STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

BRIAN MCKINNEY, SR., an individual, and
GAYANGA CO LLC,
a Michigan limited liability company,

Plaintiffs,

vs.

CITY OF DETROIT OFFICE
OF INSPECTOR GENERAL, and
KAMAU C. MARABLE,
in his individual and official capacities,

Defendants.

CASE NO.: 26-007722-CZ

HON. DAVID J. ALLEN

Adam G. Clements (P77233)
PERKINS LAW GROUP
409 E. Jefferson, Floor 6
Detroit, MI 48226
(313) 964-1702
plg@perkinslawgroup.net

Attorneys for Plaintiffs

Aaron V. Burrell (P73708)
Davina A. Bridges (P85597)
DICKINSON WRIGHT PLLC
Attorneys for Plaintiffs
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500// Fax (844) 670-6009
aburrell@dwlaw.com
dbridges@dwlaw.com

Attorneys for Plaintiffs

Jerry L. Ashford (P47402)
CITY OF DETROIT LAW DEPARTMENT
2 Woodward Avenue, Suite 500
Detroit, MI 48226
(313) 237-3089
ashfj@detroitmi.gov

Attorneys for Defendants

PLAINTIFFS' BRIAN MCKINNEY, SR. AND GAYANGA CO LLC'S
<u>RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS</u>

I. INTRODUCTION

This case is about the extraordinary consequences of governmental misconduct. Based on a partial investigation and while in possession of substantial exculpatory evidence, Defendants City of Detroit Office of Inspector General ("Office of Inspector General" or "OIG") and Kamau C. Marable ("Inspector General") publicly branded Plaintiffs Gayanga Co LLC—a respected Detroit-based, Black-owned demolition contractor and its owner, Brian McKinney, Sr.—as responsible for widespread environmental contamination throughout the City of Detroit. Those statements immediately suspended Plaintiffs from City contracting, triggered lawsuits, destroyed longstanding business relationships, and ultimately forced Plaintiffs out of business. Yet after six months of suspension, and a year's long investigation that remains ongoing, Defendants have identified no wrongdoing by Plaintiffs.

Defendants do not and cannot avoid the Verified Complaint's well-pleaded allegations concerning what Defendants published and the devastation those publications caused. Instead, they seek refuge behind governmental immunity. But governmental immunity is not absolute. It protects only those officials and governmental entities acting within the authority conferred upon them by law. The Verified Complaint alleges that Defendants knowingly published materially false and misleading statements before completing their investigation, selectively omitted material exculpatory information already in their possession, ignored evidence demonstrating Plaintiffs used only City-approved backfill sources, and publicly accused Plaintiffs without first conducting a complete investigation or affording Plaintiffs any meaningful opportunity to respond. Considered in totality, the conduct suggests that Defendants acted intentionally and maliciously with the express purpose of harming Plaintiffs—conduct well outside the scope of Defendants' prescribed duties. Accepting those well-pleaded allegations as true and viewing the evidence in the light most favorable to Plaintiffs, Defendants were not engaged in conduct protected by the

Governmental Tort Liability Act ("GTLA") or the Detroit City Charter.

Defendants' Motion thus fails for three independent reasons. First, Defendants have not established Defendant Inspector General's entitlement to absolute immunity under MCL 691.1407(5) because they neither demonstrate that Defendant Office of Inspector General constitutes a "level of government" nor address the Verified Complaint's detailed allegations that Defendant Inspector General acted outside the scope of his executive authority. Second, the Detroit City Charter does not independently immunize Defendants, but instead expressly limits immunity to reports and communications made within the scope of official duties. Finally, Defendants have not established that the Office of Inspector General is either an improper party or that its challenged conduct constituted the exercise of a governmental function under MCL 691.1407(1).

Accordingly, Defendants have failed to meet their burden under MCR 2.116(C)(7), and the Motion should be denied in its entirety.

II. RELEVANT FACTUAL BACKGROUND

Plaintiff Gayanga Co LLC is a Detroit-based demolition contractor owned by Plaintiff Brian McKinney, Sr. For years, Gayanga performed demolition and backfill work for the City of Detroit using only materials and procedures approved by City officials. In July 2024, the City's Construction and Demolition Department provided Plaintiffs with an approved list of public backfill sources, including Iron Horse–Childs Lake Road. (Complaint, ¶ 20). Plaintiffs relied exclusively on those City-approved sources and had no independent responsibility to test materials the City itself had approved for use. (*Id.* at ¶ 22).

In the summer of 2025, Defendant Office of Inspector General, led by Defendant Inspector General, initiated an investigation concerning alleged contaminated backfill used on certain Detroit demolition sites. (*Id.* at ¶ 7). Rather than complete a full investigation before making public accusations, Defendants issued an official public statement on September 11, 2025 announcing that Plaintiffs Gayanga and McKinney were under investigation and immediately suspended from doing business with the City. Defendants publicly asserted that soil from "33 of the 41 (over 80%) properties tested" failed to satisfy Michigan residential standards and attributed those results to Gayanga's work. (*Id.* at ¶¶ 6-104). Defendants republished the same allegations again on March 19, 2026 while continuing to characterize Plaintiffs as the subject of an ongoing contamination investigation. (*Id.* at ¶ 11-15).

The publications were not issued because Defendants lacked information. They were issued despite Defendants' possession of exculpatory information that contradicted the public narrative Defendants chose to publish. (*Id.*). Indeed, before publication, Defendants possessed testing results demonstrating that more than 300 of Gayanga properties had been tested and found compliant with applicable residential standards. (*Id.* at ¶¶ 6-104). Defendants knew Plaintiffs obtained backfill exclusively from City-approved suppliers, knew the suspected source of contamination was Iron Horse, a supplier approved by the City and used by numerous contractors, knew contamination issues were not unique to Gayanga, and knew Plaintiffs had no involvement whatsoever with the Northland Mall redevelopment project despite publicly associating Plaintiffs with soil allegedly originating from that site. (*Id.*). Indeed, former Mayor Mike Duggan publicly acknowledged that Iron Horse supplied multiple contractors, that contamination affected numerous contractors, and that "the vast majority" of affected sites belonged to contractors other than Gayanga. (*Id.* at ¶¶ 25-45). Despite possessing this information, Defendants intentionally and maliciously chose to publish the statements before completing their investigation, before testing relevant sources of contamination, and without providing Plaintiffs with any meaningful opportunity to respond. (*Id.*). Instead, the OIG publicly suspended Plaintiffs and released statements that Defendants knew would foreseeably be republished by City officials, media outlets, contractors, lenders, bonding companies, and others doing business with Plaintiffs—and in fact, were republished. (*Id.*).

The consequences were immediate and severe. Plaintiffs were suspended from City contracting for 180 days, lost existing contracts and future business opportunities, became the subject of lawsuits, suffered widespread reputational harm, and effectively lost their business. (*Id.* at ¶¶ 76-77). These injuries resulted directly from Defendants' intentional publication and republication of false and misleading statements, which portrayed Plaintiffs as responsible for widespread environmental contamination despite Defendants' knowledge of contrary facts. (*Id.*).

III. ARGUMENT

A. Legal Standard.

"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." *Wade v Dept of Corr*, 439 Mich 158, 162 (1992). "The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with 'affidavits, depositions, admissions, or other documentary evidence,' the substance of which would be admissible at trial." *Odom v Wayne Cnty*, 482 Mich 459, 466 (2008) (internal citations omitted). "The contents of the complaint are accepted as true unless contradicted by the evidence provided." *Id.* (internal citations and quotations omitted). "The evidence is viewed in a light most favorable to the nonmoving party, and all legitimate inferences in favor of the nonmoving party are drawn." *Margaris v Genesee Cnty*, 324 Mich App 111, 115 (2018) (internal citations and quotations omitted). "[W]hen a relevant factual dispute exist, summary disposition is not appropriate." *Moraccini v City of Sterling Hts*, 296 Mich App 387, 391 (2012).

B. Defendants' Motion Fails Because Defendants Have Not Established Defendant Inspector General's Entitlement to Absolute Immunity Under MCL 691.1407(5).

"To qualify for absolute immunity from tort liability an individual governmental employee must prove his or her entitlement to immunity by establishing, consistently with the statute's plain language, (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 v Jaskowski*, 494 Mich 190, 204 (2013). Defendants establish neither statutory requirement.

1. Defendants have failed to establish that Defendant Inspector General Satisfies the Threshold Requirements of MCL 691.1407(5).

Absolute immunity under Section 1407(5) is not conferred merely because an individual occupies a leadership position within a governmental office. Rather, "[t]o benefit from the immunity granted to highly ranked officials, an individual must be a judge, a legislator, or the highest executive official in the level of government in which he or she is employed." *Margaris*, 324 Mich App at 116. Likewise, when determining whether an official qualifies as the highest appointive executive under Section 1407(5), courts must first determine whether the entity itself constitutes a "level of government." *Segue v Wayne Cnty*, Nos 310282, 310499, 2014 WL 2154976, at *1 (Mich Ct App May 22, 2014)[1] citing (*Grahovac v Munising Twp,* 263 Mich App 589, 593 (2004)). In *Segue*, the Court explained that determining whether an entity constitutes a "level of government" requires examination of whether it shares "aspects of governance with other political subdivisions, such as the power to levy taxes, the power to make decisions having a wide effect on members of the community, or the power of eminent domain." *Id*. Where an entity lacks these attributes and there is no showing that it is a "level of government," absolute immunity is

[1] All unpublished opinions are attached hereto as **Exhibit A**.

not established. *Id. See also Shefa, LLC v City of Southfield*, No 2:20-cv-11038-TGB-EAS, 2021 WL 4440401 at *12 (ED Mich, Sept 28, 2021) (concluding that the defendant was not entitled to immunity where it was not clear that the defendant's employer was a level of government and "more information is necessary, of the kind that may be found in the course of discovery, to make a determination as to whether § 691.1407(5) confers immunity on [the defendant]."); *Northern Processing, LLC v Cnty of Otsego*, No 218798, 2000 WL 33409625 at *1 (Mich Ct App, Aug 11, 2000) (reversing the lower court's decision granting summary disposition under MCR 2.116(C)(7) because "[w]hile the zoning administrator is the highest official in the zoning department, there [wa]s no showing that he is a top appointed official at a level of government. No evidence establishe[d] that the zoning administrator is the equivalent of other highest appointive or elective officials at other levels of government."); *Grahovac*, 263 Mich App at 594, 97 (affirming denial of the defendant's motion for summary disposition because there was no basis from the record to conclude that the defendant's employer is a level of government).

Here, there is no basis from the record and Defendant Inspector General failed to offer any documentary evidence that Defendant Office of the Inspector General is a level of government. The Motion simply asserts that because Defendant Inspector General serves as Inspector General, he is automatically the "highest appointive executive of the Office of the Inspector General." (Defs' Br at p 4). The Motion cites no Charter provision demonstrating that the OIG itself constitutes a "level of government," analyzes no governmental structure, and makes no effort to satisfy the statutory framework established by Michigan courts. (*See id. generally*). Instead, Defendants ask the Court to presume that the statutory requirement is satisfied merely because Defendant Inspector General heads the OIG. That is insufficient. *See, e.g.*, *Braziel v City of Benton Harbor Water Dept*, No 370316, 2025 WL 1648798 at *5 (Mich Ct App June 10, 2025) (ruling that the defendant was not entitled to summary disposition where he failed to meet his burden of presenting evidence in support of his argument that his employer was a level of government, "leaving a question of fact" about whether he was entitled to absolute immunity); *Serenity Homes-North, LLC v Doyle*, Nos 344757; 3447812019 WL 3941300 at *3 (Mich Ct App Aug 20, 2019) (where the defendant "did not present any evidence that [Defendant Lakeshore Regional Entity] had the power to levy taxes, to make decisions that had a wide effect on members of the community, or had the power of eminent domain," and "did not present any evidence that LRE had autonomous authority beyond its statutory purposes and powers or beyond the powers conferred on it by the organizing entities," the court concluded that notwithstanding the defendant's role as the highest executive officer of LRE, the defendant "was not entitled to absolute immunity under MCL 691.1407(5) because [his employer] was not a level of government"); *Holz v City of St. Ignace*, Nos 302647, 302659, 2012 WL 5193204 at *1-2 (Mich Ct App Oct 18, 2012) (same); *Segue*, 2014 WL 2154976, at *2 (internal citations omitted) (Finding that Wayne County's Department of Economic Development Growth Engine was "'not a level of government'" within the meaning of MCL 691.1407(5) even though the department had the power to make its own decisions, its actions had a wide effect on the community, and several subdivisions fell under the department's coordinating umbrella, and affirming the trial court's denial of absolute immunity to the individual defendant).

Because Defendants fail to establish that Defendant Inspector General has absolute immunity under MCL 691.1407(5), the Motion should be denied.

2. Even Assuming Defendant Inspector General Qualifies Under Section 1407(5), the Verified Complaint Alleges Conduct Outside the Scope of Defendant Inspector General's Executive Authority.

Even where an official qualifies as the highest appointive executive official, absolute immunity extends only to conduct occurring "within the scope of his or her executive authority." MCL 691.1407(5). Thus, "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, 708, n 7, 710-11 (1988) ("Whenever a governmental agency engages in an activity which is not expressly or impliedly mandated or authorized by constitution, statute, or other law (i.e., an ultra vires activity), it is not engaging in the exercise or discharge of a governmental function."). Moreover, the Michigan Supreme Court has made clear that this inquiry is fact intensive. *Id.* at 710 ("The determination whether particular acts are within their authority 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.").

Here, the Motion never engages in this analysis. Rather, Defendants define the challenged conduct at an impermissibly high level of generality, arguing that because Defendant Inspector General has authority to investigate and communicate with the public, every "media statement" made during an investigation necessarily falls within executive authority. (Defs' Br at p 5). That is not Plaintiffs' claim. Plaintiffs do not challenge Defendant Inspector General's authority to investigate allegations of waste, abuse, fraud, or corruption, or to communicate legitimate investigative findings. (*See* Complaint *generally*). Rather, Plaintiffs challenge Defendant Inspector General's decision to knowingly and intentionally publish materially false and misleading statements before completing the investigation while omitting material exculpatory information already in Defendants' possession. (*Id.*). Indeed, the Verified Complaint alleges that Defendant Inspector General acted outside the scope of his executive authority by publishing the September 11, 2025 and March 19, 2026 statements before completing the investigation, publicly reporting that "33 of 41" properties failed residential standards while omitting that approximately 309 Gayanga properties had already been tested and cleared, failed to investigate or test the City-approved backfill sources Plaintiffs actually used before publicly implying Plaintiffs intentionally used unapproved material, ignored documentation establishing that Plaintiffs obtained backfill exclusively from City-approved public sources, including Iron Horse, and publicly implied intentional misconduct before providing Plaintiffs any meaningful opportunity to respond. (*See* Complaint ¶¶ 6-104).[2]

Accepting those allegations as true and viewing all evidence in the light most favorable to Plaintiffs—as this Court must on a motion under MCR 2.116(C)(7)—Plaintiffs have plausibly alleged conduct outside the scope of executive authority. *See Odom*, 482 Mich at 466; *Margaris*, 324 Mich App at 115. At a minimum, the allegations present factual questions that cannot be resolved at the pleading stage. *See e.g.*, *Marrocco*, 431 Mich at 709 (reversing summary disposition because the record had not been sufficiently developed to determine whether the challenged acts fell within the officials' executive authority). The same is true here. Whether Defendant Inspector General's alleged conduct constituted ultra vires conduct cannot be decided by accepting Defendants' characterization of the facts while disregarding the well-pleaded allegations of the Verified Complaint.

Accordingly, Defendants have failed to establish Defendant Inspector General's entitlement to absolute immunity under MCL 691.1407(5), and summary disposition should be denied.[3]

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[2] The Charter itself further supports that Defendant Inspector General acted outside the scope of his executive authority. Indeed Section 7.5-311 provides that "[n]o report or recommendation that criticizes an official act shall be announced until every agency or person affected is allowed a reasonable opportunity to be heard at a hearing with the aid of counsel." Detroit City Charter § 7.5-311. Here, Defendants' September 11, 2025 statement publicly criticized Plaintiffs' performance of City-authorized demolition and backfilling work and announced Plaintiffs' suspension more than two months before Plaintiffs were afforded a hearing in November 2025 (Complaint, ¶ 59). Defendants' failure to comply with Section 7.5-311 further supports that Defendants' publication was outside the scope of the authority conferred by the Charter and therefore ultra vires.

[3] Plaintiffs have sued Defendant Inspector General in both his official and individual capacities. (Complaint at ¶ 4). Defendants' Motion argues exclusively that Defendant Inspector General is entitled to absolute immunity as the highest appointive executive official, but fails to address the

C. Defendants' Motion Fails Because the Detroit City Charter Does Not Independently Immunize Defendant Inspector General.

The Detroit City Charter provides only that "[t]he Inspector General and the staff shall be, to the full extent *permitted by law*, immune from any suit based on any report or communication *within the scope of official duties*." Detroit City Charter § 7.5-314 (Emphasis added). Although in conclusory fashion, Defendants treat this provision as creating an independent immunity from suit. (*See* Defs' Motion at ¶ 5). It does not. The Charter's text forecloses Defendants' argument. Indeed, the Charter grants immunity only "to the full extent permitted by law." Detroit City Charter § 7.5-314. The Charter therefore does not create immunity beyond that recognized by Michigan law; instead, it expressly incorporates and is limited by existing law.

Moreover, the Charter limits any immunity to reports or communications made "within the scope of official duties." That limitation mirrors the scope-of-authority requirement contained in MCL 691.1407(1) and (5). Thus, the Charter does not eliminate the factual inquiry. Defendants still bear the burden of establishing that the challenged publications fell within the authority actually conferred by the Charter. The Complaint alleges precisely the opposite—that Defendants acted outside the investigative authority granted by the Charter by knowingly issuing misleading public statements before completing their investigation, selectively disclosed only a limited subset of testing data, omitted material exculpatory information, falsely associated Plaintiffs with widespread contamination, and publicly announced Plaintiffs' suspension despite possessing information demonstrating that the alleged contamination was not attributable to Plaintiffs. (*See* Complaint *generally*). At this stage, those allegations must be accepted as true, and all evidence

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claims asserted against Defendant Inspector General in his individual capacity. (*See generally* Defs' Br). Because Defendants bear the burden of establishing entitlement to immunity under MCR 2.116(C)(7), the Court need not address arguments Defendants have not made. *See Seifeddine v Jaber*, 327 Mich App 514, 521-22 (2019) (a party "cannot leave it to this Court to make [its] arguments for [it]" and a party's "failure to adequately brief the issue constitutes abandonment").

viewed in the light most favorable to Plaintiffs. *See Odom*, 482 Mich at 466; *Margaris*, 324 Mich App at 115. Accordingly, Defendants cannot obtain dismissal based on Charter § 7.5-314.

D. Defendants' Motion Fails Because Defendant Office of the Inspector General Is a Proper Defendant.

Defendants summarily assert that the OIG is merely a "'creature of the City of Detroit'" and therefore cannot be sued in its own name. (Defs' Br at p 5-6). The argument ignores the analytical framework employed by Michigan courts and the authority vested in the OIG by the Detroit City Charter. To be clear, Michigan courts distinguish between ordinary municipal departments that merely perform administrative functions on behalf of a municipality and entities vested with independent authority by law. As the Court explained in *O'Neill v Emma L. Bixby Hospital*, the proper inquiry is not simply whether an entity is connected to a municipality, but whether it maintains an independent legal identity and exercises authority separate from the municipality itself. 182 Mich App 252, 257-58 (1990).

That is precisely the case here. The Charter authorizes the OIG to initiate investigations, issue subpoenas, compel testimony, conduct independent investigations, publish investigative reports, recommend discipline, and refer matters for civil or criminal enforcement independently of both the Mayor and City Council. *Id.* at §§ 7.5-305-308. Those are not merely administrative functions; they are independent powers exercised in the OIG's own name. *See id. See also Wigfall v City of Detroit*, 504 Mich 330, 342, n 22 (2019) (recognizing that charter-created Detroit agencies may possess an identity separate from the City's ordinary administrative departments and concluding that the Detroit Law Department was "an independent agency" created by the Detroit City Charter). Defendants' request to dismiss the OIG as an improper party should be denied.

E. Defendants' Motion Fails Because Defendants Have Not Established Defendant Office of Inspector General's Entitlement to Immunity Under MCL 691.1407(1).

MCL 691.1407(1) immunizes a governmental agency only when it is "engaged in the exercise or discharge of a governmental function." A governmental 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(b). However, Michigan courts have recognized that immunity does not extend to conduct that is ultra vires, that is, conduct not authorized by law. As the Supreme Court explained in *Coleman v Kootsillas*, 456 Mich 615, 619 (1998), and the Court of Appeals reaffirmed in *Mount Clemens Recreational Bowl, Inc v Director of Dept of Health and Human Services*, "[w]henever a governmental agency engages in an activity which is not expressly or impliedly mandated or authorized by constitution, statute, or other law (i.e., an ultra vires activity), it is not engaging in the exercise or discharge of a governmental function," and the governmental agency "is therefore liable for any injuries or damages incurred as a result of its tortious conduct." 344 Mich App 227, 246 (2022). Moreover, the inquiry requires examination of the activity alleged to give rise to the claim. *See Beauchamp v Saginaw Twp*, 74 Mich App 44, (1977) (internal citations omitted) ("'the test of whether a governmental agency can claim immunity under the statute is whether the specific activity alleged against the governmental defendant falls within 'the exercise or discharge of a governmental function.''").

Here, Defendants define the challenged conduct at an impermissibly high level of abstraction. (*See generally* Defs' Br). Plaintiffs do not challenge the OIG's authority to investigate allegations of fraud or corruption. (*See* Complaint *generally*). Rather, the Verified Complaint alleges that the OIG exceeded its lawful authority by publishing materially false and misleading public statements before completing its investigation, selectively reporting that "33 of 41" properties failed residential standards while omitting approximately 309 properties that had already tested compliant, ignoring documentation establishing that Plaintiffs obtained backfill exclusively from City-approved public sources, failing to investigate or test those approved sources before publicly implying Plaintiffs intentionally used unapproved material, linking Plaintiffs to the Northland Mall site despite contrary information, and publicly accusing Plaintiffs without first providing any meaningful opportunity to respond. (*Id.*).

Accepting those allegations as true and viewing all evidence in the light most favorable to Plaintiffs, Plaintiffs have alleged conduct that was not authorized and therefore falls outside the protection of MCL 691.1407(1). At a minimum, those allegations create factual questions concerning whether the challenged conduct constituted the exercise of a governmental function or ultra vires conduct that cannot be resolved as a matter of law on a motion brought under MCR 2.116(C)(7). *See e.g.*, *Marrocco*, 431 Mich at 709.

F. *Den*-Man *Contractors, Inc v City of Detroit Office of Inspector General* is Neither Binding Nor Persuasive Under the Facts Alleged Here.[4]

Defendants' reliance on *Den-Man Contractors, Inc v City of Detroit Office of Inspector General*, No 23-005543-CB, 2023 WL 12052966 (Wayne Cty Cir Ct Nov 30, 2023), is misplaced because that decision addressed materially different allegations and a materially different record. The court in *Den-Man Contractors, Inc* expressly noted that the plaintiffs conceded that "issuing a press release is a function of the government." *Id.* at *4. The court therefore analyzed only whether the OIG's general activity of issuing a press release constituted a governmental function. Plaintiffs here, however, challenge the manner in which Defendants exercised their authority by publishing materially false and misleading statements before completing their investigation, knowingly omitting material exculpatory information, and publicly implying intentional misconduct unsupported by completed investigative findings. (*See* Complaint *generally*).

[4] Preliminarily, *Den-Man Contractors, Inc* is an unpublished circuit court opinion and therefore has no precedential effect. *See Riley v Northland Geriatric Center*, 425 Mich 668, 678 (1986).

Moreover, *Den-Man Contractors, Inc* repeatedly emphasized that the plaintiffs "failed to plead an exception to governmental immunity" and therefore failed to plead in avoidance of the GTLA. *Id.* at *4. By contrast, Plaintiffs' Verified Complaint pleads detailed facts specifically directed at avoiding governmental immunity. (*See* Complaint *generally*). Among other things, Plaintiffs allege that Defendants knowingly omitted approximately 309 properties associated with Plaintiffs that had already been tested and found compliant before publishing the "33 of 41 (over 80%)" statistic, failed to investigate or test City-approved sources, including Iron Horse, before publicly implying Plaintiffs intentionally used unapproved or contaminated material, ignored documentary evidence demonstrating Plaintiffs obtained backfill exclusively from City-approved public sources, publicly linked Plaintiffs to the Northland Mall redevelopment despite public statements from the site's owner that Plaintiffs had never received or transported dirt from that project, and published the challenged statements before completing the investigation and before providing Plaintiffs any meaningful opportunity to respond. (*See* Complaint *generally*). Those allegations, accepted as true, constitute precisely the type of pleading in avoidance that the court in *Den-Man Contractors, Inc* found lacking.

Finally, the factual context of *Den-Man Contractors, Inc* was fundamentally different. There, the OIG's interim suspension followed information from the Special Inspector General for the Troubled Asset Relief Program identifying records allegedly showing that Den-Man Contractors, Inc had used unapproved backfill at approximately 200 properties, together with pending criminal charges against Den-Man Contractors, Inc's demolition manager involving alleged reimbursement fraud. *Id.* at *1. Here, Plaintiffs allege that Defendants already possessed extensive exculpatory information before issuing the statements, including knowledge that hundreds of Plaintiffs' properties had passed testing, that Plaintiffs had used City-approved backfill sources, and that contamination affected multiple contractors using the same approved supplier. (*See* Complaint *generally*). Plaintiffs further allege that Defendants deliberately omitted that information while presenting the "33 of 41" statistic in a manner that falsely implied Plaintiffs were uniquely responsible for widespread contamination. *Id*. Defendants did so to intentionally harm Plaintiffs. Indeed, Mayor Duggan, on the record in his own public remarks, said the opposite: the City verified roughly 309 of 323 Ashley tickets, tested the Ashley sites and found them clean, and reported back to the OIG that the first-half-2024 theory "did not appear to be true" and that the great majority "came from the Ashley Land Development pit and was done properly" (*Id*. at ¶¶ 34-40). As alleged in the Verified Complaint, four of the OIG's "33" are first-half-2024 Ashley properties sitting inside that very cleared set and put back into the full known universe, "over 80% contaminated" is really about 12% (roughly 88% clean). (*Id*. at ¶¶ 43-45). Accordingly, *Den-Man Contractors, Inc* neither controls nor compels dismissal. Defendants' Motion must thus be denied.[5]

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an order (1) denying Defendants' Motion for Summary Disposition pursuant to MCR 2.116(C)(7) in its entirety and (2) granting Plaintiffs any further relief the Court deems just and equitable under the circumstances.

Respectfully submitted,
DICKINSON WRIGHT PLLC

By: /s/ Davina A. Bridges
Aaron V. Burrell (P73708)
Davina A. Bridges (P85597)

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[5] Defendants do not address Plaintiffs' claim for declaratory and injunctive relief (Count V). Nevertheless, the GTLA does not bar claims seeking declaratory or equitable relief. *See Eplee v City of Lansing*, 327 Mich App 635, 648 (2019) (internal citations omitted) ("Thus, to the extent that plaintiff sought declaratory, injunctive, or equitable relief, the GTLA is inapplicable … because plaintiff did not seek to impose 'tort liability' for purposes of the GTLA."). Thus, even if Defendants were correct that governmental immunity bars Plaintiffs' tort claims (which they are not), the Motion provides no basis for dismissing Plaintiffs' claim for declaratory and injunctive relief.

500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500// Fax (844) 670-6009
aburrell@dwlaw.com
dbridges@dwlaw.com

Attorneys for Plaintiffs

PERKINS LAW GROUP

By: /s/ Adam G. Clements
Adam G. Clements (P77233)
409 E. Jefferson, Floor 6
Detroit, MI 48226
(313) 964-1702
plg@perkinslawgroup.net

Attorneys for Plaintiffs

Dated: August 7, 2026

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2026, the foregoing was electronically filed with the Clerk of the Court using the MiFile e-file system; which will send notification to all counsel of record.

/s/ Davina A. Bridges
Davina A. Bridges (P85597)

Exhibit A

2014 WL 2154976
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Taylor C. SEGUE III, Plaintiff–Appellee/Cross–Appellant,
v.
WAYNE COUNTY, Defendant–Cross–Appellee,
and
Turkia Awada Mullin, Defendant–Appellant.
Taylor C. Segue III, Plaintiff–Appellee,
v.
Turkia Awada Mullin, Defendant–Appellant,
and
Wayne County, Defendant.

Docket Nos. 310282, 310499.
|
May 22, 2014.

Wayne Circuit Court; LC No. 11–013278–CL.

Before: CAVANAGH, P.J., and OWENS and M.J. KELLY, JJ.

Opinion

PER CURIAM.

***1** These consolidated appeals arise from plaintiff Taylor C. Segue III's claims of wrongful termination and tortious interference. In Docket No. 310282, defendant Turkia Awada Mullin appeals by right the trial court's order denying her motion to dismiss Segue's claim against her on the ground that she is immune from suit as the highest executive employee of a level of government. On cross-appeal, Segue argues that the trial court erred when it dismissed his claim of wrongful termination against defendant Wayne County under MCR 2.116(C)(8). In Docket No. 310499, Mullin appeals by leave granted the trial court's decision to deny her motion to dismiss under 2.116(C)(8). For the reasons more fully explained below, we affirm in part, reverse in part, and remand for proceedings.

I. EXECUTIVE IMMUNITY

Mullin first argues that she has absolute immunity as the highest appointive executive of Wayne County's Department of Economic Development Growth Engine. Because she was immune from suit, she maintains, the trial court erred when it refused to dismiss Segue's tortious interference claim against her. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v. Gates Performance Engineering, Inc,* 285 Mich.App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo whether the trial court correctly selected, interpreted, and applied the relevant statutes. *Gay v. Select Specialty Hosp,* 295 Mich.App 284, 291–292; 813 NW2d 354 (2012).

The Michigan Legislature provided that certain elective or appointive officials have absolute immunity from tort liability when acting within the scope of their authority: "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." MCL 691.1407(5). To determine whether Mullin is entitled to immunity as the highest appointive executive, we must first determine whether the Department constitutes a "level of government" within the meaning of MCL 691.1407(5). *Grahovac v. Munising Twp,* 263 Mich.App 589, 593; 689 NW2d 498 (2004). This inquiry focuses on several factors, including "whether the entity shares aspects of governance with other political subdivisions, such as the power to levy taxes, the power to make decisions having a wide effect on members of the community, or the power of eminent domain." *Id.* at 593. We also consider the extent to which the governmental employee exercises "broad-based jurisdiction or extensive authority similar to that of a judge or legislator[,]" *id.,* quoting *Chivas v. Koehler,* 182 Mich.App 467, 471; 453 NW2d 264 (1990), and whether the entity at issue has certain autonomous authority, *Davis v. Detroit,* 269 Mich.App 376, 381; 711 NW2d 462 (2005).

In *Grahovac,* the Court determined that the chief of a volunteer fire department was "not the highest appointed or elected official in a level of government" because there was no evidence that the fire department had any powers of governance, made "decisions having a wide effect on members of the community", or had "broadly based jurisdiction or extensive authority similar to that of a judge or legislator." *Grahovac,* 263 Mich.App at 594. Instead, the volunteer fire department was "at the complete disposal of the township board and can neither exist nor act without that board's authorization." *Id.* Thus, the township board—not the fire department—was the relevant "level of government" and executive immunity did not, therefore, apply to the fire department's chief. *Id.* at 594–595.

***2** In contrast, the Court in *Nalepa v. Plymouth–Canton Comm School Dist,* 207 Mich.App 580, 587; 525 NW2d 897 (1994), determined that a school district is a level of government because it shares "many aspects of governance with other political subdivisions traditionally considered levels of government." The school district encompassed a defined geographical area, could levy taxes, exercise eminent domain, make decisions having a wide effect on the community, and had an elected board. *Id.*

Mullin does not contest that the Department lacks the traditional powers of governance. Instead, she argues that the Department constitutes a "level of government" because various provisions in the Wayne County Charter appear to give the Department autonomous authority and the power to make decisions having a wide effect on the community. Mullin did not fully develop this argument in her brief in support of her motion for summary disposition. Typically, this Court will only consider the arguments and evidence actually presented to the trial court on a motion for summary disposition. See *Barnard Mfg,* 285 Mich.App at 380–381. Nevertheless, even assuming that Mullin properly presented this line of argument, we must conclude that the Department was not a level of government within the meaning of MCL 691.1407(5).

Mullin relies heavily on this Court's decision in *Davis* for the proposition that the Department is a level of government. There, the Court determined that Detroit's fire department and water and sewage department were "levels of government" because "the Detroit City Charter and the Detroit City Code grant the fire commissioner and the board of water commissioners autonomous authority that was not alleged in *Grahovac.*" *Davis,* 269 Mich.App at 381. Mullin then compares the portions of the Detroit Charter cited in *Davis* to the relevant provisions of the Wayne County Charter purportedly establishing the Department and its divisions. See, e.g., Wayne Charter § 77 (approving the articles of incorporation for the economic development corporation), § 78 (establishing the predecessor to the Department).

The difficulty, however, is that those charter provisions are silent regarding the Department's autonomy. Indeed, the specific provision establishing the Department characterizes it as a coordinating entity rather than a level of government: "[t]he department shall coordinate the activities of business development, assistance, and retention as well as neighborhood preservation and enhancement...." Wayne Charter § 78–1. [1] Indeed, Mullin unequivocally averred that as the Department's director, she "answered to" and "carried out the directives of" the Wayne County Executive, Robert Ficano. That is, she essentially conceded that the Department was not an autonomous governmental unit that had the power to make its own decisions, even though its actions had a wide effect on the community and even though several subdivisions fell under the Department's coordinating umbrella. On this record, the Department is more akin to the volunteer fire department in *Grahovac* than to the fire department and water and sewage department in *Davis,* or even to the school board in *Nalepa,* which exercised traditional powers of governance. The Department is not a "level of government" within the meaning of MCL 691.1407(5). [2] Because the Department is not a "level of government," the trial court did not err when it denied her motion to dismiss on the ground that she had absolute immunity. [3]

1 The "Reorganization Plan for the Executive Branch of Wayne County", which was not presented below, similarly does not demonstrate that the Department had autonomous authority.

2 Mullin cited several unpublished cases and a foreign authority in support of the proposition that Wayne County's charter plainly shows that the Department is a level of government. However, none of those decisions involved a situation where the director admitted to answering and carrying out the directives of a higher, separate governmental entity. For that reason we find those authorities unpersuasive.

3 Because the issue of Mullin's qualified immunity was not properly raised and developed before the trial court, we decline to address it on appeal. See *Ward v. Frank's Nursery & Crafts, Inc,* 186 Mich.App 120, 134; 463 NW2d 442 (1990).

II. WRONGFUL TERMINATION

***3** Segue argues on cross-appeal that the trial court erred when it determined that his claim for wrongful termination contrary to public policy was preempted by the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, and dismissed it. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg,* 285 Mich.App at 369. This Court also reviews de novo the proper interpretation and application of the WPA. *Gay,* 295 Mich.App at 291–292.

The WPA prohibits an employer from retaliating against an employee for engaging in certain protected activities. *Whitman v. City of Burton,* 493 Mich. 303, 305; 831 NW2d 223 (2013). To establish a prima facie case under the WPA, a plaintiff must show that "(1) he was engaged in protected activity as defined by the act, (2) the defendant discharged him, and (3) a causal connection exists between the protected activity and the discharge." *Chandler v. Dowell Schlumberger Inc,* 456 Mich. 395, 399; 572 NW2d 210 (1998). "A WPA claim and a public policy tort claim are mutually exclusive." *Dolan v. Continental Airlines,* 208 Mich.App 316, 321; 526 NW2d 922 (1995), rev'd in part on other grounds 454 Mich. 373 (1997). Accordingly, a public policy claim is sustainable "only where there is also not an applicable statutory prohibition against discharge in retaliation for the conduct at issue." *Dudewicz v. Norris–Schmid, Inc,* 443 Mich. 68, 79–80; 503 NW2d 645 (1993).[4] If the WPA does not apply, however, there is no preemption. *Driver v. Hanley,* 226 Mich.App 558, 566; 575 NW2d 31 (1997).

4 The trial court incorrectly stated that *Dudewicz* has been overruled. Our Supreme Court has disapproved of certain dicta in *Dudewicz* and overruled other cases relying on that dicta. *Brown v. Mayor of Detroit,* 478 Mich. 589, 594 n 2; 734 NW2d 514 (2007). But that dicta is not at issue here.

The WPA applies to an employee who reports of "a violation or a suspected violation of a law or regulation...." MCL 15.362. Here, the trial court held that Segue's advice to Mullin that "diverting" the funds would be illegal constituted a report of a violation or a suspected violation of law. For that reason, it determined that the WPA preempted Segue's public policy claim against Wayne County. We do not agree that Segue's statement of belief concerning the legality of the transfer constituted the reporting of a violation or suspected violation of law. Segue's advice to Mullin was offered in response to Mullin's request that he transfer the funds at issue. Segue alleged that he refused to "obey" Mullin's instructions without first obtaining the consent of the Board of the Wayne County Detroit CDE, Inc. and that he prepared a resolution for the Board that would enable the transfer.[5] A fair reading of Segue's allegations shows that he claims that he was fired not in retaliation for "reporting" suspected illegal activity, but rather for refusing to "obey" Mullin's request to make the transfer without the Board's prior approval; his advice was merely his justification for refusing to proceed.

5 The trial court stated that Segue threatened to report Mullin's alleged illegal directive to the Wayne County Detroit CDE, Inc., Board, but he actually alleged in his complaint that he prepared and submitted a resolution for the Board that would "accomplish the task" of transferring the funds. That is, he did not threaten to report anything—he merely offered an alternative approach to achieve the same end properly.

Mullin's reason for firing Segue is key to resolving this issue. Under Michigan's common law, an employer cannot discharge an at-will employee for refusing to perform an illegal act during the course of his employment. *Suchodolski v. Mich. Consol Gas Co,* 412 Mich. 692, 695; 316 NW2d 710 (1982). And Segue plainly alleged he was fired for "refusing to engage in an illegal act" as opposed to for "reporting" one. He also did not allege that he reported a "violation or suspected violation" of law. To the contrary, Segue alleged that he told Mullin the transfer of the funds at issue "*would be* improper and illegal." (Emphasis supplied.) Because the WPA does not protect an employee from retaliation for refusing to perform an illegal act, see MCL 15.362, it does not preempt Segue's claim that Mullin wrongfully discharged him for refusing to perform an illegal act. *Driver,* 226 Mich.App at 566.

***4** The trial court erred when it concluded otherwise and dismissed Segue's claim against Wayne County on that basis.

III. FAILURE TO STATE A CLAIM

Finally, on interlocutory appeal, Mullin challenges the trial court's decision to deny her motion to dismiss under MCR 2.116(C)(8). Specifically, Mullin claims that, because she did not act solely for her own interest in firing Segue, he cannot maintain a claim for tortious interference. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg,* 285 Mich.App at 369.

"The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant." *Knight Enterprises v. RPF Oil Co,* 299 Mich.App 275, 280; 829 NW2d 345 (2013) (quotation marks and citation omitted). "One who alleges tortious interference with a contractual ... relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights ... of another." *Derderian v. Genesys Health Care Sys,* 263 Mich.App 364, 382; 689 NW2d 145 (2004) (quotation marks and citation omitted). A party to a contract cannot maintain a cause of action for tortious interference against another party to that same contract. *Id.* This means that "corporate agents are not liable for tortious interference with the corporation's contracts unless they acted solely for their own benefit with no benefit to the corporation." *Reed v. Mich. Metro Girl Scout Council,* 201 Mich.App 10, 13; 506 NW2d 231 (1993). "Such a claim requires proof, with specificity, of affirmative acts by the defendant[ ] which corroborated the unlawful purpose of the [tortious] interference." *Coleman–Nichols v. Tixon Corp,* 203 Mich.App 645, 657; 513 NW2d 441 (1994) (quotation marks and citation omitted).

Segue alleged that Mullin acted for her own benefit in firing him. Specifically, he alleged that Mullin repeatedly pressured him to "divert" funds from the CDE to the Wayne County Business Development Corporation, an account from which she had received a $75,000 bonus; the CDE was funded by undisclosed political contributors; politicians utilized the CDE for "questionable activities" including "elaborate trips"; the former Deputy Director of the CDE cautioned Segue that Mullin's predecessor was previously ordered to return funds to the CDE after making a similar transfer of funds; and that Mullin terminated Segue after he submitted a resolution for approval to the CDE Board. These allegations permit an inference Mullin's order to transfer the funds and her decision to fire Segue were to benefit and protect herself rather than the Department. At the very least, the allegations would permit further discovery to shed light on the circumstances surrounding the request and Mullin's decision to discharge Segue.

***5** Mullin counters that because Segue is bound by his allegation that Mullin acted "during the course of her employment and within the scope of her authority" when she fired him, Segue cannot show that she acted solely for her own benefit. But whether Mullin acted within the scope of her authority does not change this analysis. Indeed, this Court has already held that an employee's exercise of authority within the scope of his employment " 'does not immunize his conduct if he used his authority to further his own ends at the plaintiff's expense.' " *Stack v. Marcum,* 147 Mich.App 756, 760; 382 NW2d 743 (1985) (emphasis removed), quoting *Seven D Enterprises, Ltd v. Fonzi,* 438 F Supp 161, 164 (ED Mich, 1977).[6] Segue's complaint is therefore not self-defeating.

6 While Mullin cites case law in support of the proposition that Segue must show that the agent acted outside the scope of his authority to establish tortious interference, her authority did not address the situation where the agent used his authority solely for his own ends.

We also decline Mullin's invitation to revisit whether at-will employment contracts are the proper subject of a tortious interference claim. A special panel of this Court has already held that they are. *Health Call of Detroit v. Atrium Home & Health Care Servs, Inc,* 268 Mich.App 83, 93; 706 NW2d 843 (2005). And we are not at liberty to revisit that issue again. MCR 7.215(J)(6). We similarly reject Mullin's argument that Segue's claim should be dismissed because his damages are speculative. This Court held in *Health Call of Detroit* that the establishment of a tortious interference claim "provides a basis to award damages in some form[,]" *id.* at 93, although nominal damages may be "the limit of recovery[,]" *id.* at 103.

For these reasons, we affirm the trial court's order to the extent that it denied Mullin's motion for summary disposition. However, we reverse the trial court's decision and vacate its order to the extent that it dismissed Segue's claim against Wayne County. We further remand this case for further proceedings consistent with this opinion.

Affirmed in part, reversed and vacated in part, and remanded for further proceedings. We do not retain jurisdiction. As the prevailing party, Segue may tax his costs. MCR 7.219(A).

All Citations

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United States District Court, E.D. Michigan, Southern Division.

SHEFA, LLC, and Sidney Elhadad, Plaintiffs,
v.
CITY OF SOUTHFIELD, et al., Defendants.

2:20-cv-11038-TGB-EAS
|
Signed 09/28/2021

Attorneys and Law Firms

Brian H. Herschfus, Wood, Kull, Herschfus, Obee & Kull, P.C., Farmington Hills, MI, for Plaintiffs.

David D. Burress, T. Joseph Seward, Kali M. L. Henderson, Seward Peck & Henderson PLLC, Royal Oak, MI, for Defendants City of Southfield, Southfield Downtown Development Authority, Al Aceves.

Edward G. Lennon, Birmingham, MI, Michael P. Ashcraft, Jr., Plunkett & Cooney, Bloomfield Hills, MI, for Defendant Plunkett Cooney.

Michael P. Ashcraft, Jr., Plunkett & Cooney, Bloomfield Hills, MI, for Defendants Douglas Bernstein, Patrick Lannen.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS (ECF NOS. 11, 12)

TERRENCE G. BERG, UNITED STATES DISTRICT JUDGE

***1** This dispute arises out of Plaintiffs' efforts to redevelop a long-defunct hotel in Southfield, Michigan. Plaintiffs Shefa, LLC and its owner Sidney Elhadad generally allege that Defendants the City of Southfield, the Southfield Downtown Development Authority ("DDA"), and its Director, Al Aceves, as well at the City's law firm, Plunkett Cooney, P.C., and two of its attorneys, Douglas C. Bernstein and Patrick Lannen, have interfered with and hampered Plaintiffs' attempted redevelopment or sale of the property. Plaintiffs allege fifteen causes of action: (1) breach of contract, (2) inverse condemnation, (3) conspiracy under 42 U.S.C. § 1985(3), (4) conspiracy under 42 U.S.C. § 1983, (5) conspiracy to interfere with livelihood, (6) conspiracy under 42 U.S.C. § 1985(3), (7) common law conspiracy, (8) concert of action, (9) malicious prosecution, (10) sanctions under 28 U.S.C. § 1927, (11) interference with business relationship or expectancy of business relationship, (12) *Monell* municipal liability under 42 U.S.C. § 1983, (13) costs and fees under 42 U.S.C. § 1988, (14) violations of the Fifth and Fourteenth Amendments, and (15) violations of the Fourteenth Amendment. ECF No. 1, PageID.18-53. Currently before this Court are the City of Southfield Defendants' Motion to Dismiss Pursuant to 12(b)(6) (ECF No. 11) and the law firm Defendants' Motion to Dismiss and for Judgment on the Pleadings (ECF No. 12).

I. BACKGROUND

Plaintiff Sidney Elhadad is the member owner and manager of Plaintiff Shefa LLC ("Shefa"), a Michigan limited liability company. ECF No. 1, PageID.5. In 2009, Shefa acquired property located at 16400 J.L. Hudson Drive in Southfield Michigan. ECF No. 1-3, PageID.66, Shefa operated this property as a hotel until it closed its business operations in 2010. ECF No. 1, PageID.5. Unpaid real estate taxes accumulated, as did charges for water and sewage service. ECF No. 1-3, PageID.67.

In 2014, Shefa filed a Chapter 11 bankruptcy proceeding. The Bankruptcy Court entered a Confirming Order on February 19, 2016, providing, among other things, that "Shefa was obligated to pay $1.8 million to the Oakland County Treasurer for pre-petition water and sewage charges," and to pay back taxes as well. ECF No. 1-2, PageID.60. Shefa also granted the City of Southfield ("Southfield") a deed to the property to be released upon an "Event of Default," provided a first priority mortgage to Southfield, and was to obtain site plan approval for its proposed redevelopment within 180 days of the effective date of the plan. ECF No. 1-2, PageID.60-63. The Bankruptcy case was closed on February 6, 2017.

Soon thereafter, Southfield, represented by Defendant Plunkett Cooney P.C. ("Plunkett Cooney"), filed a motion in the United States Bankruptcy Court alleging that Shefa had defaulted on various provisions of the Confirming Order and requesting the deed to the property be released. ECF No.

1-3. PageID.67. The Bankruptcy Court denied Southfield's motion, finding that no "Event of Default," as required by the Confirming Order, had occurred. *Id.* at PageID.75. Southfield appealed the order, but the District Court affirmed the Bankruptcy Court's ruling. ECF No. 1-4, PageID.98-99.

***2** Following the District Court's 2019 decision, Southfield sued Shefa in Oakland County Circuit Court, seeking appointment of a receiver, judicial foreclosure, and a declaration that the hotel property was a "nuisance" and a "dangerous building." ECF No. 1-6, PageID.112. The Oakland County Circuit Court granted Shefa's motion for summary disposition, concluding that it lacked jurisdiction over the issues, and that Southfield's requests for declaratory relief failed to state a claim. *Id.* at PageID.115. The state court also denied Shefa's request for sanctions against Southfield and Plunkett Cooney. *Id.*

On April 27, 2020, Plaintiffs filed the instant complaint against Southfield, the Southfield Downtown Development Authority ("the DDA"), Al Aceves (the DDA's Executive Director), Plunkett Cooney, and Plunkett Cooney attorneys Douglas Bernstein and Patrick Lannen, alleging conspiracy, concert of action, malicious prosecution, and several additional claims based on alleged violations of federal and state law.

Pending before the court are two motions to dismiss filed by Plunkett Cooney P.C., Douglas Bernstein, and Patrick Lannen (the "Plunkett Cooney Defendants") (ECF No. 11) and by the City of Southfield, the Southfield Downtown Development Authority, and Al Aceves ("City Defendants" or "Southfield Defendants") (ECF No. 12).

II. LEGAL STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes the court to dismiss a lawsuit if it "fails to state a claim upon which relief can be granted." Rule 8(a) requires only that pleadings contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Though this standard is liberal, courts have held that it requires plaintiffs to provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action" in support of their grounds for entitlement to relief. *Albrecht v. Treon*, 617 F.3d 890, 893 (6th Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007)).

In evaluating a motion to dismiss under Rule 12(b)(6), courts must construe the complaint in the light most favorable to the plaintiff and accept all well-pled factual allegations as true. *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (citing *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006)). Consideration of a motion to dismiss under Rule 12(b)(6) is generally confined to the pleadings. *Jones v. City of Cincinnati*, 521 F.3d 555, 562 (6th Cir. 2008). Courts may, however, consider any exhibits attached to the complaint or the defendant's motion to dismiss "so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008) (citing *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001)).

III. ANALYSIS

Defendants argue that this Court lacks subject matter jurisdiction and, alternatively, that this Court should apply the *Younger* abstention doctrine. The Court finds these arguments unavailing. Defendants also argue that Plaintiffs have failed to plead any of their claims with sufficient particularly. ECF No. 11, PageID.236; ECF No. 19, PageID.577. Defendants further contend that most of Plaintiffs' claims must fail as a matter of law. Many of these arguments apply to more than one claim, and some of Plaintiffs' claims are potentially duplicative. Therefore, the Court will address each claim in turn, grouping claims where a common deficiency applies to multiple claims. For reasons that will be explained below, the Plunkett Cooney Defendants' Motion to Dismiss will be granted as to all counts. The Southfield Defendants' Motion to Dismiss will be granted as to all counts but Count Two.

*3 a. That the Bankruptcy Court may also have jurisdiction over this matter does not deprive this Court of subject-matter jurisdiction

Defendants argue that this Court lacks subject matter jurisdiction because the Complaint involves "core proceedings" that should be heard by the bankruptcy court. ECF No. 12, PageID.299. Additionally, Defendants assert that the Court should abstain and dismiss under the *Younger* abstention doctrine, because Defendant's appeal of the state court ruling is still pending.

Plaintiffs, however, assert that the bankruptcy case is closed and the claims in the instant litigation "are for constitutional claims; not core proceedings." ECF No. 17, PageID.475. And, while the bankruptcy court retains jurisdiction "to enforce terms and conditions," the current Complaint seeks "damages sustained *after* the entry of the Confirming Order." *Id.* at PageID.476 (emphasis in original). In sum, Plaintiffs argue that they raise constitutional claims under 42 U.S.C. § 1983 and the intentional tort of interference—claims which are within this Court's jurisdiction.

Bankruptcy courts are authorized under Section 157(b)(1) to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." *Stern v. Marshall*, 564 U.S. 462, 475 (2011) (quoting 28 U.S.C. § 157(b)(1)). District courts have both (1) original and exclusive jurisdiction "of all cases under title 11," and (2) "original but non-exclusive jurisdiction 'of all civil proceedings arising under title 11, or arising in or related to cases under title 11." *In re HNRC Dissolution Co.*, 761 F. App'x 553, 559 (6th Cir. 2019) (quoting 28 U.S.C. § 1334(a), § 1334(b)).

Defendants concede that the bankruptcy court has jurisdiction over Plaintiffs' claims. ECF No. 12, PageID.299 ("Plaintiffs' claims involve core proceedings that [the] Bankruptcy Court has jurisdiction over"). And while it is well-settled law that subject matter jurisdiction cannot be conferred by consent, extensive analysis of the bankruptcy court's continuing jurisdiction is unnecessary, because this Court has jurisdiction under 28 U.S.C. § 1331 over Plaintiffs' federal law claims and may exercise supplemental jurisdiction under 28 U.S.C. § 1367(a) over the remaining state-law claims.

Defendants point to no authority that would divest this Court of subject matter jurisdiction merely because the bankruptcy court may also have jurisdiction over the issues at bar. And the Sixth Circuit has previously rejected just this argument. *In re Camall Co.*, 16 F. App'x 403, 410 (6th Cir. 2001) (noting no authority for the proposition that a bankruptcy court may "divest the Federal District Court of its plenary jurisdiction" regardless of whether a proceeding is core or non-core). Therefore, this Court does not lack subject matter jurisdiction over Plaintiffs' claims.

b. *Younger* abstention is not warranted

The City Defendants argue that *Younger* abstention is proper because Southfield's appeal of the Oakland County Circuit Court's decision to dismiss Southfield's enforcement action is still pending. ECF No. 19, PageID.576. Further, the City Defendants argue, judicial sales, the enforcement of ordinances, and the enforcement of nuisance law are important state interests justifying abstention. ECF No. 12, PageID.300.

***4** Generally, "federal courts are obliged to decide cases within the scope of federal jurisdiction," and may not abstain "simply because a pending state-court proceeding involves the same subject matter." *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013). Under limited circumstances, however, the "*Younger* abstention" doctrine laid out in *Younger v. Harris*, 401 U.S. 37 (1971), directs federal courts to abstain from deciding issues that would interfere with pending state proceedings. But the *Younger* abstention doctrine is "narrow" and is proper only in three "exceptional circumstances." *Doe v. Univ. of Kentucky*, 860 F.3d 365, 369 (6th Cir. 2017) (citing *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989)) ("NOPSI"). The first is ongoing state criminal prosecutions. *Doe*, 860 F.3d at 369. The second is "particular state civil enforcement proceedings that are akin to criminal prosecutions." *Sprint Communications, Inc.*, 571 U.S. at 72. The third is "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions, such as contempt orders." *Doe*, 860 F.3d at 369, (quoting *NOPSI*, 491 U.S. at 368 (internal quotation marks omitted)). *Sprint Communications* clarified that only when a state proceeding falls into one of those three categories may a court then proceed to the three-factor test laid out in *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). *Sprint Communications Inc.*, 571 U.S. at 82 ("In short, to guide other federal courts, we today clarify and affirm that *Younger* extends to the three 'exceptional circumstances' identified in *NOPSI*, but no further.") Under the *Middlesex* test, a court may abstain where "(1) state proceedings are currently pending; (2) the proceedings involve an important state interest; and (3) the state proceedings will provide the federal plaintiff with an adequate opportunity to raise his constitutional claims." *Doe*, 860 F.3d at 369, (quoting *Middlesex*, 457 U.S. at 432-34).

In arguing for *Younger* abstention, the City Defendants proceed directly to the *Middlesex* test, alleging that the state court proceeding "involves important state interests" without addressing whether the proceeding falls into one of the three categories where *Younger* abstention is appropriate. Additionally, the single case cited by the City Defendants in support of their argument for abstention was decided before *Sprint Communications*, and as such proceeds directly to a *Middlesex* inquiry without considering the threshold question. *See Kircher v. Charter Twp. of Ypsilanti*, No. 06-14801, 2007 WL 1839895, at *3 (E.D. Mich. June 27, 2007) Therefore, that case is inapposite when considering whether the state proceeding at issue here falls into the categories outlined in *Sprint Communications*.

Southfield, the plaintiff in the Oakland County proceeding, sought a declaratory judgment that the hotel property was a "nuisance" and a "dangerous building" under Michigan law, requested that the state court appoint a receiver to facilitate a sale of the property, and alleged that "defaults under the Confirmation Order" entered by the bankruptcy court allowed it to initiate foreclosure of the property. ECF No. 1-6, PageID.111. The Oakland County Circuit Court concluded that it lacked jurisdiction over the claims. It also concluded that Southfield's request for declaratory relief failed to state a claim. Southfield appealed, and that appeal is now pending before the Michigan Court of Appeals.

The question then, is whether the state proceeding falls within the "exceptional circumstances" to which *Younger* abstention applies: (1) a "state criminal prosecution," (2) a state civil enforcement proceeding "akin to criminal prosecution," (3) or a civil proceeding "involving certain orders that are uniquely in furtherance of the state courts' abilities to perform their judicial functions." *Doe*, 860 F.3d at 369. First, category (1) is inapplicable, because the state proceeding is plainly not a criminal proceeding. And category (3) does not apply, because going forward with this matter will not interfere with the state court's "ability to enforce its orders," *Doe*, 860 F.3d at 369, as the only order issued in the state proceeding was one dismissing the case for lack of jurisdiction. [1] Therefore, *Younger* abstention will only be appropriate if the state proceeding is a civil enforcement proceeding akin to criminal prosecution.

1 The Ninth Circuit has held that appointment of a receiver is a "core" order implicating a state court's "interest in enforcing the orders and judgments of its courts." *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014). However, the only case applying that conclusion in the *Younger* context involved a state proceeding where a receiver had already been appointed by the state court when the federal suit was filed, and the federal plaintiff sought a federal injunction invalidating the order appointing the receiver. *Gilliam v. Watanabe*, No. CV 20-00201 JMS-RT, 2020 WL 5223778, at *3 (D. Haw. Sept. 1, 2020). That case is distinguishable from the case at bar, where no receiver has been appointed, and no state court order entered with which this case would interfere. *Gilliam*, 2020 WL 5223778, at *3 ("The order appointing and instructing the receiver to sell the property relates to the state courts' ability to *enforce compliance with judgments already made*.") (emphasis added, internal quotation marks and citation omitted).

***5** The Sixth Circuit has not decided, post *Sprint Communications*, whether a state foreclosure action, a request to appoint a receiver, or an action seeking a declaration that a building is a nuisance constitutes an enforcement proceeding akin to criminal prosecution. [2] As to a nuisance enforcement action, another court in this District has declined to abstain under *Younger* when faced with a state nuisance enforcement claim. *See McCausland v. Charter Twp. of Canton*, No. 18-12409, 2019 WL 4746763, at *9 (E.D. Mich. Sept. 30, 2019)(Hood, C.J.)(declining to abstain from hearing equal protection, due process, and conspiracy claims despite an ongoing state nuisance enforcement proceeding). The logic of *McCausland* is compelling. Here, as in that case, addressing the federal Plaintiffs' claims would not interfere with the state proceeding. Addressing Plaintiffs' civil rights and tort claims would not enjoin or otherwise interfere with enforcement of state nuisance laws. And moreover, even if the Court of Appeals reverses the Oakland County Court and finds that jurisdiction is proper, the trial court has already determined that, even if it had jurisdiction, Southfield failed to allege a cognizable nuisance enforcement claim. ECF No. 1-6, PageID.112-13.

2 A number of pre-*Sprint Communications* cases have applied *Younger* in the building code and nuisance contexts. *See e.g.*, *Gherghel v. Canton Twp.*, No. 10-CV-12065, 2011 WL 1982921, at *1 (E.D. Mich. May 20, 2011); *Kircher v. Charter Twp. of Ypsilanti*, No. 06-14801, 2007 WL 1839895, at *3 (E.D. Mich. June 27, 2007). But, as discussed above, these cases do not conduct the full inquiry called for by *Sprint Communications*, and are distinguishable on that basis.

The Sixth Circuit has not spoken as to whether a foreclosure claim in state court is an enforcement proceeding akin to criminal prosecution. A review of decisions in other courts reveals that state court foreclosure actions are generally not considered "exceptional circumstances" as outlined in *Sprint Communications*. *Harmon v. Dep't of Fin.*, No. CV 18-1021-RGA, 2021 WL 355152, at *3 (D. Del. Feb. 2, 2021) ("Courts in this Circuit have declined to apply *Younger* abstention when the underlying state action is a foreclosure action, absent a request to enjoin state proceedings because it does not fall into any of the three [*Sprint Communications*] categories."); *Gorodeski v. U.S. Bank Nat'l Ass'n*, 2016 WL 111422, at *3 (D.N.J. Jan. 11, 2016) ("Courts have routinely found that foreclosure proceedings do not fall within these three categories, and have declined to apply *Younger* abstention to state court foreclosure proceedings.") (collecting cases); *MacIntyre v. JP Morgan Chase Bank*, 2015 WL 1311241, at *2 (D. Colo. Mar. 19, 2015) (holding that none of the "three specifically enumerated categories" in *Sprint Communications* "appear to apply to" a Colorado judicial foreclosure proceeding); *Lech v. Third Fed. Sav. & Loan Ass'n of Cleveland*, No. 2:13-CV-518, 2013 WL 6843062, at *3 (S.D. Ohio Dec. 27, 2013), report and recommendation adopted, No. 2:13-CV-518, 2014 WL 184402 (S.D. Ohio Jan. 14, 2014) ("Here, Plaintiff does not seek to enjoin the state-court foreclosure proceedings. Accordingly, because this federal action will not interfere with the state proceeding, *Younger* abstention is unwarranted.").

The cases in which *Younger* abstention was applied are generally only those in which a federal plaintiff sought to enjoin the ongoing state court foreclosure action, or otherwise requested relief that would effectively overturn a decision of the state court. *See, e.g.*, *John J. Pembroke Living Tr. v. U.S. Bank Nat'l Ass'n for WaMu Series 2006-AR11 Trust.*, 2016 WL 9710025, at *4 (D. Colo. Oct. 24, 2016); *Abbatiello v. Wells Fargo Bank, N.A.*, 2015 WL 5884797, at *4 (E.D.N.Y. Oct. 8, 2015); *Ozuzu v. Greenpoint Mortg. Funding*, 2020 WL 5658776, at *6 (E.D.N.Y. Sept. 23, 2020). Here, the Oakland County Court has already dismissed the state foreclosure action, and Plaintiffs do not seek to enjoin that proceeding.

Because at least one court in this district has concluded that nuisance abatement proceedings do not fall within the "exceptional circumstances" to which *Younger* abstention should apply, and because the state court dismissed Southfield's nuisance claim, *Younger* abstention is not appropriate in deference to the state nuisance enforcement action. And because Plaintiffs do not seek to enjoin the foreclosure proceeding (which, it should be noted, was already dismissed by the state trial court), *Younger* abstention does not apply to the state foreclosure action. The Court need not abstain from jurisdiction pursuant to the *Younger* doctrine. Should the course of the state court action proceed in a way that implicates *Younger* or any other abstention doctrine in the future, the issue may be revisited at the request of the parties.

*6 c. Breach of contract and inverse condemnation claims (Counts One and Two)

Defendants do not specifically address Plaintiffs' claims under Count One (breach of contract) or Count Two (inverse condemnation), except a general argument that none of Plaintiffs' claims are pled with sufficient specificity. *See, e.g.*, ECF No. 19, PageID.577.

i. Plaintiffs fail to adequately plead breach of contract

To state a claim for breach of contract in Michigan, a plaintiff must allege: "(1) the existence of a valid contract; (2) the terms of the contract; (3) breach of the contract; and (4) an injury caused by the breach." *Carter v. CrossCountry Mortg., Inc.*, No. 18-12714, 2019 WL 3958275, at *2 (E.D. Mich. Aug. 21, 2019). Plaintiffs allege the existence of a contract. ECF No. 1, PageID.19 (alleging "that the Confirming Order [ ] is an agreement between the parties"); ECF No. 1-7, PageID.118 (mortgage agreement between Plaintiff Shefa LLC and Southfield). And Plaintiffs have alleged an injury: "that Shefa has been unable to redevelop the [Hotel], has been unable to reopen the Hotel for business and has been required to pay costs associated with maintaining the Hotel as a vacant structure." But while Plaintiffs allege general bad behavior on the part of Southfield, nowhere do they specifically allege that this behavior violated any term of the Confirming Order or the mortgage. Plaintiff does not allege that Southfield failed to live up to any obligation imposed by the Confirming Order, or otherwise explain how that agreement was breached. Therefore, Plaintiffs have failed to state a claim for breach of contract.

ii. Plaintiffs have stated a claim of inverse condemnation

To prevail on a claim for inverse condemnation under Michigan law, a plaintiff must prove: "that the government's actions were a *substantial* cause of the decline of his property's value and also establish the government abused its legitimate powers in affirmative actions aimed directly at the plaintiff's property." *Hescott v. City of Saginaw*, No.

