Generally, an issue is not properly preserved if it is not raised before and addressed and decided by the trial court. *Polkton Twp v Pellegroni*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Thus, this issue is unpreserved and need not be addressed by the appellate court. *Id.* Further, we do not read the BPWA as a statute that creates a cause of action in tort. Rather, the act simply gives parties who believe themselves to be aggrieved by the public bidding process an appeal by right, whether to the State Supreme Court or otherwise, which would permit judicial review of the bidding process to insure compliance with the state statute. Last, even if the BPWA is deemed to create a tort cause of action, that fact that the Detroit Privatization Ordinance far exceeds the scope of the BPWA is fatal to plaintiffs' claim. In *Mack*, *supra*, the state legislature expressly authorized tort actions for discrimination under our Civil Rights Act. Yet, this express authorization was not sufficient to permit the City of Detroit to create a civil rights ordinance that deviated from the state act. Detroit was not permitted in *Mack* to define types of discrimination not expressly proscribed by our state Civil Rights Act. Pursuant

to *Mack*, the City of Detroit lacks authority to create a cause of action that exceeds the scope of the appeal by right process defined under the Bidders on Public Works Act.

C. Defendants' Remaining Arguments on Appeal

Having concluded that defendants are entitled to judgment as a matter of law pursuant to the Governmental Tort Liability Act, we decline to address defendants' remaining arguments on appeal.

III. Conclusion

We reverse the order of the trial court denying summary disposition to defendants based on governmental immunity and we remand for entry of a judgment in defendants' favor, consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra