

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY WALBY,

Plaintiff-Appellee,

v

CITY OF CARO,

Defendant-Appellant.

UNPUBLISHED

May 13, 2021

No. 354155

Tuscola Circuit Court

LC No. 20-031064-CZ

Before: K. F. KELLY, P.J., and SERVITTO and LETICA, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying defendant's motion for summary disposition under MCR 2.116(C)(7) (immunity granted by law) and (8) (failure to state a claim). On appeal, defendant argues that the trial court erred by denying summary disposition because governmental immunity barred plaintiff's claims. We reverse and remand for further proceedings consistent with this opinion.

The underlying facts of this case are not in dispute. Plaintiff owned a building in Caro, Michigan, and contacted defendant to shut off the water supply to the building. On February 1, 2018, defendant purportedly shut off the water. On March 13, 2019, defendant became aware that the basement of the building had flooded with 315,000 gallons of water.

Thereafter, plaintiff filed a complaint alleging that defendant was grossly negligent for failing to turn the water supply off to the building, failing to maintain the shutoff valves, failing to appropriately train its employees to shut off the valves, and failing to take backup measures to shut off the city-owned water meter inside plaintiff's building.

Defendant answered and soon filed a motion for summary disposition under MCR 2.116(C)(7) and (8), arguing that it was entitled to governmental immunity under Michigan's Governmental Tort Liability Act ("GTLA"), MCL 691.1407, because operating the water supply was a governmental function and none of the statutory exceptions applied.

In response, plaintiff filed a motion to amend the complaint to add claims of breach of contract and individual liability against four employees of defendant. Plaintiff also filed a response

brief to defendant's motion, arguing that defendant was not entitled to governmental immunity because it was liable for the gross negligence of its employees under MCL 691.1407(2)(c) and the theory of vicarious liability. Finally, plaintiff argued that the additional claims in the amended complaint were not subject to governmental immunity.

At the hearing on defendant's motion for summary disposition, the trial court determined that "at this point[—]pre-discovery[—]the Court's unwilling to grant the motion for summary disposition. I think that the pleadings on their face state a sufficient claim for relief." The court reasoned that it was not "willing to rule at this point as a matter of law that there is no way by which the plaintiff could seek his relief here." Therefore, the trial court denied defendant's motion for summary disposition. The trial court also granted plaintiff's motion to amend the complaint. This appeal followed.

Defendant argues that the trial court erred by denying its motion for summary disposition because governmental immunity barred plaintiff's suit and it cannot be vicariously liable for the alleged gross negligence of its employees. We agree.

"We review de novo both a trial court's decision to grant or deny a motion for summary disposition and questions of statutory interpretation." *PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 505; 778 NW2d 282 (2009). Whether governmental immunity applies is a question of law that is also reviewed de novo on appeal. *Co Rd Ass'n of Mich v Governor*, 287 Mich App 95, 117-118; 782 NW2d 784 (2010).

"MCR 2.116(C)(7) permits summary disposition because of release, payment, prior judgment, [or] immunity granted by law." *Clay v Doe*, 311 Mich App 359, 362; 876 NW2d 248 (2015) (quotation marks and citation omitted; alteration in original). "When it grants a motion under MCR 2.116(C)(7), a trial court should examine all documentary evidence submitted by the parties, accept all well-pleaded allegations as true, and construe all evidence and pleadings in the light most favorable to the nonmoving party." *McLain v Lansing Fire Dep't*, 309 Mich App 335, 340; 869 NW2d 645 (2015).

"MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Mich Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (quotation marks and citation omitted).

Under MCL 691.1407(1), "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." Governmental immunity is to be liberally construed: "The immunity from tort liability provided by the [GTLA] is expressed in the broadest possible language; it extends to all governmental agencies and applies to all tort liability when governmental agencies are engaged in the exercise or discharge of governmental functions." *McLean v McElhaney*, 289 Mich App 592, 598; 798 NW2d 29 (2010). However, the grant of immunity under the GTLA is subject to six statutory

exceptions, *Wesche v Mecosta Co Road Comm*, 480 Mich 75, 84; 746 NW2d 847 (2008), that must be narrowly construed, *McLean*, 289 Mich App at 598.