10-13713, 2012 WL 4955254, at *1 (E.D. Mich. Oct. 17, 2012) (citing *Hinojosa v. Dep't of Nat. Res.*, 263 Mich. App. 537, 548, 688 N.W.2d 550, 557 (2004)) (emphasis in original).

Plaintiffs have stated a claim for inverse condemnation. Plaintiffs allege that they have been deprived of all economic value associated with the hotel property because, due to the conduct of the Southfield Defendants, they have been “unable to redevelop” the property, or “reopen the Hotel for business.” ECF No. 1, PageID.21. Plaintiffs allege that they have taken “great pains” to sell or redevelop the property, *Id.* at PageID.12, and have received “outstanding genuine offers to purchase and redevelop the Hotel,” but that the city has hindered their efforts to do so by “turning away deals.” *Id.* at PageID.11. “Government action that prevents or hinders the sale of property” can serve as the basis for an inverse condemnation claim. *Quinn v. City of Grosse Pointe Farms*, No. 250464, 2005 WL 159796, at *1 (Mich. Ct. App. Jan. 25, 2005). And Plaintiffs allege that Southfield has abused its legitimate powers by imposing onerous regulations in an effort to obtain the property illegitimately. Plaintiffs allege that Southfield is doing this, at least in part, because utility access to an adjoining property (that Southfield owns and is attempting to sell) runs through Plaintiffs’ property. ECF No. 1, Page.ID 13-14. Taking these allegations as true, as the court must at the motion to dismiss stage, Plaintiffs have stated a claim for inverse condemnation.

*7 d. Civil rights conspiracy claims (Counts Three, Four, and Six)

Plaintiffs allege three civil rights conspiracy claims pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3). Defendants argue that all three are barred by the “intra-corporate conspiracy” doctrine. The City Defendants contend that Plaintiffs have alleged that all Defendants acted as Southfield's agents. ECF No. 12, PageID.311. Thus, the City Defendants argue, no conspiracy can be possible. Similarly, the Plunkett Cooney Defendants argue that they acted as Southfield's agents, so the Southfield and Plunkett Cooney Defendants should be “considered a single ‘person’ for purposes of analyzing a civil conspiracy claim.” ECF No. 11, PageID.248. Defendants also argue that Plaintiffs have not adequately pled these claims.

i. Plaintiffs’ civil rights claims are barred by the intra-corporate conspiracy doctrine

The “intra-corporate conspiracy” doctrine presents a defense to conspiracy claims where members of the same collective entity are alleged to have engaged in a conspiracy. *Hull v. Cuyahoga Valley Joint Vocational School Dist. Bd. of Educ.*, 926 F.2d 505, 509 (6th Cir. 1991). This is because a corporation “cannot conspire with its own agents or employees.” *Id.* The intra-corporate conspiracy doctrine will not apply, however, where alleged conspiracy members act outside the scope of their employment. *Jackson v. City of Columbus*, 194 F.3d 737, 753 (6th Cir. 1999). The Sixth Circuit has consistently held that this doctrine applies to claims under 42 U.S.C. § 1985(3). *Johnson v. Hills & Dales Gen. Hosp.*, 40 F.3d 837, 839 (6th Cir. 1994). And in *Jackson v. City of Cleveland*, the Sixth Circuit concluded that the intra-corporate conspiracy doctrine also applies to conspiracy claims brought under 42 U.S.C. § 1983. 925 F.3d 793, 818-19 (6th Cir. 2019).

Here, Plaintiffs allege that Defendants Al Aceves, Plunkett Cooney, Douglas Bernstein, and Patrick Lannen “were employed by [Southfield] and/or [the Downtown Development Authority], or acted as agents for [Southfield] and/or [the Downtown Development Authority].” ECF No. 1, PageID.34. The parties dispute, however, whether Southfield and the Southfield Downtown Development Authority (“DDA”) constitute the same “entity.” Plaintiffs argue that “the DDA is maybe quasi-governmental, but is a non-profit corporation, distinct and separate from [the City of Southfield], a municipal corporation which is a governmental entity.” ECF No. 17, PageID.488. Defendants respond that Plaintiffs’ own complaint acknowledges that all Defendants, including the DDA, acted as agents of Southfield, and that Michigan courts have held that a municipality's DDA is a governmental entity in some contexts.

The Court has found little precedent clarifying whether a municipality and that municipality's Downtown Development Authority are considered the same “entity” for purposes of the intra-corporate conspiracy doctrine. But for three reasons, the court finds Defendants’ position more persuasive. First, careful examination of precedent reveals that cases in the Sixth Circuit have applied the intra-corporate conspiracy doctrine where alleged conspirators were members of an “integrated enterprise” consisting of multiple sub-groups. *Amadasu v. Christ Hosp.*, No. 1:04-CV-456-SJD-TSH, 2006

WL 2850524, at *3 (S.D. Ohio July 26, 2006) (applying the intra-corporate conspiracy doctrine to " 'the integrated enterprise established' between [a hospital alliance] and its member hospitals"), *report and recommendation adopted*, No. 1:04CV456, 2006 WL 2850511 (S.D. Ohio Oct. 3, 2006), *aff'd.*, 514 F.3d 504 (6th Cir. 2008). A DDA is created by a municipality pursuant to statute, Mich. Com. Laws § 125.4201 *et seq*, and is controlled by "a board consisting of the chief executive officer of the municipality ... and not less than 8 or more than 12 members," who "shall be appointed by the chief executive officer of the municipality, subject to approval by the governing body of the municipality." Mich. Comp. Laws § 125.4204. Perhaps most important, the statute authorizing the creation of DDAs provides that they "shall be deemed an instrumentality of a political subdivision," for purposes of Mich. Comp. Laws § 213.321, which deals with relocation assistance to be provided when property is condemned. Under § 213.321, instrumentalities of political subdivisions are considered "state agencies." And as discussed below, DDAs are also included within the definition of "government agencies" under Michigan's Government Tort Liability Act. See Mich. Comp. Laws § 691.1401(e). This kind of total control by the municipality, together with the fact that DDAs are considered "instrumentalities" of the political subdivisions that create them, suggests they would fall within the "integrated enterprise" contemplated by the Sixth Circuit in *Amadasu*.

***8** Second, Michigan courts appear to regard DDAs as governmental entities intimately connected to the cities that create them. *See, e.g.*, *Mimi's Sweet Shop, Inc. v. Charter Twp. of Lansing Downtown Dev. Auth.*, No. 349117, 2020 WL 6235779, at *1 (Mich. Ct. App. Oct. 22, 2020) (tort claims against city DDA and its Executive Director were barred by governmental immunity); *Oesterle v. Vill. of Chelsea*, No. 244484, 2004 WL 928258, at *3 (Mich. Ct. App. Apr. 29, 2004) (noting that "under the scheme articulated in the downtown development authority act ... the DDA is clearly an arm of the Village, such that its act in conveying the easement should be deemed to be an act of the Village."). And as discussed above, DDAs are considered government agencies in at least the condemnation and governmental tort liability contexts. Mich. Comp. Laws §§ 213.321, 691.1401(e).

Third, at least one court in this District, when faced with a similar question, has concluded that two departments of one Michigan county are considered the same "entity" for purposes of the intra-corporate conspiracy doctrine. *See Tina Desandre and Robert Desandre v. County of Oscoda, et al.*, No. 20-12209, 2021 WL 3828588, at *7 (E.D. Mich. Aug. 27, 2021) (Michelson, J.) (dismissing a civil rights conspiracy claim after concluding that a county prosecutor and county sheriff's department were the same "entity" for intra-corporate conspiracy purposes).

Plaintiffs have cited no authority to support the position that Southfield and the DDA should not be considered one "entity" or "integrated enterprise" for purposes of the intra-corporate conspiracy doctrine and provide little argument beyond simply stating in their Response Brief that they are "separate and distinct." For these reasons, the Court concludes that the intra-corporate conspiracy doctrine applies. Therefore, unless Plaintiff has pleaded that any of the Defendants acted outside the scope of their duties as employees or agents of Southfield and the DDA, Plaintiffs' conspiracy claims will be barred. Plaintiffs do not identify any acts by Plunkett Cooney, Mr. Lannen, or Mr. Bernstein that fell outside the scope of their employment or agency duties to the City of Southfield. In fact, the only insinuation that any Defendant (other than Mr. Aceves) acted outside the scope of their employment is a vague and highly generalized allegation that "the acts of these Defendants complained of herein were beyond the scope of their duties." ECF No. 1, PageID.34-35. A general and conclusory allegation like this one is insufficient to establish that any of the Plunkett Cooney Defendants acted outside the scope of their employment or agency. *See, e.g.*, *Goodman v. Mady*, No. 04-75011, 2005 WL 2417209, at *14 (E.D. Mich. Sept. 30, 2005) ("Plaintiff contends that it is enough under FRCP 8 that he simply state that [the Defendants] were acting in the scope of their employment. Plaintiff is wrong ... bald conclusions that are not supported by facts are not sufficient to state a claim.").

Plaintiffs' allegations as to Mr. Aceves are more numerous, but not more specific. Plaintiffs state several times that Mr. Aceves acted outside the scope of his duties to the DDA, but do not identify any specific acts. And all of Mr. Aceves' actions mentioned in the Complaint are acts related to his employment as Executive Director of the DDA. *See Buckley v. City of Westland*, No. 2:20-CV-11315, 2021 WL 2662255, at *4 (E.D. Mich. June 29, 2021) (Murphy, J.) (concluding police officers acted within the scope of their employment for purposes of intra-corporate conspiracy doctrine where all alleged acts "related to Defendants' employment as police officers"). Plaintiffs generally allege that Mr. Aceves acted with malice, but "the Sixth Circuit has declined to hold that actions otherwise within the scope of employment are taken outside the scope if they are also motivated by personal interests." *Desandre*, 2021 WL 3828588 at *8. Because Plaintiffs have not pleaded with sufficient specificity that any Defendants acted outside the scope of their employment or agency, Plaintiffs' claims under § 1983 and § 1985(3) are barred by the intra-corporate conspiracy doctrine.

*9 ii. Even if Plaintiffs' civil rights claims were not barred, Plaintiff has not alleged plausible conspiracy claims

Even if the intra-corporate conspiracy defense did not apply, Plaintiffs have not alleged plausible § 1983 conspiracy claims with sufficient specificity. "It is well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under § 1983." *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir. 1987). Here, Plaintiffs have merely alluded to "overt acts" without explaining what those acts were. [3] Similarly, Plaintiffs do not "describe in any detail when or how a 'meeting of the minds' took place" among the Defendants, beyond conclusory assertions that they entered a conspiracy. *Cahoo v. SAS Inst. Inc.*, 322 F. Supp. 3d 772, 812 (E.D. Mich. 2018) (rev'd in part on other grounds). "Conclusory, vague accusations that do not describe some 'meeting of the minds' cannot state a claim for relief under 42 U.S.C. § 1983." *Searcy v. Culhane*, No. 09-CV-10174, 2009 WL 1864028, at *7 (E.D. Mich. June 29, 2009).

3 *See, e.g.*, ECF No. 1, PageID.35 (alleging that "Defendants have performed numerous acts in furtherance of the conspiracy," and "[t]hat these Defendants and the other co-conspirators committed, and continue to commit overt acts in furtherance of their conspiracy to impair Plaintiffs' ability to re-develop and re-open or sell the Hotel" without specifying what those acts were); *Id.* at PageID.37 ("Overt acts in furtherance of the conspiracy occurred or were committed when these Defendants acted in violation of 42 USC 1981"); *Id.* at PageID.38 (alleging that "[t]n furtherance of their object, Defendants did two or more overt acts against Plaintiffs, which unlawful acts include, but are not limited to the facts outlined above.").

Similarly, Plaintiffs have not alleged plausible § 1985(3) claims. Plaintiffs have not alleged facts that, if true, would allow the Court to conclude that a conspiracy existed that "was motivated by racial or other constitutionally suspect class-based animus." *In re Flint Water Cases*, 384 F. Supp. 3d 802, 851 (E.D. Mich. 2019) (citing *Bartell v. Lohiser*, 215 F.3d 550, 559-60 (6th Cir. 2000)). Instead, Plaintiffs have alleged only that "it is clear on sight by his appearance that [Plaintiff Mr. Elhadad] is of the Jewish faith and of Rabbinic stature," that "it is clear that adverse action has been taken as a result of the same," and that "it is clear that action has been taken, at least in part as a demonstration of anti-Semitic behavior." ECF No. 1, PageID.12, 21, 24, 29. While Plaintiffs allege that "it is clear" that Defendants' behavior was motivated by racial animus, they allege no facts that would support such a conclusion. Merely alleging that one is a member of a protected class is insufficient to state a plausible claim for relief under § 1985(3). *See, e.g.*, *Jones v. Couvreur*, No. 17-CV-11185, 2017 WL 1543703, at *5 (E.D. Mich. Apr. 28, 2017) (dismissing § 1985(3) claim and noting that "although Jones has demonstrated that he is a member of a protected class, he has not alleged facts showing any discriminatory animus against him on the part of the alleged conspirators.").

e. Common Law Conspiracy (Count Seven)

*10 i. The "intra-corporate conspiracy" doctrine bars Plaintiffs' Common Law Conspiracy claim

Just as under federal law, under Michigan law, a conspiracy requires "a combination of two or more persons." *Fenestra Inc. v. Gulf Am. Land Corp.*, 377 Mich. 565, 593, 141 N.W.2d 36, 48 (1966). Accordingly, Michigan courts have adopted the intra-corporate conspiracy doctrine followed by the Sixth Circuit. *Salser v. Dyncorp Int'l Inc.*, 170 F. Supp. 3d 999, 1010 (E.D. Mich. 2016) (quoting *Tropf v. Holzman & Holzman*, No. 257019, 2006 WL 120377, at *1–2 (Mich. Ct. App. Jan. 17, 2006)). Therefore, Plaintiffs' state-law conspiracy claim, as currently alleged, is also barred by the intra-corporate conspiracy doctrine.

f. Conspiracy to Interfere with Livelihood (Count Five)

Defendants argue that Michigan law does not recognize a cause of action for "interference with livelihood." ECF No. 11, PageID.246. In response, Plaintiffs argue that "there exists a general public policy ... disfavoring interference with a person's livelihood." ECF No. 16, PageID.368. Neither of the two cases cited by Plaintiffs indicate that such a tort is available under Michigan law. Instead, the cited cases address the interests to be balanced by a federal court when considering a request for a preliminary injunction under federal law. *See, e.g.*, *Kelly Servs., Inc. v. Marzullo*, 591 F. Supp. 2d 924, 941 (E.D. Mich. 2008) (recognizing the "general public policy disfavoring restraints on trade and interference with a person's livelihood" when balancing interests associated with the request for a preliminary injunction); *Superior Consulting Co., Inc. v. Walling*, 851 F. Supp. 839, 848 (E.D. Mich. 1994) (same). Other than citation to two inapposite federal cases, Plaintiffs present nothing that would allow the Court to conclude that "conspiracy to interfere with livelihood" is a cognizable claim under Michigan law.

g. Concert of Action (Count Eight)

According to Defendants, Plaintiffs' concert of action claims must fail because Plaintiffs have not alleged a cognizable underlying tort claim, as required by state law. ECF No. 11, PageID.249. Defendants are correct that claims for concert of action under Michigan law previously required proof that "all defendants acted tortuously pursuant to a common design." *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 338, 343 N.W.2d 164, 176 (1984). But the Michigan Court of Appeals "has recently determined that 'concert of action' is ... no longer a viable cause of action in Michigan." *Bauer v. Hammon*, No. 339703, 2019 WL 573060, at *7 (Mich. Ct. App. Feb. 12, 2019) (quoting *Mueller v. Brannigan Brothers Restaurants and Taverns, LLC*, 323 Mich. App. 566, 580; 918 N.W.2d 545 (2018)) (internal quotation marks omitted). Because concert of action "is no longer a recognized cause of action in Michigan," *Est. of Nickerson v. Ocwen Loan Servicing, LLC*, No. 18-13965, 2019 WL 6877888, at *7 (E.D. Mich. Dec. 17, 2019), any amendment would be futile. Therefore, Count Eight must be dismissed with prejudice.

h. Malicious Prosecution (Count Nine)

i. Plaintiffs' malicious prosecution claim is not barred by res judicata principles

***11** Defendants argue that res *judicata* principles bar Plaintiffs' claim for malicious prosecution because Plaintiff Shefa could have sought sanctions in the bankruptcy case and failed to do so, and because Plaintiff did seek sanctions in the state case—a request that the state court "expressly rejected." ECF No. 11, PageID.239. Plaintiffs contend that the state court's refusal to impose sanctions does not bar recovery for malicious prosecution, as different standards apply to sanctions requests and malicious prosecution claims. ECF No. 17, PageID.486.

Michigan courts have not addressed the preclusive effect of either the denial of or failure to request sanctions on a subsequent action for malicious prosecution. But other courts have concluded that a court's grant or denial of sanctions or fee requests under Federal Rule of Civil Procedure 11 in a prior action does not preclude a subsequent state-law action for malicious prosecution. *See, e.g.*, *Cohen v. Lupo*, 927 F.2d 363, 365 (8th Cir. 1991) (concluding that denial of Rule 11 sanctions did not preclude an action for malicious prosecution as "Rule 11 and the tort of malicious prosecution differ in their nature, the elements of the claims, and the potential remedies."); *Xantech Corp. v. Ramco Indus.*, Inc., 159 F.3d 1089, 1094 (7th Cir. 1998) ("Federal case law indicates that fee requests made under Rule 11 do not pose a res judicata bar to subsequent actions for claims akin to malicious prosecution.") Defendants do not explain why the state trial court's refusal to grant sanctions under the Michigan Court Rule analogous to Rule 11 [4] would compel a different result. Therefore, the Court concludes that res judicata does not bar Plaintiffs' claim for malicious prosecution.

4 *Thomas v. La-Van Hawkins*, No. 271031, 2008 WL 53120, at *3 (Mich. Ct. App. Jan. 3, 2008) ("Federal Rule of Civil Procedure 11 is similar to Michigan's MCR 2.114 ... Therefore, in interpreting MCR 2.114, Michigan courts may look to federal case law interpreting [Rule 11]."); *John J. Fannon Co. v. Fannon Prod., LLC*, 269 Mich. App. 162, 167, 712 N.W.2d 731, 735 (2005) (describing Rule 11 as the "federal counterpart" to MCR 2.114).

ii. Plaintiffs have not alleged a plausible malicious prosecution claim

Defendants argue that Plaintiffs' claims for malicious prosecution must fail because Plaintiffs have not pleaded a special injury, or that any claims lacked probable cause. ECF No. 11, PageID.250. Under Michigan law, plaintiffs asserting claims of malicious prosecution must establish three elements: "(1) prior proceedings terminated in favor of the present plaintiff, (2) absence of probable cause for those proceedings, and (3) 'malice.' " *Friedman v. Dozorc*, 412 Mich. 1, 48, 312 N.W.2d 585, 603 (1981). Malice means that the defendant acted with "a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based." *Id.* Plaintiffs must also establish that they suffered a special injury: "some injury which would not necessarily occur in all suits prosecuted for similar causes of action." *Id.* at 33.

While their Complaint may be construed to allege that Plaintiffs have been subjected to a "succession of suits," qualifying as a special injury in Michigan, *Kauffman v. Shefman*, 169 Mich. App. 829, 839, 426 N.W.2d 819, 824 (1988), where the pleaded injury is succession of suits, each suit must satisfy all other elements of the malicious prosecution tort. Beyond a conclusory allegation that Defendants pursued "baseless" litigation, Plaintiffs have not alleged that any of the prior suits lacked probable cause. ECF No. 1, PageID.41. Moreover, the Oakland County Circuit Court explicitly concluded that Southfield's claims were neither frivolous nor "devoid of legal merit." ECF No. 1-6, PageID.115. While matters outside the pleadings are not to be considered at the motion to dismiss stage, under Fed R. Civ. P. 10(c), this Court may consider exhibits attached to a pleading as part of the pleading itself. *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997). Plaintiffs have not alleged that the suit in Oakland County Circuit Court, or any other suit brought by Defendants, lacked probable cause, and thus their claim for malicious prosecution must be dismissed.

i. 28 U.S.C. § 1927 (Count Ten)

***12** According to Defendants, Plaintiff's claim under 28 U.S.C. § 1927 must fail as a matter of law because, while that section allows a court to impose attorneys' fees against counsel for conduct occurring in a case presently before the court, "[t]here is simply no case law recognizing a claim under 28 U.S.C. § 1927 against attorneys for conduct of the attorneys in *other* litigation," which is the sole basis of Plaintiffs' tenth claim. ECF No. 11, PageID.251 (emphasis added). For their part, Plaintiffs argue that they could find no law that would prohibit a claim for sanctions under 28 U.S.C. § 1927 "being brought in a subsequent unrelated court proceeding." ECF No. 16, PageID.366.

