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STATE OF MICHIGAN
COURT OF APPEALS

HARTZLER EXCAVATING, LLC, and DOUG
HARTZLER,

UNPUBLISHED
January 21, 2021

Plaintiffs-Appellees/Cross-Appellants,

v

CHRISTOPHER J. QUATTRIN and BERRIEN
COUNTY DRAIN COMMISSIONER,

No. 351425
Berrien County Circuit Court
LC No. 19-000142-CZ

Defendants-Appellants/Cross-
Appellees,

and

TERI SUE FREEHLING, Individually and as
Personal Representative of the ESTATE OF
PATRICK FREEHLING, ROBERT DEVRIES, JR.,
and REV EXCAVATING, LLC,

Defendants.

Before: REDFORD, P.J., and MARKEY and BOONSTRA, JJ.

PER CURIAM.

Defendant Christopher J. Quattrin (Quattrin) appeals by right the trial court's order granting in part and denying in part his motion for summary disposition on grounds of governmental immunity. See MCR 2.116(C)(7); MCL 691.1407(5).¹ Plaintiffs Hartzler Excavating, LLC (Hartzler Excavating) and Doug Hartzler (Hartzler) cross-appeal the same trial

¹ Although this is an interlocutory appeal, MCR 7.202(6) provides for an appeal by right of an order denying governmental immunity.

court order, arguing that the trial court erred to the extent that it held Quattrin partially immune. We affirm in part, reverse in part, and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In 2019, plaintiffs filed suit against Quattrin and other defendants,² alleging that Quattrin had conspired with defendant Berrien County Commissioner Teri Sue Freehling (Teri Sue) and her husband, Patrick Freehling (Patrick), to defraud Berrien County. Specifically, plaintiffs alleged that Patrick initially “approached Doug Hartzler with a proposal for Hartzler to make money by working for the Drain Commission, renting equipment from [Patrick], and paying [Patrick] for [the] same.” Between 2017 and 2018, Hartzler Excavating “was awarded contracts for and performed 57 drain jobs for the Berrien County Drain Commission” and “[a]lmost all of the work performed was with equipment rented from [Patrick].” According to plaintiffs, Hartzler Excavating paid Patrick more than \$444,000 during this time frame, and Teri Sue was aware of this arrangement yet did not recuse herself from votes related to the awarding of job contracts. Plaintiffs further alleged that Quattrin later retaliated against Hartzler Excavating for firing two employees it had hired at Patrick’s request, and that he then declined to award Hartzler Excavating any additional work and made defamatory and disparaging remarks about plaintiffs.³

Plaintiffs also alleged that Quattrin had breached various contracts related to jobs awarded to Hartzler Excavating, specifically that Hartzler Excavating had not been paid for completed work, and that Quattrin had improperly deducted \$9,200 from another payment purportedly to reimburse the Drain Commission, pursuant to a contract, for equipment stolen from a job site. Plaintiffs also alleged that Quattrin had directed his attorney to send a letter to the County Administrator and other county officials seeking to add Hartzler Excavating to the list of vendors prohibited from doing business with the county.

Plaintiffs asserted claims of conspiracy to commit civil fraud, tortious interference with contract, and tortious interference with a business expectancy against all defendants, and additionally asserted claims against Quattrin for breach of contract, unjust enrichment, and quantum meruit. In lieu of filing an answer, Quattrin moved for summary disposition under MCR 2.116(C)(7) and (C)(8). Quattrin argued in part that as the duly-elected Drain Commissioner for Berrien County, he was entitled to absolute immunity against all tort claims for actions taken in relation to his official duties.⁴ In response, plaintiffs argued that governmental immunity did not apply because Quattrin was not acting within the scope of his legal executive authority. In a

² Plaintiffs’ claims against the other defendants remain pending; they are not parties to this appeal.

³ According to plaintiffs’ complaint, Quattrin then began awarding drain jobs to defendant REV Excavating, LLC, which had been formed by defendant Robert Devries, Jr., one of the employees fired by plaintiffs.

⁴ Quattrin also argued that he was entitled to summary disposition on plaintiffs’ contract, quantum meruit, and unjust enrichment claims because Quattrin was not properly named as a defendant on those claims. The trial court denied the motion with respect to those claims.

written decision, the trial court held that governmental immunity barred plaintiffs' fraud, tortious interference with contract and business expectancy claims, but did not bar plaintiffs' claim for civil conspiracy.⁵ This appeal and cross-appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a circuit court's decision regarding a motion for summary disposition. When a claim is barred by governmental immunity, summary disposition is appropriate under MCR 2.116(C)(7). Under MCR 2.116(C)(7), the moving party has the option of supporting its motion with affidavits, depositions, admissions, or other documentary evidence provided that the "substance or content" of the supporting proofs is admissible as evidence. In reviewing a motion under MCR 2.116(C)(7), we accept the factual contents of the complaint as true unless contradicted by the movant's documentation. When the material facts are not in dispute, this Court may decide whether a plaintiff's claim is barred by immunity as a matter of law. [*Petipren v Jaskowski*, 494 Mich 190, 204; 833 NW2d 247 (2013).]