“A governmental agency can be held vicariously liable only when its officer, employee, or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity which is nongovernmental or proprietary, or which falls within a statutory exception.” *Ross v Consumers Power Co*, 420 Mich 567, 625; 363 NW2d 641 (1984), superseded by statute on other grounds as stated in *Peters v Bay Fresh Start, Inc*, 161 Mich App 491, 498 (1987). “[A] governmental function is ‘an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.’ ” *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010), quoting MCL 691.1401(f). “Governmental immunity is not an affirmative defense proffered by governmental defendants, but rather is a characteristic of government; therefore a party suing a unit of government must plead in avoidance of governmental immunity.” *Kendricks v Rehfield*, 270 Mich App 679, 681; 716 NW2d 623 (2006) (quotation marks and citation omitted). “To be effective, such pleading must state a claim that fits within a statutory exception to immunity or include facts that indicate the action at issue was outside the exercise of a governmental function.” *Id.*

The resolution of this case involves the proper interpretation and application of the GTLA. Defendant contends that the GTLA provides immunity for all actions that involve a governmental function that do not fall within one of the statutory exceptions. Plaintiff generally agrees with defendant’s contention, but argues that gross negligence is an exception provided for within the text of the GTLA. Because plaintiff concedes that defendant was engaged in a governmental function, we need only address whether the allegation of gross negligence is sufficient to avoid the application of governmental immunity and allow the suit to proceed.¹

“MCL 691.1407(1) . . . broadly provides that ‘a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.’ ” *In re Bradley Estate*, 494 Mich 367, 378; 835 NW2d 545 (2013) (emphasis omitted), quoting MCL 691.1407(1). “To overcome governmental immunity for tort liability, then, plaintiffs . . . must either (1) plead a tort that falls within one of the GTLA’s stated exceptions, or (2) demonstrate that the alleged tort occurred outside the exercise or discharge of a governmental function.” *Genesee Co Drain Comm’r v Genesee Co*, 309 Mich App 317, 327; 869 NW2d 635 (2015) (footnotes omitted). “The statutory exceptions contained in the GTLA are: (1) the highway exception, MCL 691.1402, (2) the motor vehicle exception, MCL 691.1405, (3) the public building exception, MCL 691.1406, (4) the governmental hospital exception, MCL 691.1407(4), (5) the proprietary function exception, MCL 691.1413, and (6) the sewage system event exception, MCL 691.1417.” *In re Bradley*, 494 Mich at 378 n 21.

Noticeably absent from the list of statutory exceptions is gross negligence. Instead, gross negligence is referenced in MCL 691.1407(2), which provides:

¹ Even if plaintiff did not concede that defendant was engaged in a governmental function, we would conclude that defendant’s operation of the water supply is indeed a governmental function. See *NL Ventures VI Farmington, LLC v Livonia*, 314 Mich App 222, 244; 886 NW2d 772 (2015).

Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, *each officer and employee of a governmental agency, each volunteer* acting on behalf of a governmental agency, and *each member* of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(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. [Emphasis added.]

Although plaintiff argues that MCL 691.1407(2)(c) permits liability for a governmental entity's gross negligence, it is clear that the statute only imposes liability on the individual actor, not the governmental entity. See *Yoches v Dearborn*, 320 Mich App 461, 476; 904 NW2d 887 (2017) ("MCL 691.1407(1) provides immunity to a governmental agency without regard to an employee's gross negligence," while "MCL 691.1407(2) provides immunity for governmental employees . . . [except] when the employee's conduct constitutes gross negligence."). Accordingly, plaintiff's argument that the allegations of gross negligence in the complaint permitted the lawsuit to proceed is without merit.

The parties next disagree about whether vicarious liability could allow plaintiff's claim of gross negligence to survive summary disposition, and both cite *Ross* to support their respective position. The *Ross* Court considered various aspects of governmental immunity and the GTLA, including whether a governmental entity can be vicariously liable for the tort of its employee. *Ross*, 420 Mich at 621-625. The Court acknowledged that the GTLA is silent with respect to whether vicarious liability may be imposed upon a governmental entity, but noted that prior decisions had impliedly acknowledged that vicarious liability may be imposed on the basis of respondeat superior. *Id.* at 623. However, the Court cautioned that "courts must be careful not to destroy an agency's immunity by indiscriminately imposing vicarious liability whenever individual officers, employees, and agents are held personally liable for their torts." *Id.*

In the context of governmental immunity, a governmental entity can be vicariously liable for the tort of its employee "only where the individual tortfeasor acted during the course of his or her employment and within the scope of his or her authority." *Id.* at 624. But that is not the end of the inquiry:

Even when the tort is committed during the employee's course of employment and is within the scope of the employee's authority, the governmental agency is not automatically liable. Where the individual tortfeasor is acting on

behalf of an employer, the focus should be on the activity which the individual was engaged in at the time the tort was committed. *A governmental agency can be held vicariously liable only when its officer, employee, or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity which is nongovernmental or proprietary, or which falls within a statutory exception.* The agency is vicariously liable in these situations because it is in effect furthering its own interests or performing activities for which liability has been statutorily imposed. However, if the activity in which the tortfeasor was engaged at the time the tort was committed constituted the exercise or discharge of a governmental function (i.e., the activity was expressly or impliedly mandated or authorized by constitution, statute, or other law), the agency is immune pursuant to § 7 of the governmental immunity act. [*Id.* at 624-625 (citations omitted; emphasis added).]

