STATE OF MICHIGAN

COURT OF APPEALS

ALBERT GARRETT, GREGORY DOCKERY and DAN SHEARD, Plaintiffs-Appellees, v CITY OF DETROIT, DETROIT CITY COUNCIL and DETROIT BUILDING AUTHORITY, Defendants-Appellants.	UNPUBLISHED August 19, 2008 Nos. 269809; 273463 Wayne Circuit Court LC No. 05-521567-CL

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

FORT HOOD, J. (*dissenting*.).

I respectfully dissent. I would affirm the trial court's order denying defendant's motion for summary disposition based on governmental immunity and granting plaintiffs' request for a preliminary injunction.

Review of a trial court's determination regarding a motion for summary disposition is de novo. *Feyz v Mercy Memorial Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). Although defendants moved for summary disposition based on MCR 2.116(C)(8) and MCR 2.116(C)(10), 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. *Burton v Reed City Hosp Corp*, 471 Mich 745, 757; 691 NW2d 424 (2005); MCR 2.116(G)(5). When reviewing a motion based on MCR 2.116(C)(7), 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).

The defense motion for summary disposition was denied when the trial court determined that plaintiffs' claims sound in contract and, therefore, avoided the application of governmental immunity. I would affirm, albeit on other grounds.

In *Mack v Detroit*, 467 Mich 186, 190-192; 649 NW2d 47 (2002), superseded in part on other grounds *Costa v Community Emergency Med Services, Inc*, 475 Mich 403; 716 NW2d 236 (2006), the female plaintiff, a police officer, attained the status of lieutenant and held various positions in the department. While employed as the acting inspector of the sex crimes unit, the plaintiff alleged that she was repeatedly propositioned by her male supervisors for sex. The

plaintiff rebuffed the sexual advances, partly because of her sexual orientation as a lesbian, and complained to her superiors about the unwelcome conduct. She asserted that her superiors refused to take any action, and consequently, she endured additional discrimination and harassment. The plaintiff alleged that she was assigned a desk job answering telephones and was prohibited from participating in investigations. The plaintiff then filed suit, alleging intentional infliction of emotional distress and violations of the city of Detroit's charter that precluded discrimination on the basis of sex and sexual orientation. Ultimately, the Supreme Court concluded that 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*:

> Plaintiff contends that the charter expressly creates a private cause of action for sexual orientation discrimination. However, whether the charter attempted to create a private cause of action for sexual orientation discrimination is an irrelevant inquiry because we hold that the charter *could not* create a cause of action against the city without contravening state governmental immunity law.
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> Const 1963, art 7, § 22 governs the authority of a city to enact a charter:
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> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, *subject to the constitution and law*. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section. [Emphasis added.]
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> Thus, although art 7, § 22 grants broad authority to municipalities, it clearly subjects their authority to constitutional and statutory limitations.
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> One such statutory limitation involves governmental immunity. In the governmental tort liability act (GTLA), the Legislature expressly stated that "[e]xcept as otherwise provided in this act, a governmental agency is immune from tort liability if [it] is engaged in the exercise or discharge of governmental function." MCL 691.1407(1). Accordingly, a governmental agency is immune unless the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government. The GTLA allows suit against a governmental agency in only five areas. However, there are other areas outside the GTLA where the Legislature has allowed specific actions against the government to stand, such as the Civil Rights Act. Further, municipalities may be liable pursuant to 42 USC 1983. *Monell v New York City DSS*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978).
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> However, none of the exceptions where a suit is allowed against the government can be read to allow suit for sexual orientation discrimination. Likewise, no statute grants governmental agencies the authority to create an immunity exception for sexual orientation discrimination or waive immunity in

> the area of civil rights. Notably, the CRA, which makes a municipality liable for specific civil rights violations, neither provides a cause of action for sexual orientation discrimination nor grants municipalities the authority to create one. MCL 37.2101 *et seq.* Moreover, the CRA limits complaints to causes of action for violations of the act itself:
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> > A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both. [MCL 37.2801(1) (emphasis added).]
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> In sum, without some express legislative authorization, the city *cannot* create a cause of action against itself in contravention of the broad scope of governmental immunity established by the GTLA. No such legislative act has recognized sexual orientation discrimination claims. Accordingly, this Court declines to circumvent the limitations placed on a municipality by the Legislature and recognize a cause of action against the city for sexual orientation discrimination. [*Mack, supra* at 193-197 (footnotes omitted).]

Relying on *Mack, supra*, defendant asserts that this case falls within the parameters of governmental immunity. However, review of Michigan law reveals that the Legislature "has allowed specific actions against the government to stand" in the context of bids. In the Bidders on Public Works Act (BPWA), MCL 123.501 *et seq*,[1] the Legislature has expressly authorized a cause of action against a municipality for the failure to follow the procedures of a competitive bidding process. The Legislature has granted municipalities the power to enter into competitive bidding with private entities to provide certain public services. MCL 123.501. The governmental entity accepting the bids may rate the bidders "according to their experience, equipment and resources and be furnished with proposals, plans and specifications for only such type and quantity of work as their qualifications as outlined in section one of this act would warrant." MCL 123.503. The Legislature created a cause of action against the governmental entity as follows:

> Any person feeling himself aggrieved at the determination of any such officer, board, commission, committee or department shall have the right of appeal by mandamus, certiorari or other proper remedy to the supreme court of the state of Michigan, or *in any proper case to any circuit court having jurisdiction*. [MCL 123.506 (emphasis added).]

Defendant's contention, that this factual scenario is governed by the *Mack* decision, is not supported by the Legislature's authorization of a cause of action that arises out of the bidding process. Therefore, in my view, plaintiffs may maintain an action for a violation of Detroit

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[1] Although this statute was not raised below, issues of statutory construction present questions of law that are reviewed de novo. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). Issues of law for which all necessary facts have been presented may be addressed on appeal. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997).

Ordinances, § 18-5-104(b). The trial court reached the correct result in denying defendants' motion for summary disposition based on governmental immunity, but for the wrong reason. Under such circumstances, the trial court's ruling may be affirmed. *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005).

With regard to Docket No. 273463, I would also affirm the trial court in part and remand. Defendants failed to make and support the motion for summary disposition with regard to the claim of preemption by the collective bargaining agreements and the Public Employee Relations Act (PERA), MCL 423.210 *et seq*. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). With regard to the issue of standing, plaintiff Garrett's involvement in the litigation as a taxpayer was insufficient because it failed to assert a substantial interest detrimentally affected in a manner different from the citizenry at large. *Moses, Inc v SEMCOG*, 270 Mich App 401, 414; 716 NW2d 278 (2006). However, plaintiffs Dockery and Sheard alleged standing based not only as taxpayers, but also as city employees who were laid off due to the privatization of their jobs without following the proper procedures. Although defendants disputed the job status of these individuals, defendants failed to provide documentary evidence in support as required by *Quinto, supra*. See also MCR 2.116(G)(4-6).

In Docket No. 269809, I would affirm. In Docket No. 273463, I would affirm in part.

/s/ Karen M. Fort Hood