III. ANALYSIS

Quattrin argues that the trial court erred by concluding that governmental immunity did not bar plaintiffs' claim of civil conspiracy. We agree. However, we disagree with Quattrin's corollary argument that plaintiffs' contract and quasi-contract claims essentially re-alleged tort claims and that the trial court therefore erred by holding that those claims were not barred by that same immunity.

Quattrin moved for summary disposition under MCL 691.1407(5), a provision of, a provision of the governmental tort liability act (GTLA), MCL 691.1401 *et seq.* MCL 691.1407(5) provides:

A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

⁵ We note that Count I of plaintiffs' complaint was captioned as a "Civil Conspiracy to Commit Civil Fraud." Plaintiffs did not allege separate counts for fraud and conspiracy. However, "conspiracy" requires a predicate act, which in this case appears to be the claimed fraud. See *Urbain v Beierling*, 301 Mich App 114, 132; 835 NW2d 455 (2013); *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003). Nonetheless, the trial court held that the alleged acts underlying plaintiff's "fraud" claim were within the scope of Quattrin's authority, but that the alleged acts underlying plaintiff's "conspiracy" claim were not within the scope of Quattrin's authority.

To prove entitlement to absolute immunity from tort liability under MCL 691.1407(5), a defendant must establish “(1) that he or she is a judge, legislator, or the elective or highest appointive executive official of a level of government and (2) that he or she acted within the scope of his or her judicial, legislative, or executive authority.” *Petipren*, 494 Mich at 204. Stated differently, “the highest executive officials of local government are not immune from tort liability for acts not within their executive authority.” *Marrocco v Randlett*, 431 Mich 700, 710-711; 433 NW2d 68 (1988). A plaintiff has the burden of initially pleading in avoidance of governmental immunity. See *Odom v Wayne Co*, 482 Mich 459, 478-479; 760 NW2d 217 (2008).

Plaintiffs do not dispute that, as the duly-elected Berrien County Drain Commissioner, Quattrin qualified for governmental immunity for acts carried out within the scope of his authority.⁶ Rather, the parties only dispute whether the allegations of wrongdoing forming the factual basis for plaintiffs’ various legal claims against Quattrin, taken as true, were within the scope of his authority or whether Quattrin was acting ultra vires, i.e., beyond the scope of his legal authority.

The GTLA does not specifically define what it means to act within the scope of executive authority. See *Petipren*, 494 Mich at 205. Our Supreme Court has stated that determining whether a given action is within the scope of legal authority requires an objective inquiry and

depends on a number of factors, including the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official’s authority, and the structure and allocation of powers in the particular level of government. [*Id.* at 205-206 (quotation marks and citation omitted).]

This list of factors is nonexhaustive, but it “does not include analysis of the actor’s subjective state of mind” because “[a]n official’s motive or intent has no bearing on the scope of his or her executive authority.” *Id.* at 206. Rather, the executive official’s scope of authority “consists of the extent or range of his or her delegated executive power.” *Id.* at 207. The relevant question is “simply whether the official exercised authority vested in the official by virtue of his or her role in the executive branch.” *Id.* at 209.

Because Quattrin has not submitted any contradicting affidavits, depositions, admissions, or other documentary evidence, for the purposes of our review we accept the factual allegations in plaintiffs’ complaint as true. See *Petipren*, 494 Mich at 204. The duties and powers of the drain commissioner are established by The Drain Code of 1956, MCL 280.1 *et seq.* A county drain commissioner has the authority to award bids for the construction of drains and is otherwise generally responsible for their maintenance and upkeep. See generally MCL 280.241 (concerning

⁶ Because the parties agree on this point, we accept without deciding that the Berrien County Drain Commissioner is an elective executive official of a level of government qualifying for absolute governmental immunity under MCL 691.1407(5) for acts carried out within the scope of his authority.

drain commissioner's inspection of drains, drain contracts, and payments on drain contracts); MCL 280.245 (concerning process for drain commissioner's payment for drain orders).

In holding that governmental immunity did not apply to plaintiffs' civil conspiracy claim, the trial court stated:

In looking solely at the conduct alleged, concocting conspiratorial schemes is not an enumerated power within the Drain Code and, therefore, not within the scope of Defendant Quattrin's authority when it alleged that Defendant Quattrin engaged in a conspiracy as Drain Commissioner. Further, the conspiratorial acts took place prior to, and separate from, the letting of bids and awarding of drain contracts to Plaintiffs; in fact, it is alleged that Plaintiffs did not establish their business to bid on future drain contracts until after the scheme was hatched by Defendant Quattrin and Defendants Freehling. Therefore, because the conspiratorial acts alleged are outside the scope of Defendant Quattrin's authority as the Berrien County Drain Commissioner, Defendant Quattrin's motion for summary disposition pursuant to MCR 2.116(C)(7) is denied with regard to Plaintiffs' claim of civil conspiracy.