Plaintiffs' claim for sanctions must be dismissed. As the Fifth Circuit has explained, § 1927 "does not reach conduct that cannot be construed as part of the proceedings before the court issuing § 1927 sanctions." *Matter of Case*, 937 F.2d 1014, 1023 (5th Cir. 1991). Accordingly, other federal courts have held that § 1927 does not provide an independent cause of action under which prospective plaintiffs may recover for conduct that occurred before another court. *See, e.g.*, *GRiD Sys. Corp. v. John Fluke Mfg. Co.*, 41 F.3d 1318, 1319 (9th Cir. 1994) ("The suit filed in state court is an entirely separate action, not subject to the sanctioning power of the district court."); *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 69–70 (2d Cir. 1990) ("We have seen no basis for concluding that § 1927 was intended to permit a litigant to institute a new lawsuit to collect excess costs and fees incurred in a prior litigation."); *Raymark Indus., Inc. v. Baron*, 1997 WL 359333, at *7 (E.D. Pa. June 23, 1997) ("Defendants argue that Raymark has not stated a claim for relief, as § 1927 does not provide an independent cause of action. This court agrees with Defendants.") Because § 1927 sanctions are not available to punish conduct that did not occur before the sanctioning court, and because an amended pleading could not cure this deficiency, Count Ten must be dismissed with prejudice.

j. Interference with expectancy of business relationship (Count Eleven)

i. Whether Defendant Aceves is entitled to immunity is not conclusively established at this stage

Defendants argue that Defendant Aceves is entitled to immunity under Michigan's Government Tort Liability Act, Mich. Comp. Laws § 691.1407(5). ("GTLA"). The GTLA shields government agencies officials from tort liability. Immunity under the GTLA for individual defendants is an affirmative defense. *Odom v. Wayne Cty.*, 482 Mich. 459, 479 (2008). The Sixth Circuit has explained that "courts generally cannot grant motions to dismiss on the basis of an affirmative defense unless the plaintiff has anticipated the defense and explicitly addressed it in the pleadings." *Est. of Barney v. PNC Bank, Nat. Ass'n*, 714 F.3d 920, 926 (6th Cir. 2013) (internal marks and citation omitted). Plaintiffs have not done so here. But "a suit can be dismissed on the basis of an affirmative defense if the facts establishing the defense are definitively ascertainable from the allegations of the complaint and they conclusively establish the affirmative defense" *Est. of Barney*, 714 F.3d at 926.

Under the GTLA, a "government agency" includes any "political subdivision," which in turn includes, among other things, "a municipal corporation," and "a district or authority authorized by law or formed by 1 or more political subdivisions." Mich. Comp. Laws § 691.1401(e). As a DDA is an "authority authorized by law" and "formed by" a political subdivision (here, Southfield), the DDA qualifies as a government agency for purposes of the GTLA. Defendant Mr. Aceves argues that Section 691.1407(5) of the GTLA applies to him. That provision provides absolute immunity to the "highest appointive executive officials of all levels of government" when they act within the scope of their authority. Mich. Comp. Laws. § 691.1407(5). However, review of Michigan precedent reveals that whether an entity is a "level of government" for the purposes of § 691.1407(5) is an inquiry separate from whether that entity is a "government agency" or a "political subdivision" under the GTLA more generally. *See Grahovac v. Munising Twp.*, 263 Mich. App. 589, 593, 689 N.W.2d 498, 500 (2004) ("To determine whether defendant is entitled to absolute immunity, we must first decide whether a township fire department is a level of government."). Whether an entity is a "level of government" depends on consideration of "whether the entity shares aspects of governance with other political subdivisions, such as the power to levy taxes, the power to make decisions having a wide effect on the members of a community, or the power of eminent domain." *California Charley's Corp. v. City of Allen Park*, No. 266383, 2006 WL 1714161, at *2 (Mich. Ct. App. June 22, 2006). It is not clear from the allegations in Plaintiff's complaint that the DDA has such powers, or otherwise is a "level of government" and therefore the facts available do not "conclusively establish the affirmative defense." Est. of Barney, 714 F.3d at 926. More information is necessary, of the kind that may be found in the course of discovery, to make a determination as to whether § 691.1407(5) confers immunity on Defendant Aceves.

***13** Defendant relies on one Michigan decision that appears to have concluded that the Executive Director of a city's Downtown Development Authority is entitled to immunity as a "highest appointive executive official." *Mimi's Sweet Shop, Inc. v. Charter Twp. of Lansing Downtown Dev. Auth.*, No. 349117, 2020 WL 6235779, at *1 (Mich. Ct. App. Oct. 22, 2020) (referencing Ingham County Court's decision to dismiss claims against DDA Executive Director due to governmental immunity). While this Court is not bound to adhere to unpublished opinions of Michigan courts, it may consider and follow those decisions. *SunAmerica Hous. Fund 1050 v. Pathway of Pontiac, Inc.*, No. 19-11783, 2020 WL 2308687, at *2 (E.D. Mich. May 9, 2020). However, the record available in *Mimi's Sweet Shop* does not allow the court to determine the reasoning that the Ingham County Circuit Court applied in reaching its conclusion (because that decision is not available), and the Michigan Court of Appeals explicitly declined to address the issue on appeal, deeming it waived. 2020 WL 6235779, at *3. Consequently, the persuasive authority of *Mimi's Sweet Shop* is insufficient to compel the conclusion that Defendant Aceves is entitled to immunity.

ii. Plaintiffs have not stated a claim for tortious interference

The elements of tortious interference with a business relationship are "[(1)] the existence of a valid business relationship or expectancy, [(2)] knowledge of the relationship or expectancy on the part of the defendant, [(3)] an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and [(4)] resultant damage to the plaintiff. *Dalley v. Dykema Gossett*, 287 Mich. App. 296, 323, 788 N.W.2d 679, 696 (2010). To fulfill the third element, "a plaintiff must demonstrate that the defendant acted both intentionally and either improperly or without justification" by alleging "with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference." *Id.*

Here, Plaintiffs have alleged the existence of a business relationship between Shefa and Southfield. ECF No. 1, PageID.47-48. Plaintiffs have alleged that Mr. Aceves had knowledge of the relationship. *Id.* And Plaintiffs have alleged damages. *Id.* at PageID.49. But Plaintiffs do not specifically allege any actions Mr. Aceves took, beyond a generalized allegation that "Aceves intentionally interfered" with the Southfield-Shefa relationship. ECF No. 1, PageID.48-49. This is far short of what is required to state a claim for tortious interference. Therefore, Count Ten must be dismissed for failure to state a claim upon which relief may be granted.

k. Claims against the City of Southfield on a 42 U.S.C. § 1983 *Monell* theory for unconstitutional policies, customs, or practices (Count Twelve)

"To prevail in a § 1983 suit against a municipality, a plaintiff must show that the alleged violation of constitutional rights occurred because of a municipal policy or custom. *Thomas v.*

City of Chattanooga, 398 F.3d 426, 429 (6th Cir. 2005) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)). Defendants argue that Plaintiffs have failed to identify any unlawful policy or custom that caused Plaintiffs' injury, and that Plaintiffs have pleaded only conclusory allegations without adequate factual support. ECF No. 12, PageID.307.

Plaintiffs allege that Southfield "maintained a policy, custom, or pattern and practice of promoting, facilitating, or condoning improper, illegal, and unconstitutional behavior by its officers and agents." ECF No. 1, PageID.50. Plaintiff also alleges that Southfield "possessed actual knowledge indicating a deficiency with the existing policy, supervision and/or training (or lack thereof), including but not limited to the failure to have a specific safeguards in place such as those (actions) alleged herein were likely to occur." *Id.* Beyond these general allegations, Plaintiffs do not identify with specificity any policy of Southfield that caused the injury alleged here, nor explain how any policy of Southfield caused their injuries. Such "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to withstand a motion to dismiss. *Raymond v. O'Connor*, 526 F. App'x 526, 530 (6th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *see also* *Wooten v. Spigner*, No. 2:11-CV-11479-DT, 2011 WL 5075692, at *4 (E.D. Mich. Sept. 8, 2011), report and recommendation adopted, No. 11-11479, 2011 WL 5075713 (E.D. Mich. Oct. 25, 2011) (holding that plaintiffs failed to allege a *Monell* claim where they did not "allege any specific policies, practices, or customs which amounted to deliberate indifference to or actually caused the alleged constitutional violations."). Because Plaintiffs have not identified a specific custom or policy and tied that policy to their claimed injuries, their claim under *Monell* must be dismissed.

*14 l. Claim for relief under 42 U.S.C. § 1988 (Count Thirteen)

Count Thirteen seeks relief pursuant to 42 U.S.C. § 1988. Section 1988 authorizes a federal court to award reasonable attorney fees to a party that prevails in a civil rights action. It "does not create a separate federal cause of action for a civil rights violation." *Thomas-El v. Smith*, No. 20-CV-10128, 2020 WL 1888829, at *5 (E.D. Mich. Apr. 16, 2020). Therefore, Count Thirteen must be dismissed with prejudice.

m. General constitutional claims (Counts Fourteen and Fifteen)

Count Fourteen is captioned "Deprivation of Property Interest (Fifth and Fourteenth Amendments)." ECF No. 1, PageID.51. Count Fifteen seeks relief for "14th Amendment Violations" ECF No. 1, PageID.52. These claims must be dismissed, as Plaintiffs' claims are properly brought under § 1983, not directly under the Constitution of the United States. *Foster v. Michigan*, 573 F. App'x 377, 391 (6th Cir. 2014) ("To the extent that Appellants attempt to assert direct constitutional claims, they fail; we have long held that § 1983 provides the exclusive remedy for constitutional violations."); *Fox v. City of Saginaw*, No. 19-CV-11887, 2021 WL 120855, at *13 (E.D. Mich. Jan. 13, 2021) (dismissing takings claims purporting to arise "directly" under the Fifth and Fourteenth Amendments rather than under 42 U.S.C. § 1983).

To the extent that Plaintiff Elhadad seeks to assert an equal protection claim under 42 U.S.C. § 1983, he has not alleged sufficient facts establishing that he was treated differently than others similarly situated. *Slee v. Woodhull Twp.*, No. 17-12103, 2018 WL 732198, at *13 (E.D. Mich. Feb. 6, 2018). To the extent Plaintiffs seek to assert a claim under 42 U.S.C. § 1983 for deprivation of a protected property interest, it is not clear what property interest has been impacted, or in what way. And it is similarly unclear who Plaintiff asserts these claims against.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss filed by Al Aceves, the City of Southfield, and the Southfield Downtown Development Association is **DENIED** with respect to Plaintiffs' claim for inverse condemnation, and **GRANTED** as to all other claims. [5] The Motion to Dismiss filed by Plunkett Cooney, P.C., Patrick Lannen, and Douglas C. Bernstein is **GRANTED** with respect to all claims.

5 Although Plaintiffs' federal claims have been dismissed, the Court will, in its discretion, exercise supplemental jurisdiction over the remaining state-law claim for inverse condemnation. *See* *Gamel v. City of Cincinnati*, 625 F.3d 949, 952 (6th Cir. 2010) (district court may retain supplemental jurisdiction even if all underlying federal claims are

> dismissed). Given the Court's familiarity with the facts in issue, the time expended on this litigation, the possibility that Plaintiffs may amend their Complaint and revive their federal claims, the fact that at least one Michigan court has concluded that it lacked jurisdiction over matters closely related to the instant case, and the possibility that this case may require involvement of the Federal Bankruptcy Court, the Court concludes that judicial economy, convenience, fairness to the litigants, and comity would be best served by exercising supplemental jurisdiction.

***15** Plaintiffs' claims for concert of action under state law, sanctions under 42 U.S.C. § 1927, and for costs and fees under 42 U.S.C. § 1988 are **DISMISSED WITH PREJUDICE**. All other claims are **DISMISSED WITHOUT PREJUDICE**. If they choose to do so, Plaintiffs may file a motion seeking leave to amend the Complaint, along with a proposed Amended Complaint addressing the deficiencies raised by Defendants, within 21 days of the date of this Order.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2021 WL 4440401

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

NORTHERN PROCESSING, L.L.C., Plaintiff-Appellant,
v.
COUNTY OF OTSEGO, Otsego County Zoning Administrator, and Otsego County Planning Commission, Defendants-Appellees.

No. 218798.
|
Aug. 11, 2000.

Before: MURPHY, P.J., and KELLY and TALBOT, JJ.

MEMORANDUM.

***1** Plaintiff appeals as of right the order granting defendants' motion for summary disposition under MCR 2.116(C)(7) based on governmental immunity. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff brought this action for declaratory and injunctive relief and money damages based on the denial of a permit to mine gravel. Plaintiff alleged that the zoning administrator improperly refused to apply a formal policy adopted by the county board of commissioners as to minor permits for small parcels. Defendants moved for summary disposition, asserting that the claim was based on actions of the zoning administrator who is entitled to absolute governmental immunity under M.C.L. § 691.1407(5); MSA 3.996(107)(5). The trial court granted summary disposition on this ground.

At the time this case was filed, M.C.L. § 691.1407(5); MSA 3.996(107)(5) provided:

> Judges, legislators, and the elective or highest appointive executive officials of all levels of government are immune from tort liability for injuries to persons or damages to property whenever they are acting within the scope of their judicial, legislative, or executive authority.

To determine whether the zoning administrator is entitled to absolute immunity, a court must establish whether the zoning department is a level of government. *Nalepa v Plymouth-Canton Comm School Dist,* 207 Mich.App 580, 587; 525 NW2d 897 (1994). The court should look to whether the entity shares the attributes of other political subdivisions, such as a defined geographical area, power to tax, power of eminent domain, and power to make decisions with wide effect on the community. *Id.* Unlike a county, township, city, or school district, the county zoning department lacks these attributes. While the zoning administrator is the highest official in the zoning department, there is no showing that he is a top appointed official at a level of government. No evidence establishes that the zoning administrator is the equivalent of other highest appointive or elective officials at other levels of government.

Defendants' remaining issues were not decided by the trial court, and the factual basis for these claims was not developed. The parties may address these issues after remand.

Reversed and remanded. We do not retain jurisdiction.

All Citations

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Daretha BRAZIEL, Individually and as Next Friend of DB, a Minor, and DR, a Minor, Keesha Jones, Individually and as Next Friend of DJ, a Minor, TMC, a Minor, TC, a Minor, and KLB, a Minor, Ieasha Jones, Individually and as Next Friend of DJ, a Minor, KK, a Minor, KF, a Minor, SJ, a Minor, and DAJ, a Minor, Emma Kinnard, Stacey Branscumb, and Michael D. Brigham, Plaintiffs-Appellees,
v.
CITY OF BENTON HARBOR WATER DEPARTMENT, Elhorn Engineering, F&V Operations Inc., and City of Benton Harbor, Defendants,
and
Michael O'Malley, Individually and In His Official Capacity, Defendant-Appellant.

No. 370316
|
June 10, 2025, 3:06 PM

Berrien Circuit Court, LC No. 23-000249-NM

Before: Boonstra, P.J., and Letica and Redford, JJ.

Opinion

Per Curiam.

***1** Defendant, Michael O'Malley,[1] appeals as of right a March 11, 2024 order denying his motion for summary disposition under MCR 2.116(C)(7) (governmental immunity) and (C)(8) (failure to state a claim). On appeal, defendant argues the trial court erred by denying his motion for summary disposition and declining to dismiss him from the action because he was entitled to governmental immunity under the Governmental Tort Liability Act ("GTLA"), MCL 691.1401 *et seq.*, on the basis of either absolute or qualified immunity. Because we find no error in the trial court's decision, we affirm and remand to the trial court for further proceedings.

1 Although O'Malley is one of several defendants in this action, we refer to O'Malley as "defendant" because he is the only defendant who appealed the trial court's March 11, 2024 order. We still use "defendants" to refer collectively to all of the defendants named in this case.

I. FACTUAL BACKGROUND[2]

2 The facts stated in this case are taken from plaintiffs' complaint. For purposes of this appeal, we accept the pleadings as true.

This case concerns defendant's response to the discovery of lead in the City of Benton Harbor's ("the City") municipal water system in excess of lead action levels. Lead is a neurotoxin that is particularly dangerous to children. Both federal and Michigan law regulate the quality of drinking water for the public under their respective Safe Drinking Water Acts ("SDWA"). 42 USC 300f *et seq.*; MCL 325.1001 *et seq.* In Michigan, the Department of Environment, Great Lakes, and Energy ("EGLE"), formerly known as the Department of Environmental Quality, is the department with "power and control over public water supplies and suppliers of water." MCL 325.1002(g); MCL 325.1003.

EGLE sets standards for the monitoring, treatment, and prevention of lead contamination in drinking water in the Lead and Copper Rule, Mich. Admin. Code, R. 325.10101 *et seq.*[3] These standards require governing authorities to take particular actions when the public water supply's lead level exceeds "0.015 milligrams per liter (mg/l) in tap water samples collected during a monitoring period ...." Mich. Admin. Code, R. 325.10604f(c). These actions include issuing public advisories and public education materials to the persons served by the water supply and offering to arrange for water sampling to customers who request it. Mich. Admin. Code, R. 325.10410(1). Additionally, governing authorities who were previously in compliance with lead action levels must increase testing frequency from every three years, Mich. Admin. Code, R. 325.10710a(4)(d)(*iii*), to every six months, Mich. Admin. Code, R. 325.10710c(2), and correct corrosion problems through corrosion-control studies and treatment, Mich. Admin. Code, R. 325.10604f(1)(b).

3 The Environmental Protection Agency also requires specific standards for the monitoring,

> treatment, and prevention of lead contamination in drinking water in the National Primary Drinking Water Regulations. 40 CFR 141 *et seq.*

The typical source of lead contamination is not the source water, but lead leaching from older pipes in the water delivery system. Such is the case in Benton Harbor. The City sources its water from Lake Michigan, which does not contain lead. However, the City's public water system is 100 years old. In 2018, lead exceeding the lead action level at 22 parts per billion (ppb) and the bacteria E. coli were both identified in Benton Harbor's municipal water system.

***2** Plaintiffs have alleged that defendants treated the lead contamination with a corrosion-control treatment called "Carus 8600," which was a generic phosphate blend and that they did so without a corrosion-control study, without tailoring the phosphate blend to the water system's particular needs, and without monitoring its effectiveness. While using this blend to treat corrosion, plaintiffs assert the level of lead in the water supply increased. As recent as the testing period from January to June 2021, testing performed in some Benton Harbor homes measured lead up to 889 ppb.

Although the level of lead in the water supply continued to increase, defendants represented to plaintiffs that they were successfully remedying the lead contamination. Defendants also represented that water filters, which were untested or ineffective for treatment of water with a lead concentration over 150 ppb, would mitigate contamination. This caused plaintiffs to unknowingly consume lead-contaminated water. Plaintiffs were not told to stop consuming the water until late 2021.

In October 2023, plaintiffs filed a putative class action against O'Malley, who was the Director of the Benton Harbor Water Department, the City, and two private corporations, who had contracted with the City to address the lead contamination, for mismanaging the response to the discovery of the elevated lead levels and intentionally misleading the public about remediation of the water contamination. Plaintiffs alleged a claim of gross negligence against O'Malley. In support of this claim, plaintiffs alleged that "O'Malley's inaction or ineffective action failed to stop the exceedingly high lead action level exceedances." Plaintiffs also alleged:

> From 2018-2020, although [sic] Benton Harbor's water supply was contaminated with lead, bacteria and other contaminants and each testing and monitoring sample period revealed lead levels violated federal and State Safe Drinking Water Acts and the Lead and Copper rule. Although the water supply was unsafe to ingest, Defendant O'Malley repeatedly denied, lied and covered up this public health emergency and crisis by repeatedly telling Benton Harbor residents and the public that the water was safe to drink.

O'Malley moved for summary disposition under MCR 2.116(C)(7) and (C)(8) on the basis that he had governmental immunity against plaintiffs' claim. First, relying on a few provisions in the Benton Harbor Charter, O'Malley argued he was entitled to absolute immunity because he was the "highest appointive official" of a "level of government" as the Director of the Benton Harbor Water Department. Second, O'Malley argued he was entitled to qualified immunity because plaintiffs failed to allege that O'Malley's conduct amounted to gross negligence or that he was the proximate cause of plaintiffs' injuries. Accordingly, O'Malley asserted he was entitled to summary disposition on plaintiffs' claims and dismissal from the action.

Plaintiffs responded to O'Malley's motion for summary disposition, arguing, first, that O'Malley was not entitled to absolute immunity because the Water Department was not a "level of government." Plaintiffs argued the provisions in the Benton Harbor Charter showed only that the Water Department had "supervision" over the water supply, which did not demonstrate autonomous authority. Second, that the allegations in their complaint, accepted as true, stated an actionable claim of gross negligence against O'Malley because they alleged that O'Malley intentionally lied about the water quality, failed to file accurate reports, and falsified documents, all while telling residents that the water was safe to drink.

***3** The trial court denied O'Malley's motion for summary disposition in relation to both his absolute immunity and qualified immunity arguments. The trial court explained that defendant only presented a few pages of the Benton Harbor Charter to the trial court in support of his absolute immunity argument. The trial court noted that review of the remainder of the Charter and other evidence was necessary to determine whether O'Malley was entitled as a matter of law to absolute immunity. The trial court further explained that although plaintiffs' complaint contains some conclusory allegations, the pleadings still sufficiently alleged O'Malley's conduct was grossly negligent.

This appeal followed.