Thus, plaintiff's argument that the alleged gross negligence of defendant's employees can support vicarious liability is without merit; plaintiff conceded that operating the water supply is a governmental function and, as noted, none of the statutory exceptions apply. See *Yoches*, 320 Mich App at 476-477 ("Consequently, if an exception to governmental immunity does not apply 'as otherwise provided in this act,' . . . the [governmental entity] would not be vicariously liable for [the entity's employee's] negligence, regardless of whether it rises to the level of gross negligence.").

Plaintiff notes that the trial court denied defendant's motion for summary disposition in part because no discovery had been conducted. Even though the lack of discovery was attributable to the pandemic, it does not change the fact that plaintiff failed to plead in avoidance of governmental immunity. Governmental "immunity protects the state not only from liability, but also from the great public expense of having to contest a trial." *Odom v Wayne Co*, 482 Mich 459, 478; 760 NW2d 217 (2008). Therefore, "[a] plaintiff filing suit against a governmental agency must initially plead his claims in avoidance of governmental immunity." *Id.* at 478-479. "Placing this burden of the plaintiff relieves the government of the expense of discovery and trial in many cases." *Id.* at 479. For the reasons already discussed, plaintiff failed to plead in avoidance of governmental immunity as to defendant, and, therefore, the trial court erred in denying its motion for summary disposition.

Finally, defendant asserts plaintiff's breach-of-contract claim in the amended complaint was legally insufficient on its face and was merely an attempt to relabel his tort claim.² Although

² To the extent that defendant argues that the trial court abused its discretion by granting plaintiff's motion to amend his complaint, we do not address that question. We note that defendant's initial brief on appeal does not contain a statement of the question involved that challenges the trial court's ruling on that motion. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000) (declining to consider an issue that was not set forth in the statement of questions presented). And, although an appellant in an appeal as of right from a final order may raise issues relating to prior orders, *Green v Ziegelman*, 282 Mich App 292, 301 n 6; 767 NW2d 660 (2009), the order granting plaintiff's motion to amend the complaint was entered after the order denying

a breach-of-contract claim is not barred by governmental immunity merely because the underlying facts could support a tort claim, *Ross*, 420 Mich at 647-648, the claim must be examined to determine whether it is an attempt to disguise a tort claim as a contract claim, *Penner v Seaway Hosp*, 169 Mich App 502, 509-510; 427 NW2d 584 (1988). “In determining whether a claim is based in contract or tort, courts are not bound by the label assigned to the claim by the plaintiff.” *Broz v Plante & Moran, PLLC*, 326 Mich App 528, 548; 928 NW2d 292 (2018), vacated in part on other grounds 504 Mich 892 (2019). “Rather, a court is required to consider the gravamen of the suit based on the complaint as a whole.” *Id.* “[W]hen a party breaches a duty stemming from a legal obligation, other than a contractual one, the claim sounds in tort.” *In re Bradley*, 494 Mich at 384.

It is unnecessary to determine whether a contract between the parties existed. Instead, this issue can be quickly disposed of on the basis of how the alleged breach arose. Plaintiff alleges that defendant breached the contract to turn off the water supply to the building by failing to turn off the water. But the alleged breach does not arise from a contractual obligation to turn off the water. Instead, defendant’s office of water department has a legal obligation covering “the maintenance and operation of the water supply, plumbing equipment, distribution system, fire hydrants, meters and all other appurtenances of the water supply system of the city.” *Caro Ordinances*, § 38-96. Because the alleged breach arises of out defendant’s legal obligation to operate and maintain the water supply, plaintiff breach-of-contract claim sounds in tort, rather than contract. Accordingly, the defendant is entitled to governmental immunity as to plaintiff’s breach-of-contract claim.

Reversed and remanded for entry of an order granting defendant’s motion for summary disposition consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Deborah A. Servitto
/s/ Anica Letica

summary disposition. Moreover, defendant objected to the entry of the order granting plaintiff’s motion to amend the complaint on procedural grounds and the trial court stayed proceedings before the procedural issues could be resolved. Regardless, the parties agree that the trial court addressed defendant’s motion for summary disposition by reviewing the allegations in plaintiff’s amended complaint, and, if the “contract” claim is actually a tort claim, as defendant contends, then the issue is a question of law. See *Co Rd Ass’n of Mich*, 287 Mich App at 117-118 (stating that whether governmental immunity applies is a question of law).