We conclude that the trial court erred in its analysis of this claim. Our review of plaintiffs' complaint shows that plaintiffs' allegations of conspiratorial or fraudulent activity by Quattrin were based on Quattrin's exercise of his executive authority as drain commissioner to award or refuse to award contracts for certain drain jobs. The injury that plaintiffs allege resulted from this civil conspiracy was "the minimum of \$41,890 in existing revenue and hundreds of thousands of dollars in expected business income from future work for the Drain Commission." The award of, and payment for, drain jobs was squarely within Quattrin's executive authority as the elected drain commissioner. We cannot consider Quattrin's alleged motive or subjective intent in awarding or denying contracts, or in withholding payment for completed work. See *Petipren*, 494 Mich at 206.

Plaintiffs direct this Court to language in Justice BRICKLEY's separate opinion in *Smith v Dep't of Pub Health*, 428 Mich 540, 611; 410 NW2d 749 (1987) (BRICKLEY, J., concurring),⁷ stating that "the intentional use or misuse of a badge of governmental authority for a purpose unauthorized by law is not the exercise of a governmental function," in an attempt to argue that legal means cannot be sanctioned for illegal ends. But *Smith* concerned whether, in assessing a governmental agency's entitlement to immunity under MCL 691.1407(1), the agency was engaged in the "exercise or discharge of a governmental function." It did not concern whether, in assessing an individual governmental officer's entitlement to immunity under MCL 691.1407(2), the individual was acting within the scope of his authority. Moreover, as this Court has recognized, *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 593; 640 NW2d 321 (2001), the "use or misuse of a badge of governmental authority for a purpose unauthorized by law" is not the legal

⁷ This separate opinion was joined by Justice RILEY. See *Smith*, 428 Mich at 637. The main opinion in *Smith* was a memorandum opinion signed by the six participating Justices, with four separate concurring and dissenting opinions accompanying it. *Id.* at 544.

test for overcoming governmental immunity with respect to an executive official. Rather, as our Supreme Court has observed, the application of governmental immunity to an executive official turns on an “objective inquiry [that] does not include analysis of the actor’s subjective state of mind” and that “[a]n official’s motive or intent has no bearing on the scope of his or her executive authority.” *Petipren*, 494 Mich at 206.⁸

Therefore, regardless of whether we were to view plaintiffs’ claim as one of “fraud” or “conspiracy” (or both), plaintiffs have not alleged any tortious action by Quattrin that is independent from his official role and authority. Consequently, MCL 691.1407(5) confers absolute governmental immunity, and the trial court erred by denying Quattrin’s motion for summary disposition with respect to the civil conspiracy claim.

However, we find no merit in Quattrin’s corollary argument that the trial court erred by concluding that he was not entitled to absolute immunity with respect to plaintiffs’ claims for unjust enrichment, breach of contract, or quantum meruit. Quattrin appears to accept, as this Court has held, see *Genesee Co Drain Comm’r v Genesee Co*, 321 Mich App 74, 78; 908 NW2d 313 (2017), that breach of contract or breach of implied contract claims are not barred by the GTLA, which immunizes governmental actors only from claims sounding in tort. Although we agree with the proposition that “the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim,” *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691-692; 822 NW2d 254 (2012), plaintiff’s complaint does not simply repackage or restate tort claims as contract claims, but instead alleges distinct causes of action and injury caused by Quattrin’s alleged breaches of express or implied contractual obligations. At this early stage of the proceedings, nothing more is required; the GTLA simply does not apply to these claims. See *Genesee Co Drain Comm’r*, 321 Mich App at 77-78.⁹

We reverse the trial court’s denial of Quattrin’s motion for summary disposition regarding plaintiffs’ civil conspiracy claim, affirm the trial court’s remaining holdings, and remand for

⁸ Plaintiffs argue that applying governmental immunity to their civil conspiracy claim against Quattrin would effectively render elected officials immune from any claim of civil conspiracy. We do not agree that *Petipren*, or this opinion, sweeps so broadly, but in any event, if the Legislature did not in fact intend governmental immunity to apply in such instances, it could always amend the law to say so directly. See *GMAC LLC v Treasury Dep’t*, 286 Mich App 365, 380; 781 NW2d 310 (2009) (“[I]t is the province of the Legislature to acquiesce in the judicial interpretation of a statute or to amend the legislation to obviate a judicial interpretation.”). Moreover, although direct civil liability is unavailable, to the extent that any of plaintiffs’ allegations are true, Quattrin—or any other public official accused of this type of conduct—ultimately remains subject to other potential remedies, including criminal prosecution.

⁹ We decline to address Quattrin’s argument that plaintiffs “sued the wrong party” with regard to their contract and quasi-contract claims, because it is unrelated to the question of governmental immunity, and therefore beyond the scope of this appeal. See *Pierce v Lansing*, 265, Mich App 174, 182; 694 NW2d 65 (2005).

further proceedings consistent with this opinion. We do not retain jurisdiction. Neither party having prevailed in full, we do not award costs. MCR 7.219(A).

/s/ James Robert Redford

/s/ Jane E. Markey

/s/ Mark T. Boonstra