II. STANDARD OF REVIEW

The applicability of governmental immunity is a question this Court reviews de novo. *Beals v Michigan*, 497 Mich 363, 369; 871 NW2d 5 (2015), overruled in part on other grounds by *Ray v Swager*, 501 Mich 52, 72 n 49; 903 NW2d 366 (2017). This Court also reviews de novo a decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

A trial court may grant summary disposition under MCR 2.116(C)(7) on the basis of governmental immunity. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). In a motion for summary disposition under MCR 2.116(C)(7), this Court considers "all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Beals*, 497 Mich at 370 (quotation marks and citation omitted). "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether the claim is barred by immunity is a question for the court to decide as a matter of law." *Id.* (quotation marks and citation omitted).

A motion under MCR 2.116(C)(8) "tests the legal sufficiency of a claim based on the factual allegations in the complaint." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019) (emphasis omitted). The trial court must decide the motion on the pleadings alone, accepting as true all factual allegations contained therein, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). A motion under MCR 2.116(C)(8) may be granted only when the claim is so clearly unenforceable that no factual development could possibly justify recovery. *El-Khalil*, 504 Mich at 160. Further, "[a] mere statement of a pleader's conclusions and statements of law, unsupported by allegations of fact, will not suffice to state a cause of action." *Varela v Spanski*, 329 Mich App 58, 72; 941 NW2d 60 (2019).

To the extent resolution of this issue involves statutory interpretation, this Court reviews de novo whether a trial court properly interpreted and applied the relevant statutes. *Wiesner v Washtenaw Co Community Mental Health*, 340 Mich App 572, 580; 986 NW2d 629 (2022).

III. ABSOLUTE IMMUNITY

Defendant first argues the trial court erred by concluding a question of fact remained whether he was entitled to absolute immunity under the GTLA. Concluding that defendant did not meet his burden to establish he had absolute immunity as a matter of law, we disagree.

Under the GTLA, the Michigan Legislature has determined that certain elective or appointive officials have absolute immunity from tort liability when acting within the scope of their authority: "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." MCL 691.1407(5). The purpose of absolute immunity is to shield public employees who are responsible for broad, essential governmental decision-making so they may fulfill their public duties without being intimidated. *Grahovac v Munising Twp*, 263 Mich App 589, 595; 689 NW2d 498 (2004). To show entitlement to absolute immunity from tort liability, the governmental employee 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 v Jaskowski*, 494 Mich 190, 204; 833 NW2d 247 (2013). The governmental employee bears the burden of establishing entitlement to absolute immunity. *Id.*

***4** In this case, defendant contends that he is entitled to absolute immunity because he is the highest appointive executive official of a level of government as the Director of the Water Department. To determine whether defendant is entitled to absolute immunity, this Court must first determine whether the Water Department constitutes a "level of government" and, if answered in the affirmative, then determine whether defendant is its "highest appointive executive official."

To decide whether an entity is a "level of government" within the meaning of MCL 691.1407(5), this Court has looked at several factors. These include "whether the entity shares aspects of governance with other political subdivisions, such as the power to levy taxes, the power to make decisions having a wide effect on members of the community, or the power of eminent domain." *Grahovac*, 263 Mich App at 593. This Court has also considered whether the government employee exercises "broad-based jurisdiction or extensive authority similar to that of a judge or legislator," *Id.*, quoting *Chivas v Koehler*, 182 Mich App 467, 471; 453 NW2d 264 (1990), and whether the entity has "autonomous authority." *Davis v Detroit*, 269 Mich App 376, 381; 711 NW2d 462 (2006)

In *Grahovac*, 263 Mich App at 594, this Court concluded that a volunteer fire department was not a level of government because no evidence supported that the fire department had any powers of governance. The defendant lacked the power to levy taxes, the power of eminent domain, the power to make decisions having a wide effect on members of the community, or any broadly-based jurisdiction or extensive authority. *Id.* The Court noted that all of these powers were specifically granted by the Legislature to the township board or other government agencies. *Id.* Instead, the volunteer fire department was "at the complete disposal of the township board and [could] neither exist nor act without the board's authorization." *Id.* This Court concluded the township board was the relevant level of government and, consequently, the fire department chief was not entitled to absolute immunity. *Id.*

In *Davis*, 269 Mich App at 381, this Court concluded that Detroit's fire department and water and sewage department were levels of government. The *Davis* Court distinguished *Grahovac* on the basis that *Grahovac* involved a township, which unlike cities, was governed solely by legislative provisions. *Id.* at 380. In contrast, the Court looked to the Detroit City Charter and Detroit City Code to determine whether the departments were levels of government. *Id.* at 381. It concluded that the charter and code granted the fire commissioner and board of water commissioners "autonomous authority that was not alleged in *Grahovac*." *Id.* citing 1997 Detroit Charter, §§ 7-801, 7-802, 7-804, 7-806, 7-1501, and 7-1502.

In this case, O'Malley does not contend that the Water Department holds traditional powers of governance such as the power to levy taxes or the power of eminent domain. Rather, O'Malley argues the Water Department was similar to the departments in *Davis* because it has autonomous authority over matters related to water in Benton Harbor. In the trial court and this Court, O'Malley relied on §§ 3.16, 3.17, and 3.38 of the Benton Harbor Charter to support this assertion. However, these provisions do not establish as a matter of law that the Water Department exercised autonomous authority over the water supply.

Section 3.16 provides that "[t]he administrative functions and powers of the City shall be divided into eight departments as follows: Law; Finance; Public Works and Service; Public Welfare; Public Health; Water; and Sewage Disposal, subject to modification hereinafter provided." Benton Harbor Charter, § 3.16. The next section describes the directors of each of the departments:

> ***5** There shall be a Director of every department who shall have the supervision and control thereof. The Commission shall appoint the Director of Law and the Director of Finance and they shall be responsible to the supervision and control of the Commission in the discharge of their duties; the Manager shall appoint and employ the Directors of the other departments and they shall be responsible to the supervision and control of the Manager for the discharge of their duties .... All such Directors shall be appointed or employed for an indefinite term and only at the will of the Commission or Manager respectively, as the case may be, and may be removed at any time at the pleasure of the Commission or Manager respectively, by whom such Director is appointed or employed. [Benton Harbor Charter, § 3.17.]

Finally, under § 3.38:

> The Director of the Water Department shall be a licensed operator with qualifications as designated by the

> Michigan State Board of Health and shall have direct supervision of the municipal supply and all works, lands, water, lands under water, dams, pumping stations, ways, water mains, pipes and all other works and property connected therewith." [Benton Harbor Charter, § 3.38.]

O'Malley contends that these provisions collectively demonstrate that the Water Department had autonomy over the City's water works system, including all administrative functions related to water, and it did not require the Water Department to collaborate with any other entity.

Viewed in isolation, these provisions do not establish as a matter of law that the Water Department had autonomous authority over water in Benton Harbor. Rather, the provisions only provide that the City Commission tasked the Director of the Water Department with the "supervision" of the municipal water supply. Supervision alone is not synonymous with autonomous authority. These three provisions are not comparable to the charter provisions in *Davis*. They do not establish that the Water Department was an autonomous governmental unit with the power to make independent decisions.

Moreover, as explained by the trial court, O'Malley only presented a few pages of the Benton Harbor Charter, leaving a question of fact whether the remainder of the Charter or other facts supported a determination that the Water Department exercised autonomous authority over the municipal water supply. As the party moving for summary disposition, O'Malley bore the burden of presenting evidence in support of his argument and he failed to do so. As such, he was not entitled to summary disposition.

Indeed, other provisions in the Benton Harbor Charter counsel against a determination that the Water Department exercises autonomous authority. Chapter XI of the Charter supports that the Commission, rather than the Water Department, holds decision-making power over the municipal water supply. The Commission holds the power to make ordinances, rules, and regulations for the maintenance of the municipal water supply. Benton Harbor Charter, § 11.11. The Commission holds the power to improve upon or expand the water system. Benton Harbor Charter, § 11.12. Finally, the Commission holds the power to levy taxes for water use. Benton Harbor Charter, § 11.13.

O'Malley argues the Benton Harbor Charter "makes clear" the Water Department's power includes the promulgation of rules and regulations. The Benton Harbor Charter does not support this assertion. Rather, the Charter grants the power to promulgate rules and regulations regarding the water supply to the Commission. Benton Harbor Charter, § 11.11. The section O'Malley relied on is actually found in the Benton Harbor Code of Ordinances and it does not support that the Water Department has any power to promulgate rules and regulations. It merely provides that individuals seeking to access city water agree to be bound by the rules and regulations relevant to the Water Department. Benton Harbor Code of Ordinances, § 44-16(c).

***6** In conclusion, O'Malley conceded that the Water Department lacked traditional powers of governance. Moreover, no showing was made that the Water Department had "broad-based jurisdiction or extensive authority similar to that of a judge or legislator." *Grahovac*, 263 Mich App at 593 (quotation marks and citation omitted). Finally, defendant did not present evidence that the Water Department exercised autonomous authority; rather, the Charter and Code of Ordinances counsel against such a determination. Because defendant failed to establish that the Water Department is a "level of government" within the meaning of MCL 691.1407(5), he is not entitled as a matter of law to absolute immunity.

IV. QUALIFIED IMMUNITY

Defendant contends that, even if this Court disagrees that he had absolute immunity, he had qualified immunity. In support of this argument, defendant argues the trial court erred by determining plaintiffs sufficiently pleaded O'Malley's conduct was grossly negligent and the proximate cause of their injuries. We disagree with both contentions.

Under the GTLA, governmental employees are "generally immune from tort liability when they are engaged in the exercise or discharge of a governmental function." *Ray*, 501 Mich at 62. The GTLA provides several exceptions to this rule. Relevant to this appeal:

> [E]ach officer and employee of a governmental agency ... is immune from tort liability for an injury to a person or

> damage to property caused by ... employee ... while in the course of employment ... if all of the following are met:
>
> (a) The ... employee ... 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 ... employee's ... conduct does not amount to gross negligence that is the proximate cause of the injury or damage. [MCL 691.1407(2).]

The governmental employee bears the burden of establishing his or her entitlement to immunity as an affirmative defense. *Ray*, 501 Mich at 62.

The parties do not dispute that subdivisions (a) and (b) were satisfied in this case. However, the parties dispute subdivision (c). Accordingly, this Court must assess whether plaintiffs sufficiently pleaded that O'Malley's conduct was "grossly negligent" and the "proximate cause" of plaintiffs' injuries. A plaintiff alleging gross negligence must also plead the elements of ordinary negligence, i.e., duty, breach, causation, and damages. See *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009).

Defendant first argues plaintiffs' allegations related to O'Malley were conclusory statements, unsupported by factual allegations, such that plaintiffs failed to set forth the elements of negligence. Although it is true that a complaint that contains mere conclusory statements unsupported by factual allegations will not survive a motion for summary disposition under MCR 2.116(C)(8), *Varela*, 329 Mich App at 72, plaintiffs' complaint contained sufficient factual allegations to survive the motion for summary disposition. Defendant's argument takes a myopic view of plaintiffs' complaint that is unsupported by the pleading requirements necessary to survive a motion for summary disposition under MCR 2.116(C)(8). As previously stated, when considering such a motion, this Court must accept as true all factual allegations contained therein, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Peters*, 215 Mich App at 486.

In their complaint, plaintiffs allege O'Malley was grossly negligent because he (1) failed to act or took ineffective action to remedy the lead contamination after its discovery; and (2) "repeatedly denied, lied, and covered up this public health emergency and crisis by repeatedly telling Benton Harbor residents and the public that the water was safe to drink." As noted by the trial court, some of the allegations in plaintiffs' complaint are conclusory; however, plaintiffs sufficiently pleaded factual allegations related to O'Malley to support their legal conclusions.

***7** First, plaintiffs alleged O'Malley's "inaction or ineffective action failed to stop the exceedingly high lead action level exceedances." The complaint explains O'Malley was the Director of the Water Department during the period when Benton Harbor's water supply exceeded the lead action level. Plaintiffs allege he violated both federal and Michigan SDWA requirements and guidelines for selection, use, and monitoring of corrosion-control measures to eliminate the lead contamination. The complaint explained that governing authorities use "corrosion control treatment" to prevent lead leaching from older pipes into the water supply. When choosing from the various methods of corrosion control, the governing authority must choose a ratio and dosage tailored to the needs of the particular water system and monitor its effectiveness. Likewise, the governing authority was required to perform a corrosion-control study before implementing the treatment.

Despite these requirements, O'Malley submitted a permit application to EGLE, which included use of the generic "Carus 8600" phosphate blend to treat the lead contamination when that blend had not been tested for use in the Benton Harbor water system and defendants did not attempt to tailor the blend to the particular water system. Defendants never completed a corrosion-control study and failed to monitor for the blend's effectiveness after implementing it. This resulted in the level of lead in the water increasing.

Additionally, plaintiffs do not merely plead that O'Malley failed to act or acted ineffectively. Rather, they pleaded that O'Malley affirmatively acted to obscure the results of the corrosion control. Plaintiffs alleged he obscured the results of the Carus 8600 blend by refusing to disclose the addresses of the testing sites to EGLE and requested to reduce the number of testing sites. Related to the issue of E. coli contamination, plaintiffs pleaded O'Malley used "false technical excuses" to cover up discrepancies in water supply testing that the EPA determined were inaccurate. Finally, plaintiffs alleged defendant was terminated from his position for falsifying Water Department documents.

Collectively, these factual allegations could support that O'Malley did not act or, when he did act, he did so ineffectively because he improperly selected the corrosion-control treatment. Likewise, these factual allegations support that he intentionally obscured the results of the treatment plan to mislead state regulators regarding its success. Consequently, plaintiffs' complaint was not devoid of factual allegations in support of this theory of recovery.

Defendant contends that because defendant Elhorn Engineering ("Elhorn") recommended use of Carus 8600 and EGLE approved the permit application submitted by O'Malley, the injury plaintiffs alleged arose out of EGLE's and Elhorn's actions rather than O'Malley's actions. Indeed, plaintiffs alleged Elhorn recommended selection of Carus 8600 for corrosion control and EGLE ultimately approved the permit application requesting to use the product. However, even accepted as true, these pleadings do not negate O'Malley's role, as Director of the Water Department, in selecting and using Carus 8600 in the water system. The fact that he consulted with other entities and sought approval does not alter his responsibility for the alleged harm plaintiffs suffered. Likewise, this argument ignores plaintiffs' pleading that O'Malley attempted to obscure the testing results. Drawing reasonable inferences from these pleadings, plaintiffs have sufficiently alleged a connection between O'Malley's actions and the harm to plaintiffs.

Defendant also argues that plaintiffs failed to show defendant breached a duty to them because plaintiffs insufficiently pleaded that he did not meet an obligation by testing fewer than the required number of homes or that he was required to disclose the addresses of the testing sites to EGLE. He also argues his attempt to lower the number of testing sites was denied by EGLE. Again, this argument takes too narrow a view of the complaint. First, plaintiffs alleged that "O'Malley refused to disclose the addresses of the testing sites to EGLE." Reasonably inferred from use of the term "refused," EGLE requested that O'Malley disclose the testing sites and he refused that request. Second, although defendant correctly points out that EGLE denied his request to reduce testing sites and, therefore, he did not cause any direct harm to plaintiffs by reducing the testing sites, these allegations provide context and support to plaintiffs' larger allegation that O'Malley attempted to obscure testing results and mislead the public regarding efforts to reduce the lead level in the water supply.

***8** Defendant correctly notes that, although plaintiffs allege O'Malley was fired from his position for falsifying documents, they do not allege that the documents were related to lead contamination or explain what misconduct was at issue. However, it is possible, drawing reasonable inferences from the complaint and viewing this allegation in the context of all allegations, that O'Malley was fired for falsifying documents related to his handling of the lead and bacteria contamination. Ultimately, even if this particular allegation is conclusory, plaintiffs have sufficiently pleaded other factual allegations to survive defendant's motion for summary disposition.

In addition to the attempts to obscure the testing results, plaintiffs alleged that O'Malley lied to the public regarding the safety of drinking the water and the effectiveness of the mitigation measures. Plaintiffs point to two statements made by O'Malley in support of this allegation that they allege were false and misleading. First, O'Malley was alleged to have told a Benton Harbor resident that even if water in homes tested above 15 ppb, after the "first flush it was okay to drink and cook" with the tap water because "they provide clean water right to their spout." Second, O'Malley was alleged to have publicly and falsely stated inroads were being made to eliminate lead from the water when the corrosion-control treatment was not successfully treating the contamination. Likewise, plaintiffs alleged that all defendants told residents to use water filters in their homes when they knew the waters filters were not effective for lead concentrations over 150 ppb and, as early as 2019, some Benton Harbor homes had lead levels in excess of 150 ppb.

The next question is whether plaintiffs pleaded a valid claim for gross negligence with these allegations. The GTLA defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). This Court has noted that this definition suggests "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). Further, "[i]t is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge." *Id.* However, "[s]imply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result." *Id.*

Plaintiffs allege that O'Malley selected Carus 8600 to treat the water without defendants testing it or tailoring it to the particular water system. They additionally allege this caused the lead level to increase. They also assert defendant lied about, denied, and attempted to cover up the water contamination by misleading state regulators regarding testing procedures and lying to Benton Harbor residents about the success of the Water Department's efforts to treat the water and the propriety of drinking the water.

These allegations do not contend that O'Malley created this public health crisis. They contend that he exacerbated the water crisis by mishandling its remediation, engaging in obstructive conduct, and lying to the public about the success of their efforts and the propriety of drinking the water when he knew lead contamination was an ongoing and worsening issue.

Lead is a well-known toxin. O'Malley was the Director of the Water Department and was specifically trained and licensed to supervise the municipal water supply. Benton Harbor Charter, § 3.38. Someone in his position would be well-aware of the dangers of exposing the public to lead contamination. Plaintiffs allege his conduct exposed Benton Harbor residents to that toxin and encouraged them to continue drinking from the water supply under the false belief that the City was effectively remediating the issue and that measures, such as water filters, would make the water safe to consume. A reasonable juror could conclude that O'Malley's conduct was "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). Accordingly, the trial court did not err by concluding plaintiffs sufficiently pleaded a claim of gross negligence.

***9** For purposes of the GTLA, even if a government employee's conduct was grossly negligent, he or she is immune from liability unless that conduct was "the proximate cause" of the plaintiffs' injuries. MCL 691.1407(2)(c). Proximate cause, or legal cause, is distinct from factual cause, or cause in fact, which "requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Ray*, 501 Mich at 63 (quotation marks and citation omitted). Whether a defendant's conduct was the proximate cause "requires a determination of whether it was foreseeable that the defendant's conduct could result in harm to the victim." *Id.* at 65. Stated otherwise, "the harm caused to the plaintiff was the general kind of harm the defendant negligently risked." *Id.* at 64 (quotation marks and citation omitted). Generally, there may be more than one proximate cause of an injury, but for purposes of the GTLA, a government employee's conduct cannot be the proximate cause unless it was "the one most immediate, efficient, and direct cause of the injury ...." *Id.* at 65 (quotation marks and citation omitted).

Defendant contends that as a matter of law he cannot be the proximate cause of plaintiffs' injury because, as pleaded, the lead leaching into the water system from the aging pipes was the most immediate, efficient, and direct cause of injury. However, our Supreme Court has warned against this type of analysis because it weighs factual causes instead of assessing the legal responsibility of the actors involved. *Id.* at 71-72. In *Ray*, the Supreme Court overturned its previous order in which it held that under the GTLA a claim against a firefighter, who was allegedly grossly negligent in fighting a house fire that killed the plaintiff's child, was not the proximate cause because the fire was the proximate cause. *Id.*, overruling *Dean v Childs*, 474 Mich 914; 705 NW2d 344 (2004). The Supreme Court explained this analysis was erroneous:

> Determining proximate cause under the GTLA, or elsewhere, does not entail the weighing of factual causes but instead assesses the legal responsibility of the actors involved. Moreover, because proximate cause is concerned with the foreseeability of consequences, only a human actor's breach of a duty can be a proximate cause. Consequently, nonhuman and natural forces, such as a fire, cannot be considered "the proximate cause" of a plaintiff's injuries for the purposes of the GTLA. Instead, these forces bear on the question of foreseeability, in that they may constitute superseding causes that relieve the actor of liability if the intervening force was not reasonably foreseeable. [*Ray*, 501 Mich at 71-72.]

Applied to this case, the fact that the presence of lead in Benton Harbor's 100-year-old water system is among the factual causes of plaintiffs' injuries does not negate the possibility of O'Malley being the proximate cause.

Moreover, the allegations in this case are not that defendants caused the lead to be present in the water system. The allegations are that, after discovering the lead contamination, O'Malley exacerbated the water contamination by improperly treating for corrosion and making false and misleading statements to the public that assured that their drinking water was safe, all while knowing that dangerous levels of lead were present in the drinking water. Accepting these pleadings as true, it is foreseeable that the harm pleaded by plaintiffs was the general kind of harm that O'Malley's conduct negligently risked. *Id.* at 64. Likewise, a reasonable juror could conclude that he was the most immediate, efficient, and direct cause of plaintiffs' injuries. Accordingly, a question of fact remains whether O'Malley was the proximate cause of plaintiffs' injuries.

Affirmed.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

SERENITY HOMES-NORTH, LLC, and
Serenity Homes-West, LLC, Plaintiffs-Appellees,
v.
Lynne DOYLE, Community Mental Health of Ottawa County, and Lakeshore Regional Entity, Defendants,
and
Jeffrey L. Brown, Defendant-Appellant.

Nos. 344757; 344781
|
August 20, 2019

Ottawa Circuit Court, LC No. 18-005231-CB

Before: Cavanagh, P.J., and Stephens and O'Brien, JJ.

