

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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AMERICAN FEDERATION OF STATE,  
COUNTY AND MUNICIPAL EMPLOYEES  
COUNCIL 25, AFSCME LOCAL 542, ALBERT  
GARRET and NORMA JELKS,

Plaintiffs-Appellees,

v

CITY OF DETROIT,

Defendant-Appellee,

and

CITY OF DETROIT BUILDING AUTHORITY,

Defendant-Appellant.

UNPUBLISHED  
April 18, 2006

No. 257665  
Wayne Circuit Court  
LC No. 02-225264-CL

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No. 257666  
Wayne Circuit Court  
LC No. 03-319555-CL

Before: Hoekstra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Defendant, Detroit Building Authority (DBA), appeals as of right an order denying its motion for summary disposition. We reverse in part and remand.

This action arises out of efforts by DBA to let contracts to private entities for maintenance of city parks. There is little doubt that this outsourcing of maintenance services was a device designed to avoid the City's commitments under a collective bargaining agreement (CBA) with plaintiffs. On appeal, defendant DBA argues that governmental immunity applies to bar plaintiffs' claims. We agree in part.

## I

In 1974, the DBA was incorporated pursuant to statutory authority under the Building Authority Act (BAA), MCL 123.951, and since then has developed into an agency whose purpose is to assist City Departments in carrying out their capital improvement programs. The DBA's sources of funding have included defendant city's general fund and capital fund, as well as issuance of bonds; its articles of incorporation include the power to contract with private entities and to maintain recreational facilities "acquired by the Authority". There is considerable overlap in the City's administration and the governance of the DBA.

Separate from the creation and operation of the DBA is the City Charter that became effective in 1997. Both the charter and city ordinances regulate and limit the privatization of city services and require city council approval of such contracts. No council approval was obtained for the DBA's privatization contracts at issue here. Provisions of the CBA also limit the purpose or intent of outsourcing and its effects on union employees.

## II

"Governmental immunity is a question of law that is reviewed de novo." *Pierce v City of Lansing*, 265 Mich App 174, 176; 694 NW2d 65 (2005), citing *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002). "[A]ll well-pleaded allegations of fact must be accepted as true and construed in favor of the nonmoving party, unless contradicted by any affidavits, depositions, admissions, or other documentary evidence submitted by the parties." *Pierce, supra* at 177. "If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law." *Id.* at 177, citing *Maiden v Rozwood*, 461 Mich 109, 120-122; 597 NW2d 817 (1999).

"The governmental tort liability act ["GTLA"], MCL 691.1401 *et seq.*, provides immunity for governmental agencies . . ." *Haliw v City of Sterling Heights*, 464 Mich 297, 302; 627 NW2d 581 (2001), rev'd on other grounds 471 Mich 700; 697 NW2d 753 (2005). The immunity granted to governmental agencies "is broad, with narrowly drawn exceptions." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 149; 615 NW2d 702 (2000) (citing *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 618; 363 NW2d 641 (1984)). "Except 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." MCL

691.1407(1). So long as the governmental agency was engaged in a governmental function, it is immune from tort liability unless an exception applies. *Mack, supra* at 195; *Haliw, supra* at 302.

The first issue is whether defendant DBA is a “governmental agency.” “Governmental agency” is defined by the statute as “the state or a political subdivision.” MCL 691.1401(d). A “political subdivision” is defined as “a municipal corporation . . . [or] a district or authority authorized by law or formed by 1 or more political subdivisions; or an agency, department . . . board or council of a political subdivision.” MCL 691.1401(b). Defendant DBA is an “authority authorized by law,” specifically, by the BAA, which provides:

*Any . . . city . . . may incorporate . . . 1 or more authorities for the purpose of acquiring, furnishing, equipping, owning, improving, enlarging, operating and maintaining a building or buildings . . . recreational facilities . . . and the necessary sites therefor . . . for use for any legitimate public purpose of the . . . city . . . .* [MCL 123.951 (emphasis added).]

Thus, defendant DBA was “authorized by law,” since it was authorized by the BAA.

The next issue is whether defendant DBA was “engaged in the exercise of discharge of a governmental function.” MCL 691.1407(1). 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). Here, defendant DBA was engaged in maintenance of parks, an activity authorized by the BBA, which provides:

*Any . . . city . . . may incorporate . . . 1 or more authorities for the purpose of acquiring, furnishing, equipping, owning, improving, enlarging, operating and maintaining a building or buildings . . . recreational facilities . . . and the necessary sites therefor . . . for use for any legitimate public purpose of the . . . city . . . .* [MCL 123.951 (emphasis supplied).]

However, while defendant’s Articles of Incorporation expressly provide that “the Authority shall also have the power to contract with . . . private persons, partnerships or corporations for the operation, maintenance or repair of any . . . recreational facilities *acquired by the Authority.*” [emphasis added] the record does not reflect whether the parks at issue here were “acquired” by defendant or what effect that would have on the determination of whether the DBA was engaged in a governmental function for purposes of the GTLA. These two issues must be addressed on remand.

### III

Even if the DBA engaged in the exercise of a governmental function for purposes of the GTLA, we find that Count I, styled “Equitable Relief for Ultra Vires Actions,” is not barred by governmental immunity. Defendant DBA maintains that Count I sounds in tort. Plaintiffs contend, *inter alia*, that they are asserting fraud and misrepresentation which clearly sound in

tort. *Cleary Trust v Muzyl Trust*, 262 Mich App 485, 502; 686 NW2d 770 (2004); *Yudashkin v Linzmeyer*, 247 Mich App 642, 646; 637 NW2d 257 (2001).<sup>1</sup>

However, the gravamen of Count I is not for a tort, but rather for ultra vires conduct in violation of the BAA. Accordingly, governmental immunity does not apply since governmental immunity shields a governmental agency “from tort liability . . . .” MCL 691.1407(1). The parties do not address whether violation of the BAA gives rise to a private cause of action and the trial court did not decide the issue. Appellate review is normally circumscribed to issues decided by the trial court, *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999). This is also an issue to be determined on remand.

#### IV

Defendant DBA also argues that the trial court erred in denying summary disposition of plaintiffs’ Count II, for an alleged violation of defendant city’s charter. We agree.

In *Mack* the plaintiff asserted a claim for violation of a Detroit City Charter provision prohibiting sexual orientation discrimination, contending that it created a private cause of action. *Mack, supra* at 189. The Supreme Court disagreed, holding that a cause of action could not be created that would conflict with governmental immunity. *Id.* at 189-190. Further, the Court held that “because the plaintiff failed to plead a recognized claim in avoidance of governmental immunity, her sexual orientation discrimination claim should have been dismissed.” *Id.* at 190. A plaintiff claiming a violation of a city charter must plead a claim within one of the statutory exceptions to governmental immunity. *Id.* Here, plaintiff has not pleaded in Count II a claim within any of the five recognized exceptions.<sup>2</sup> Therefore, Count II is barred by governmental immunity.

Reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra  
/s/ Janet T. Neff  
/s/ Donald S. Owens

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<sup>1</sup> To the extent that it is found that the DBA, a governmental agency, was engaged in the exercise of a governmental function, any claim of fraud and misrepresentation is subject to dismissal on immunity grounds. Likewise, any claims plaintiffs make to avoid immunity on the basis of intentional tort must fail. *Smith v Dep’t of Pub Health*, 428 Mich 540; 410 NW2d 749 (1987). Counts III and IV must also fall to governmental immunity, clearly being tort claims.

<sup>2</sup> The five statutory exceptions to governmental immunity are 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).