Opinion

Per Curiam.

***1** Defendant Jeffery L. Brown appeals as of right and by leave granted [1] the trial court's order denying his motion for summary disposition pursuant to MCR 2.116(C)(7) (immunity granted by law) and (8) (failure to state a claim). For the reasons set forth in this opinion, we affirm.

1 *Serenity Homes-North, LLC v. Doyle*, unpublished order of the Court of Appeals, entered December 28, 2018 (Docket No. 344781).

I. BACKGROUND

This case arises from a fee dispute for services rendered by the plaintiffs Serenity Homes-North, LLC, and Serenity Homes-West, LLC, licensed adult foster-care facilities that provided foster care and other mental health services to developmentally disabled and mentally ill individuals and their families (the consumers). Abraham Joshua was the resident agent of both Serenity Homes-North and Serenity Homes-West. Defendant Community Mental Health of Ottawa County (CMHOC) was a program that was funded by federal and state tax funds that provided behavioral health services to vulnerable citizens with mental health issues. Defendant Lynne Doyle was the Executive Director and the Chief Executive and Administrative Officer of CMHOC. CMHOC placed individuals in plaintiffs' facilities pursuant to a written agreement and subsequent oral agreements. Plaintiffs alleged that CMHOC failed to pay plaintiffs from late 2016 through 2017 for previously rendered services and that CMHOC owed plaintiffs more than $35,000.

Defendant Lakeshore Regional Entity (LRE) was a Prepaid Inpatient Health Plan that was responsible for ensuring that Medicaid funding was available for entities to serve vulnerable individuals. LRE coordinated the management of Medicaid funding for several human service agencies including CMHOC and also had a quality assurance function regarding service providers. Defendant Brown was the Chief Executive Officer of LRE at the time of the occurrences that gave rise to this lawsuit.

Plaintiffs alleged that despite their provision of services to persons placed at their facilities by CMHOC, their invoices for services were not paid. Plaintiffs asserted that they met with LRE director Brown in August and September 2017 in an effort to facilitate payment. It was during this time that plaintiffs alleged Brown told them, "he would take care of it", referring to the outstanding billings. In November 2017, plaintiffs filed a formal provider grievance with LRE regarding the outstanding bills. The principals of the plaintiffs and the defendants engaged in discussions through the balance of 2017. At one meeting, the plaintiffs alleged that the CMHOC executive made defamatory remarks. In January 2018, plaintiffs filed the instant lawsuit. The complaint pled both a written and oral contract claims as well as unjust enrichment and account stated claims. Additionally, tortious interference and civil conspiracy claims were pled against all defendants. Claims against the individual defendants were also filed. Plaintiffs accused Brown of fraud and lodged a defamation claim against Doyle.

***2** Motions for summary disposition were filed, most of which are not at issue in this appeal. Defendant Brown denied all allegations against him and asserted various affirmative defenses. Brown moved for summary disposition under MCR 2.116(C)(7) and (8). Plaintiffs responded and opposed Brown's motions for summary disposition. The trial court denied his motion finding that Brown was neither cloaked in absolute governmental immunity or qualified immunity. This appeal ensued.

II. MCR 2.116(C)(7)

Brown first argues on appeal that the trial court erroneously determined that he was not entitled to absolute governmental immunity while the court found that he was the highest ranking official of LRE. He argues that his former employer LRE is a "level of government." We disagree.

This Court reviews de novo the trial court's grant or denial of a motion for summary disposition. *Bailey v. Schaaf*, 494 Mich. 595, 603; 835 N.W.2d 413 (2013). Additionally, the applicability of governmental immunity is a question of law that this Court reviews do novo. *County Rd. Ass'n. of Mich. v. Governor*, 287 Mich. App. 95, 117-118; 782 N.W.2d 784 (2010). "In making this determination, this Court reviews the entire record to determine whether defendant was entitled to summary disposition." *Maiden v. Rozwood*, 461 Mich. 109, 118; 597 N.W.2d 817 (1999).

MCR 2.116(C)(7) permits summary disposition if the claim is barred by immunity. *Odom v. Wayne Co.*, 482 Mich. 459, 466; 760 N.W.2d 217 (2008). The movant may support the motion for summary disposition under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(2). The trial court shall consider such evidence if the substance of the evidence would be admissible at trial. MCR 2.116(G)(6); *Odom*, 482 Mich. at 466. Additionally, "[t]he contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Maiden*, 461 Mich. at 119.

The governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, grants absolute immunity to high-ranking government officials. *Odom*, 482 Mich. at 468-469. 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." Judges, legislators, and the highest executive officials at all levels of government receive immunity from all tort liability for acts done within the scope of their judicial, legislative, or executive authority. *Odom*, 482 Mich. at 468.

The purpose of the protection of absolute immunity is to shield public employees who engage in broad, essential governmental decision-making and to permit the officials to fulfill their public duties. *Grahovac v. Munising Twp.*, 263 Mich. App. 589, 595; 689 N.W.2d 498 (2004). An executive official may be entitled to absolute immunity if he or she has broad-based jurisdiction or extensive decision-making authority. *Id.* at 593. In order to determine whether a governmental entity is a "level of government," courts "examine whether the entity shares aspects of governance with other political subdivisions, such as the power to levy taxes, the power to make decisions having a wide effect on members of the community, or the power of eminent domain" and whether the governmental entity has policy-making powers. *Id.* at 593, 595-596.

***3** LRE is a regional entity established under the Mental Health Code. MCL 330.1204b establishes the requirements and procedures for establishing a regional entity under the Mental Health Code, MCL 330.1001 *et seq.* MCL 330.1204b(1) provides that "[a] combination of community mental health organizations or authorities may establish a regional entity by adopting bylaws that satisfy the requirements of this section." The regional entity's bylaws must contain the purposes and powers of the regional entity, the manner in which a community mental health services program participates in governing the regional entity, the manner in which the regional entity's assets and liabilities are allocated to each participating community mental health services program, and the manner in which the regional entity enters into contracts, among other provisions. See MCL 330.1204b(1)(a), (b), (c), and (f). Additionally, "[a] regional entity established under this section is a public governmental entity separate from the county, authority, or organization that establishes it." MCL 330.1204b(3).

In this case, the parties do not dispute that Brown was the highest ranking official of LRE, and the lower court record supports this conclusion. Brown was the Chief Executive Officer of LRE, and exercised broad-based jurisdiction and had extensive authority over LRE.

LRE was formed as a regional entity pursuant to MCL 330.1204b, and the purpose of LRE was to carry out the provisions of the Mental Health Code by coordinating and furthering the statutory purposes of the entities that established LRE. As the statute plainly reads, LRE is a "governmental entity". However, applying the *Grahovac* factors, it is not a "level of government" under MCL

691.1407(5). Brown did not present any evidence that LRE had the power to levy taxes, to make decisions that had a wide effect on members of the community, or had the power of eminent domain. LRE's authority and jurisdiction regarding issues related to mental health, developmental disability, and substance use disorder services was limited rather than broad-based jurisdiction or extensive authority similar to a judge or legislator. Therefore, LRE did not have aspects of governance or have the statutory authority to make policy decisions. See *Grahovac*, 263 Mich. App. at 593, 595-596.

Further, Brown did not present any evidence that LRE had autonomous authority beyond its statutory purposes and powers or beyond the powers conferred on it by the organizing entities. Although LRE had the powers provided in MCL 330.1204b(2), including the powers shared by the organizing entities, the power to contract with the state and the organizing entities, and the power to accept funds, LRE's authority was limited by the organizing entities. There was no evidence presented of other authorities, such as a city charter or city code that granted LRE autonomous authority or additional powers. Cf. *Davis v. Detroit*, 269 Mich. App. 376, 380-381; 711 N.W.2d 462 (2005). Although LRE had the power to fulfill its purposes pursuant to MCL 330.1204b(2) and its bylaws, it did not have the power to make decisions beyond its statutory powers and those established by the organizing entities in LRE's bylaws. Therefore, we conclude that LRE was not an autonomous governmental unit. Notwithstanding Brown's role as the highest executive officer of LRE, the trial court did not err by determining that Brown was not entitled to absolute immunity under to MCL 691.1407(5) because LRE was not a level of government. See *Maiden*, 461 Mich. at 119; *Grahovac*, 263 Mich. App. at 597.

Brown next argues that the trial court erroneously determined that he was not entitled to qualified governmental immunity. We disagree.

The *Odom* Court articulated the test for determining whether an individual has governmental immunity:

> If the plaintiff pleaded an intentional tort, determine whether the defendant established that he is entitled to individual governmental immunity under the *Ross* test [2] by showing the following:
>
> ***4** (a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,
>
> (b) the acts were undertaken in good faith, or were not undertaken with malice, and
>
> (c) the acts were discretionary, as opposed to ministerial. [*Odom*, 482 Mich. at 479-480.]

Pursuant to *Ross v. Consumers Power Co. (On Rehearing)*, 420 Mich. 567, 633-634; 363 N.W.2d 641 (1984), a governmental employee must establish that he or she acted within the scope of his or her employment in order to be immune from intentional tort claims. *Odom*, 482 Mich. at 473. This includes actions that the governmental employee reasonably believed that he or she was authorized to take. *Id.* Additionally, a government employee's actions must not have been malicious or executed with a wanton or reckless disregard of the rights or harm to another. *Id.* at 474-475. Finally, immunity applies to discretionary as opposed to ministerial actions. *Id.* at 475-476.

2 *Ross v. Consumers Power Co. (On Rehearing)*, 420 Mich. 567, 633-634; 363 N.W.2d 641 (1984).

Plaintiffs asserted intentional tort claims of fraud and tortious interference with business relations. See *Health Call of Detroit v. Atrium Home & Health Care Servs., Inc.*, 268 Mich. App. 83, 90; 706 N.W.2d 843 (2005); *Huron Tool and Engineering Co. v. Precision Consulting Servs., Inc.*, 209 Mich. App. 365, 370-371; 532 N.W.2d 541 (1995); see also *Odom*, 482 Mich. at 480. Plaintiffs' civil conspiracy claim required plaintiffs to establish the underlying intentional tort claims. See *Urbain v. Beierling*, 301 Mich. App. 114, 132; 835 N.W.2d 455 (2013). Brown had the burden to prove that he was entitled to qualified governmental immunity pursuant to the *Ross* test. *Odom*, 482 Mich. at 479-480.

The parties do not dispute that Brown interacted with plaintiffs in the course of his employment and within the scope of his authority as Chief Executive Officer of LRE. The parties also do not dispute that Brown's statement to plaintiffs that he would take care of the outstanding invoices was discretionary. The lower court record supports these conclusions. Plaintiffs alleged that Joshua met with Brown during the course of his employment as Chief Executive Officer of LRE to discuss the lack of payment for services that plaintiffs provided to consumers. Additionally, Brown's statement to Joshua that he would take care of the unpaid invoices required Brown to exercise judgment to resolve a problem and was not merely the performance of a duty. See *Odom*, 482 Mich. at 473, 476.

Plaintiffs pleaded that Brown acted with malice or with wanton or reckless disregard of plaintiffs' right to be compensated for fulfilling their contractual obligations and disregard of the risk of harm that plaintiffs would incur additional expenses. Brown did not present any evidence to contradict plaintiffs' allegation that he did not act in good faith, other than generally denying the allegations against him.

In contrast, plaintiffs alleged that Brown wrongfully refused to pay the outstanding invoices. They also pled that Doyle, CMHOC, and LRE acted, in part, in an effort to conceal their organizational and personal malfeasance, difficulties with state authorities and loss of funding. Plaintiffs also alleged that Brown acted with malice or reckless disregard for plaintiffs' right to be compensated because defendant knew that he was powerless to effectuate the invoices' payment but indicated to Joshua that he would take care of the outstanding invoices. Plaintiffs alleged that Brown intended for plaintiffs to continue to provide services, plaintiffs relied on Brown's misrepresentation and continued to provide services, and plaintiffs suffered damages caused by Brown's misrepresentation. Regarding the tortious interference claim, plaintiffs alleged that Brown was aware of plaintiffs' business relationships with their consumers and that Brown's misrepresentation was the cause of injuries and damages to plaintiffs. Finally, plaintiffs alleged that Brown acted in concert with Doyle, CMHOC, and LRE to deprive plaintiffs of their ability to provide services to their consumers and to deprive plaintiffs of their payment for previously rendered services and that they suffered damages.

***5** Accepting these uncontradicted allegations as true, plaintiffs sufficiently pleaded that Brown acted with malice or with a wanton or reckless disregard of the rights or harm to plaintiffs. See *Odom*, 482 Mich. at 474-475; *Maiden*, 461 Mich. at 119. Therefore, Brown was not entitled to qualified governmental immunity pursuant to MCL 691.1407(5) or summary disposition pursuant to MCR 2.116(C)(7). See *Odom*, 482 Mich. at 479-480. Because plaintiffs pleaded sufficient facts regarding their civil conspiracy claim and their underlying intentional tort claims, as we will further discuss, the trial court did not erroneously deny Brown summary disposition under MCR 2.116(C)(7) regarding each of plaintiffs' claims. See *Odom*, 482 Mich. at 479-480; *Maiden*, 461 Mich. at 119.

III. MCR 2.116(C)(8)

Brown also argues that the trial court erroneously determined that plaintiffs alleged sufficient facts to support the elements of their fraud, tortious interference with business relations, and civil conspiracy claims against Brown. We disagree.

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and the pleadings. *Bailey*, 494 Mich. at 603. “All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant.” *Johnson v. Pastoriza*, 491 Mich. 417, 435; 818 N.W.2d 279 (2012). However, a plaintiff's conclusory statements that are unsupported by allegations of fact will not suffice to state a cause of action. *ETT Ambulance Serv. Corp. v. Rockford Ambulance, Inc.*, 204 Mich. App. 392, 395-396; 516 N.W.2d 498 (1994). In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(8), a trial court considers only the pleadings. MCR 2.116(G)(5).

Summary disposition is properly granted when the alleged claims are “so clearly unenforceable as a matter of law and no factual development could possibly justify recovery.” *Johnson*, 491 Mich. at 435 (quotation marks and citation omitted). Summary disposition may be premature if it is granted before discovery on a disputed issue is complete. *Dimondale v. Grable*, 240 Mich. App. 553, 566; 618 N.W.2d 23 (2000). “However, summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion.” *Id.* (quotation marks and citation omitted).

Fraud is an intentional tort claim. *Huron*, 209 Mich. App. at 370-371. In order to establish a claim of fraud,

> [A] plaintiff must prove that (1) the defendant made a material representation, (2) the representation was false, (3) the defendant knew that it was false when it was made, or made it recklessly, without any knowledge of its truth and as a positive assertion, (4) the defendant made the representation with the intention that the plaintiff would act on it, (5) the plaintiff acted in reliance on it, and (6)

> the plaintiff suffered injury because of that reliance. [*Zaremba Equip., Inc. v. Harco Nat'l. Ins. Co.*, 280 Mich. App. 16, 38-39; 761 N.W.2d 151 (2008)].

The plaintiff's reliance must be reasonable. *Id.* at 39. However, a plaintiff is not able to establish a fraud claim if he or she had the means to determine that a representation was not true. *Id.* at 38.

In this case, plaintiffs stated a fraud claim against Brown on which relief could be granted. Plaintiffs alleged that Brown made a material representation that he would take care of the payment of plaintiffs' outstanding invoices. Plaintiffs further alleged that Brown knew that this representation was false because Brown knew that he was powerless to effectuate payment or that he simply would not effectuate payment. In support of the former, they have asserted that at the time the representations were made Brown was aware that LRE and CMHOC had suffered a loss of funding from the state and were in jeopardy of further losses. Additionally, plaintiffs alleged that Brown indicated that he would effectuate payment of the invoices with the intent that plaintiffs would continue to provide services and refrain from seeking legal remedies for the outstanding invoices. Finally, plaintiffs alleged that they relied on Brown's statement, continued to provide services, and suffered an injury by incurring expenses for additional uncompensated services rendered after Brown stated that he would effectuate payment of the outstanding invoices. Therefore, plaintiffs alleged each of the six elements of fraud in their amended complaint. See *Zaremba*, 280 Mich. App. at 38-39.

***6** Regarding the reliance element, plaintiffs alleged that they continued to provide services in reliance on Brown's statement that he could effectuate CMHOC's payment of the outstanding invoices. Although Brown was the Chief Executive Officer of LRE, and was not an employee of CMHOC, plaintiffs alleged that LRE ensured that Medicaid funding was available to CMHOC and certified that programs, such as CMHOC, were in substantial compliance with the applicable standards for community mental health services programs. Accepting plaintiffs' factual allegations as true, plaintiffs' reliance on Brown's statement was reasonable based on Brown's role as Chief Executive Officer of LRE and LRE's role of ensuring that funding was available to CMHOC and ensuring that CMHOC complied with the applicable program standards. Plaintiffs also sufficiently alleged that, when Brown made the statement that he would effectuate payment, he did not intend to perform the promise because Brown knew that CMHOC was not in substantial compliance with program standards and he was powerless to effectuate payment or that he would not effectuate payment. Therefore, we conclude that plaintiffs sufficiently alleged facts to support the elements of their fraud claim against Brown, and the trial court properly denied defendant's motion for summary disposition regarding plaintiffs' fraud claim pursuant to MCR 2.116(C)(8). See *Bailey*, 494 Mich. at 603, 618; *Zaremba*, 280 Mich. App. at 38-39.

In order for a plaintiff to establish a claim of tortious interference with a business relationship or expectancy, a plaintiff must prove:

> (1) [T]he existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted. [*Health Call*, 268 Mich. App. at 90].

Tortious interference with business relations claims can involve inducing a party to terminate an employment contract, interfering with a party's business relationships and expectancies of continued employment, or a reasonable likelihood of an award of a public contract or a sale of property. See *id.* at 90-91; *Cedroni Ass'n., Inc. v. Tomblinson, Harburn Assocs., Architects & Planners, Inc.*, 492 Mich. 40, 45-46; 821 N.W.2d 1 (2012).

In this case, plaintiffs stated a tortious interference with business relations claim against Brown on which relief could be granted. Plaintiffs pleaded that they had valid business relationships with their consumers and that they have a valid business expectancy to be paid for their services pursuant to oral and written agreements with CMHOC. Plaintiffs also pleaded that Brown had knowledge of plaintiffs' business relationships and that CMHOC owed plaintiffs more than

$35,000 for previously rendered services, as demonstrated by Brown's meeting with Joshua to discuss CMHOC's failure to pay plaintiffs. Plaintiffs alleged that Brown interfered with plaintiffs' expectancy to receive payment for plaintiffs' previously rendered services by falsely stating that he would effectuate payment of the outstanding invoices, which caused plaintiffs to incur expenses for additional uncompensated services and to refrain from seeking repayment of the outstanding invoices and other legal remedies from CMHOC. Accepting plaintiffs' factual allegations as true, plaintiffs sufficiently alleged facts to support the elements of their tortious interference with business relations claim against Brown, and the trial court properly denied Brown's motion for summary disposition regarding this claim pursuant to MCR 2.116(C)(8). See *Bailey*, 494 Mich. at 603, 618; *Health Call*, 268 Mich. App. at 90-91.

A plaintiff must establish an underlying tort in order to establish a claim of civil conspiracy. *Urbain*, 301 Mich. App. at 132; *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n.*, 257 Mich. App. 365, 384; 670 N.W.2d 569 (2003), aff'd 472 Mich. 91 (2005). "A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Advocacy Org.*, 257 Mich. App. at 384 (quotation marks and citation omitted). If a plaintiff fails to establish an actionable tort, the plaintiff also fails to establish his or her civil conspiracy claim. *Id.* at 384-385.

***7** In this case, plaintiffs stated a civil conspiracy claim against Brown on which relief could be granted. As noted, the plaintiffs pleaded sufficient factual allegations to support their tortious interference with business relations claims. They alleged that Brown, Doyle, CMHOC, and LRE acted in concert to commit that tort. Plaintiffs also alleged that they suffered damages, including economic injury, harm to their business reputation, and loss of business opportunities.

Plaintiffs sufficiently pleaded that Brown acted with Doyle, CMHOC, and LRE to accomplish the unlawful purpose of depriving plaintiffs of the rights and payment owed to them pursuant to their contractual agreements for the previously rendered services. Plaintiffs also sufficiently alleged that Brown used unlawful means, including Brown's alleged fraudulent statement and tortious interference with business relations, to deprive plaintiffs of their contractual rights and the payment for the previous rendered services. Therefore, we conclude that plaintiffs sufficiently alleged facts to support the elements of their civil conspiracy claim against Brown, and the trial court properly denied Brown's motion for summary disposition regarding plaintiffs' civil conspiracy claim pursuant to MCR 2.116(C)(8). See *Bailey*, 494 Mich. at 603, 618; *Advocacy Org.*, 257 Mich. App. at 384-385.

The trial court properly determined that Brown was not entitled to absolute or qualified governmental immunity and that the plaintiffs sufficiently alleged facts to support the elements of their fraud, tortious interference with business relations, and civil conspiracy claims against Brown. Therefore, the trial court properly denied Brown's motion for summary disposition under MCR 2.116(C)(7) and (8).

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2019 WL 3941300

End of Document

2012 WL 5193204
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Tammie HOLZ, Plaintiff–Appellant,
v.
CITY OF ST. IGNACE, Township of Moran, and Jake Tamlyn, Defendants–Appellees.
Nancy Nowiski, Plaintiff–Appellant,
v.
City of St. Ignace, Township of Moran, and Jake Tamlyn, Defendants–Appellees.

Docket Nos. 302647, 302659.
|
Oct. 18, 2012.

Mackinac Circuit Court; LC No.2009–006688–NO, 2009–006697–NO.

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

Opinion

PER CURIAM.

***1** In these consolidated appeals, plaintiffs appeal as of right the trial court's order granting summary disposition for Jake Tamlyn (defendant). We affirm.

In December 2008, plaintiffs and a group of family and friends traveled to Silver Mountain, a skiing and snow-tubing hill in northern Michigan, for winter recreation. While at Silver Mountain, plaintiffs engaged in snow tubing—riding a large, inflated inner tube down a snow hill for recreation. During a tubing run Holz's tube inexplicably stopped midway down the hill, where it was subsequently struck by another tuber in the middle of the hill. Nowiski then also collided with Holz a few seconds later. Plaintiffs suffered extensive injuries from the collisions.

Plaintiffs sued the City of St. Ignace and Moran Township, the two municipalities that owned and operated Silver Mountain, and Tamlyn, the manager of Silver Mountain, claiming that defendants operated a dangerous facility without regard for the safety of patrons.[1] Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10), claiming that he was entitled to absolute immunity under MCL 691.1407(5), and that he was entitled to immunity under MCL 691.1407(2) because he was not grossly negligent, and was not the proximate cause of plaintiffs' injuries. The trial court concluded that defendant was entitled to absolute immunity under MCL 691.1407(5).

1 The parties agreed that St. Ignace and Moran Township were entitled to governmental immunity under MCL 691.1407(1), which leaves Tamlyn as the only remaining defendant.

We review de novo a trial court's decision on a motion for summary disposition. *Young v. Sellers,* 254 Mich.App 447, 449; 657 NW2d 555 (2002). Under MCR 2.116(C)(7), summary disposition is appropriate when an action is barred by governmental immunity. *Odom v. Wayne Co,* 482 Mich. 459, 466; 760 NW2d 217 (2008). "With regard to a motion for summary disposition pursuant to MCR 2 .116(C)(7), this Court reviews the affidavits, pleadings, and other documentary evidence presented by the parties and 'accept[s] the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true.' " *Young,* 254 Mich.App at 450, quoting *Novak v. Nationwide Mut Ins, Co,* 235 Mich.App 675, 681; 599 NW2d 546 (1999) (alteration in original). We also review de novo a trial court's application of governmental immunity. *McLean v. McElhaney,* 289 Mich.App 592, 596; 798 NW2d 29 (2010).

Plaintiffs argue that the trial court erred by determining that defendant was absolutely immune. Plaintiffs further argue that while defendant was the "highest executive official" at Silver Mountain, he was not the "highest executive official" at a level of government. We agree.

The governmental tort liability act shields a governmental employee from tort liability in certain circumstances. MCL 691.1407. One such circumstance is provided in MCL 691.1407(5), which reads:

> 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.

***2** To determine whether a governmental employee is entitled to absolute immunity under MCL 691.1407(5) as the "highest executive official," it is necessary to determine the relevant "level of government" involved. *Grahovac v. Munising Twp,* 263 Mich.App 589, 593; 689 NW2d 498 (2004). [2]

2 It is also necessary to determine whether the governmental employee was acting in the scope of his or her authority, *Bennett v. Detroit Police Chief,* 274 Mich.App 307, 311–312; 732 NW2d 164 (2006), but no party has contended that defendant was acting outside the scope of his authority in this case.

Courts determine the level of government by examining "whether the entity shares aspects of governance with other political subdivisions, such as the power to levy taxes, the power to make decisions having a wide effect on members of the community, or the power of eminent domain." *Grahovac,* 263 Mich.App at 593. Courts also consider the extent to which the governmental employee exercises " 'broad-based jurisdiction or extensive authority similar to that of a judge or legislator.' " *Id.,* quoting *Chivas v. Koehler,* 182 Mich.App 467, 471; 453 NW2d 264 (1990). When the governmental entity is at the "complete disposal" of municipal officials, the level of government is the municipality itself, not the governmental entity. See *id.* at 594.

We find that Silver Mountain is not a level of government. Silver Mountain does not have the authority to levy taxes or exercise eminent domain. Any policy decisions of Silver Mountain are limited in effect to its patrons. Moreover, defendant did not exercise the broad type of authority naturally exercised by judges and legislators. His authority was restricted to overseeing the functioning of the ski hill, and neither defendant nor Silver Mountain had the authority to exercise any type of police power. Thus, the relevant level of government here is one or both municipalities, see *Grahovac,* 263 Mich.App at 594, and therefore defendant was not entitled to absolute immunity under MCL 691.1407(5).

However, the trial court correctly determined that defendant was entitled to immunity. If a governmental employee is not entitled to absolute immunity under MCL 691.1407(5), he or she may still be entitled to immunity under MCL 691.1407(2). *Odom,* 482 Mich. at 479–480. MCL 691.1407(2) provides:

> 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.

***3** This statute limits the liability of government employees to gross negligence. *Costa v. Community Emergency Medical Services, Inc,* 475 Mich. 403, 411; 716 NW2d 236 (2006). Whether a governmental employee was grossly negligent is generally a question of fact, but summary disposition is appropriate when reasonable minds could not differ. *Briggs v. Oakland Co,* 276 Mich.App 369, 374; 742 NW2d 136 (2007).

" 'Gross negligence' means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). Gross negligence occurs when "the contested conduct was substantially more than negligent." *Costa,* 475 Mich. at 411. "Evidence of ordinary negligence does not create a question of fact regarding gross negligence." *Love v. Detroit,* 270 Mich.App 563, 565; 716 NW2d 604 (2006). Instead, the evidence must suggest that the contested conduct was reckless. *Chelsea Investment Group, LLC v. Chelsea,* 288 Mich.App 239, 265; 792 NW2d 781 (2010).

Plaintiffs argue that defendant's conduct was grossly negligent because he failed to take basic precautions against the risk of injury. We disagree. In *Tarlea v. Crabtree,* 263 Mich.App 80, 90; 687 NW2d 333 (2004), this Court stated:

> Simply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result. However, saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness. Even the most exacting standard of conduct, the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent.
>
> The much less demanding standard of care—gross negligence—suggests, instead, almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge.

Defendant did not demonstrate "a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). To the contrary, defendant implemented several precautions to protect the safety of patrons at Silver Mountain. Defendant and the other Silver Mountain employees inspected the tubes twice daily to ensure that the tubes were in proper condition. Conspicuous signs were placed at various locations throughout Silver Mountain to warn tubers of the tubing risks. An employee was usually present at the top of the hill to regulate patrons' spacing down the hill. These are all tangible and significant precautions against the risk of injury.

Plaintiffs argue that an employee should have been present at all times at the top of the hill to regulate spacing. However, the temporary absence of an employee does not render defendant grossly negligent. Furthermore, any reasonable person should be aware of the possibility of injury when two tubes collide and should know to maintain an appropriate distance between tubes. The warning signs reinforced this information. The fact that defendant allowed employees to briefly avoid the cold reflects the practical recognition that employees should not need to supervise adults at all times.

***4** Plaintiffs argue that defendant was grossly negligent in failing to reasonably inspect the tubes for defects because Holz's tube unexpectedly stopped in the middle of the hill. However, Holz stated in her deposition that her tube had no noticeable defects, and we do not believe the situation is appropriate for an application of res ipsa loquitur. Even if Holz's tube stopped because it was defective, defendant's rate of tube inspection—twice daily—did not indicate that defendant disregarded the safety of the tubers in a "willful" way. Instead, it established that defendant actively tried to protect the safety of the tubers.

Plaintiffs argue that defendant was grossly negligent because he did not institute additional safety procedures after earlier injuries were suffered by tubers. However, the injuries to which plaintiffs refer involved children and/or occurrences at the bottom of the hill. Irrespective of whether defendant could or should have responded in any particular way to those injuries, no such response would necessarily have had any protective effect against a collision between adults in the middle of the hill.

We find that defendant's conduct was clearly not grossly negligent. Defendant did not actively disregard the risk of injury to tubers, and he implemented safety measures to appropriately balance the need for safety with the practical restrictions of operating a ski hill on a limited budget and avoiding precluding patrons from actually engaging in the recreation for which they came. Because no reasonable person could conclude that defendant was grossly negligent, the trial court should have granted summary disposition to defendant on the basis that he was not grossly negligent as a matter of law.

Further, even if we concluded that a question of fact existed with respect to the alleged gross negligence, then we would still be compelled to affirm because defendant was not the proximate cause of plaintiffs' injuries.

Under MCL 691.1407(2)(c), a governmental employee is liable for conduct that is "the proximate cause of the injury or damage." "The phrase 'the proximate cause' is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury." *Robinson v. Detroit,* 462 Mich. 439, 459; 613 NW2d 307 (2000). This phrase must be distinguished from "a proximate cause," which implies the possibility of multiple proximate causes. See *id.* at 459–462.

In the instant case, no reasonable person could conclude that defendant was *the* proximate cause of plaintiffs' injuries. Plaintiffs' injuries were attributable to plaintiffs themselves at least as much as their injuries were attributable to defendant. See *Oliver v. Smith,* 290 Mich.App 678, 686–687; 810 NW2d 57 (2010). Nowiski and the other tuber could have waited until Holz reached the bottom of the hill before proceeding. This would have obviously averted the collisions. Holz could have simply looked up the hill when she unexpectedly paused in the middle of the hill. Had she done so, Holz could have avoided the incoming tubers by moving a few feet in one direction. Consequently, even if defendant was grossly negligent, the conduct of plaintiffs and the other tuber family friend was the most direct cause of plaintiffs' injuries. *Robinson,* 462 Mich. at 459. Defendant was entitled to immunity under MCL 691.1407(2) because he was not the proximate cause of plaintiffs' injuries.

***5** We affirm because the trial court reached the correct result. See *Peterson Novelties, Inc v. Berkley,* 259 Mich.App 1, 17; 672 NW2d 351 (2003). While defendant was not entitled to summary disposition as the "highest executive official," he was entitled to summary disposition on two alternate grounds: (1) he was not grossly negligent, and (2) he was not the proximate cause of plaintiffs' injuries.

Affirmed.

All Citations

Not Reported in N.W.2d, 2012 WL 5193204

2023 WL 12052966 (Mich.Cir.Ct.) (Trial Order)
Circuit Court of Michigan.
Wayne County

DEN-MAN CONTRACTORS, INC, and David R. Holman, Plaintiffs,
v.
CITY OF DETROIT OFFICCE OF INSPECTOR GENERAL, Defendant.

No. 23-005543-CB.
November 30, 2023.

Opinion and Order

Annette J. Berry, Circuit Judge.

***1** At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan, on this: 11/30/2023

PRESENT: Honorable Annette Jurkiewicz-Berry

Circuit Judge

This case is before the Court on a motion for summary disposition pursuant to MCR 2.116(C)(7) and (8) filed by Defendant City of Detroit Inspector General. For the reasons stated below, the Court will grant the motion and dismiss the Complaint.

1. BACKGROUND

By way of background, in 2010 the United States Treasury created the Hardest Hit Fund (HHF) to provide funds to states who suffered as a result of the subprime mortgage crises of the early 2000s. The City of Detroit received monies from the HHF in 2013, to help with the demolition of vacant residential properties. The Detroit Land Bank Authority (DLBA) was created to manage the HHF monies and the large amount of vacant property in the city. The Detroit Building Authority (DBA) manages the demolition services process.

Plaintiff Den-Man Contractors is owned by Plaintiff David Holman. Den-Man is engaged in the demolition of commercial, industrial, and residential properties. In 2017, Den-Man began performing demolition and abatement work on buildings in Detroit under the direction of the DBA. According to Defendant, in 2018 it opened several investigations into Den-Man's demolition practices after it received complaints from the DLBA. These investigations are ongoing. Defendant referred the investigations to the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) for possible prosecution.

In January of 2022, SIGTARP notified the DLBA and Defendant that it had identified records which showed that the backfill material used by Den-Man in 2017 and 2018 for about 200 properties did not originate from an approved source, in violation of Den-Man's contracts with the City and the DLBA. Defendant currently has an investigation opened in this matter.

On April 25, 2023, the Michigan Department of Attorney General filed criminal enterprises and false pretenses charges against David MacDonald. MacDonald was employed by Den-Man to lead the company's demolition program. The AG alleges that MacDonald claimed to have paid for dirt used at the demolition sites that he obtained at no cost and which may have originated from contaminated sources. It is further alleged that Den-Man received $1.1 million for reimbursement for backfill material costs which it did not incur due to MacDonald's actions.

On April 26, 2023, Defendant alleges that it learned Den-Man had applied to become a qualified demolition contractor for the City of Detroit. This prompted Defendant to issue an interim suspension of Den-Man on April 27, 2023. Defendant also issued a press release regarding the interim suspension.

***2** On May 2, 2023, Plaintiffs filed their Complaint. Their Complaint alleges Count I: Violation of Article 1, § 17 of the Michigan Constitution, Count II: False Light Invasion of Privacy, Count III: Tortious Interference With Contractual Relations, and Count IV: Injunctive Relief.

Presently before the Court is Defendant's motion for summary disposition seeking dismissal of all counts of the Complaint.

2. STANDARD OF REVIEW

Defendant brings its motion pursuant to MCR 2.116(C)(7) and (8). A motion is properly granted under MCR 2.116(C)(7)when "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of … immunity granted by law...." A motion under subrule (C)(7) may be supported by affidavits, depositions, or other documentary evidence. The allegations in the complaint must be accepted as true (unless contradicted by the documentary evidence), and they must be viewed in the light most favorable to the nonmoving party. When there is no factual dispute, whether the plaintiffs claim is barred is a question of law. *Allen Park Retirees Ass'n, Inc v City of Allen Park*, 329 Mich App 430, 443-444; 942 NW2d 618 (2019).

MCR 2.116(C)(8) provides for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under (C)(8) tests the legal sufficiency of the complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may consider only the pleadings in rendering its decision. *Id.* All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997). "The motion should be granted if no factual development could possibly justify recovery." *Beaudrie, supra* at 130.

3. Analysis

A. Count I: Violation of Article 1, § 17 of the Michigan Constitution

Defendant first argues that it is entitled to dismissal of Plaintiffs' claim of violation of Article 1, § 17 of the Michigan Constitution. In their Complaint, Plaintiffs allege that they have constitutionally protected property interests in the work they were performing in the City of Detroit, and that their due process rights were violated when Defendant issued the interim suspension without providing Plaintiffs an opportunity to be heard before or after the issuance of the suspension. Plaintiffs are seeking money damages for the alleged violation of their constitutional due process right.

"Article 1, § 17 of Michigan's 1963 Constitution provide[s] that the state shall not deprive a person of life, liberty, or property without due process of law." *In re Keyes Estate*, 310 Mich App 266, 274; 871 NW2d 388 (2015). When a property right is at stake, due process generally requires notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.*

According to Defendant, Plaintiffs filed an appeal to the Detroit City Council on April 28, 2023, one day after the interim suspension was issued. An appeal hearing was held on June 12, 2023, at which time Plaintiffs, who were represented by legal counsel, submitted documentation in support of their appeal from the suspension. The Detroit City Council, after deliberation, affirmed Defendant's issues of the interim suspension.

***3** Plaintiffs do not dispute that they were given notice and an opportunity to be heard during the appeal proceedings. Rather, Plaintiffs argue that Defendant should have done an investigation before issuing the suspension. However, whether the Defendant should have done more investigating prior to issuing the suspension does not implicate Plaintiffs' due process rights, which were protected when Plaintiffs' were given notice and an opportunity to be heard before the Detroit City Council. Accordingly, Defendant is entitled to dismissal of Plaintiffs' due process claim.

Further, under Michigan law, Plaintiffs may not bring state constitutional claims against Defendant. In *Jones v Powell*, 462 Mich 329, 337; 612 NW2d 423 (2000), the Michigan Supreme Court held that there is no independent damages remedy against individual government entities for violations of the Michigan State Constitution. Citing *Smith v Department of Public Health*, 428 Mich 540; 410 NW2d 749 (1987), the Michigan Supreme Court held that while the *state* might be subject to state constitutional claims in a narrow class of cases, other governmental entities within the state, such as municipalities (or counties), as well as individuals, are not. *Jones, supra* at 335 (finding "no support for inferring a damage remedy for a violation of the Michigan Constitution in an action against a municipality or an individual government employee.").

B. Tort Claims

Defendant next seeks dismissal of Plaintiffs' claims of false light invasion of privacy and tortious interference with contractual relations. Plaintiffs' claim for false light invasion of privacy is based on Plaintiffs' allegation that Defendant publicly broadcast false information regarding Den-Man and Holman in the press release issued by Defendant regarding the interim suspension. Plaintiffs claim of tortious interference is based on allegations that the interim suspension and press release issued by Defendant resulted in the loss of contracts between Plaintiff and the City of Detroit and other entities.

Under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*, "[e]xcept as 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). "Governmental function" is defined, in relevant part, as "activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(b). "[T]his definition is to be broadly applied and requires only that there be some constitutional, statutory, or other legal basis for the activity in which the governmental agency was engaged." *Harris v University of Michigan Board of Regents*, 219 Mich App 679, 684; 558 NW2d 255 (1996). "Conversely, governmental agencies are not entitled to immunity under the act for injuries arising out of ultra vires activity, defined as activity not expressly or impliedly mandated or authorized by law." *Richardson v Jackson Co*, 432 Mich 377, 381; 443 NW2d 105 (1989). "To determine whether a governmental agency is engaged in a governmental function, the focus must be on the general activity, not the specific conduct involved at the time of the tort." *Pardon v Finkel*, 213 Mich App 643, 649; 540 NW2d 774 (1995). "The GTLA does not contain an 'intentional tort exception to governmental immunity' from tort liability." *Genesee County Drain Comm v Genesee County*, 309 Mich App 317, 328; 869 NW2d 635 (2015).

In order to assert a viable claim against a governmental agency, a plaintiff must plead in avoidance of the GTLA, meaning that the "plaintiff must plead facts establishing that an exception to governmental immunity applies to his or her claim." *Wood v City of Detroit*, 323 Mich App 416, 420; 917 NW2d 709 (2018).

***4** In this case, Plaintiffs have failed to plead an exception to governmental immunity for either of their tort claims. Further, Plaintiffs concede on page 13-14 of their response brief that "issuing a press release is a function of the government...." Plaintiffs nonetheless argue that there is still an obligation to make certain the content of the press release is accurate and truthful. While engaged in its duties, as set forth in the Charter of the City of Detroit, Defendant is a governmental agency engaged in the discharge of a governmental function and thus Defendant is immune from all tort liability under MCL 691.14079(1). As noted above, to determine whether governmental immunity applies, the Court looks to the general activity engaged in by Defendant, i.e. issuace the press release, and not the specific conduct, i.e. the content of the press release, in determining whether governmental immunity applies.

Although there are exceptions to governmental immunity, Plaintiffs have not identified any exception that would apply to the facts of this case and Plaintiffs have failed to plead in avoidance of governmental immunity. Accordingly, Defendant is entitled to governmental immunity from Plaintiffs' claims of false light invasion of privacy and tortious interference with contractual relations and the Court will dismiss the claims.

C. Amendment

Plaintiffs argue in their responsive brief that they "must be provided an opportunity to amend their complaint to identify the multiple instances of gross negligence committed by the City."

Plaintiffs are correct that it is well settled that when summary disposition is granted under MCR 2.116(C)(8), the trial court "must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile." *Shaw v State Farm Mutual Automobile Insurance Company*, 324 Mich App 182, 209; 920 NW2d 148 (2018). MCR 2.116(I)(5) provides that if the grounds in a motion for summary disposition are "based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings…, unless the evidence before the court shows that amendment would not be justified." However, this Court has concluded that Defendant is entitled to dismissal of Plaintiffs' tort claims under MCR 2.116(C)(7), not MCR 2.116(C)(8). Accordingly, Plaintiffs do not have the right under MCR 2.116(I)(5) to amend their Complaint.

Further, even if this Court had dismissed Plaintiffs' tort claims under MCR 2.116(C)(8), Plaintiffs would not be entitled to amend their Complaint because the amendment proposed by Plaintiffs would be futile. Plaintiffs seek to amend their Complaint to identify the multiple instances of gross negligence committed by Defendant. However, the "gross negligence" exception to governmental immunity does not apply to governmental agencies. MCL 691.1407(1). Rather, the "gross negligence" standard applies to governmental employees. See MCL 691.1407(2)(c). Because Defendant is a governmental agency and not a governmental employee, the gross negligence standard does not apply, and any amendment of the Complaint to allege gross negligence on the part of Defendant would be futile, as Plaintiffs' tort claims would still be barred by governmental immunity.

For the reasons stated in the foregoing Opinion,

IT IS ORDERED that Defendant City of Detroit Office of the Inspector General's Motion for Summary Disposition is hereby **GRANTED.**

IT IS FURTHER ORDERED that Plaintiff Den-Man Contractor's and David Holman's request to amend their Complaint is hereby **DENIED.**

IT IS FURTHER ORDERED that all claims in Plaintiffs' Complaint are hereby **DISMISSED.**

IT IS FURTHER ORDERED that this Order resolves the last pending claim and closes the case.

DATED: 11/30/2023

/s/ Annette J. Berry

November 30, 2023

Circuit Judge

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