

324 Mich.App. 614
Court of Appeals of Michigan.

Beatrice BOLER, Edwin Anderson, Alline
Anderson, and Epco Sales, LLC,
Plaintiffs-Appellees,

v.

GOVERNOR, State of Michigan, Department of
Environmental Quality, and Department of Health
and Human Services, Defendants-Appellees,
and

Daniel Wyant, Liane Shekter-Smith, Adam
Rosenthal, Stephen Busch, Patrick Cook, Michael
Prysby, Bradley Wurfel, Ed Kurtz, Darnell Earley,
Gerard Ambrose, Lockwood, Andrews & Newman,
P.C., and Lockwood, Andrews & Newman, Inc.,
Defendants,

and

Dayne Walling, Howard Croft, Michael Glasgow,
Daugherty Johnson III, and City of Flint,
Defendants-Appellants.

No. 337383

Submitted April 4, 2018, at Detroit.

Decided June 14, 2018, 9:00 a.m.

Synopsis

Background: City residents, including individuals and a company, brought purported class action for breach of contract, unjust enrichment, and declaratory relief against city, certain city officers and employees, city's former emergency managers, State governor, State, Michigan Department of Environmental Quality, and various Department employees with respect to city's contaminated water supply, alleging that defendants conspired to keep seriousness of pollution and contamination from residents and that defendants allowed delivery of water supply to continue, which put residents' health at risk and caused them damages. The Court of Claims, No. 16-000126-MK, Mark T. Boonstra, J., sua sponte dismissed action. Residents appealed.

Holdings: The Court of Appeals held that:

city was not acting as arm of State when operating its

waterworks, and thus Court of Claims did not have exclusive jurisdiction over residents' claims, and

State's appointment of emergency manager for city did not transform city into arm of State.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss for Lack of Subject Matter Jurisdiction.

****288** Court of Claims, LC No. 16-000126-MK, Mark T. Boonstra, J.

Attorneys and Law Firms

Butzel Long, PC (by Joseph E. Richotte, Frederick A. Berg, Jr., and Sheldon H. Klein) for the city of Flint.

The city of Flint Law Department (by Angela N. Wheeler, Reed E. Erickson, and William Y. Kim) for the city of Flint and, in their official capacities only, Dayne Walling, Howard Croft, Michael Glasgow, and Daugherty Johnson III.

White Law, PLLC (by Alexander S. Rusek) for Howard Croft, in his individual capacity.

O'Neill, Wallace & Doyle, PC (by Brett T. Meyer) for Michael Glasgow, in his individual capacity.

Law Office of David Meyers (by David W. Meyers) and Law Office of Edwar A. Zeineh, PLLC (by Edwar Zeineh) for Daugherty Johnson III, in his individual capacity.

Aaron D. Lindstrom, Solicitor General, Laura Moody, Chief Legal Counsel, and Richard S. Kuhl, Margaret A. Bettenhausen, Nathan A. Gambill, and Zachary C. Larsen, Assistant Attorneys General, for Governor Rick Snyder, the state of Michigan, the Department of Environmental Quality, and the Department of Health and Human Services.

Eugene Driker, Morley Witus, and Todd R. Mendel, Special Assistant Attorneys General, for Governor Rick Snyder.

Before: Servitto, P.J., and Markey and O'Connell, JJ.

Opinion

Per Curiam.

****289 *617** Defendants Dayne Walling, Howard Croft, Michael Glasgow, Daugherty Johnson III, and the city of Flint (defendants)¹ appeal as of right the trial court’s sua sponte order dismissing plaintiffs’ claims against them for lack of subject-matter jurisdiction. We affirm.

Plaintiffs, residents of and a company located in the city of Flint, filed this lawsuit in June 2016 (purportedly as a class action) against the city, various officers and employees of the city, former emergency managers of the city, the Governor, the state of Michigan, the Michigan Department of Environmental Quality (MDEQ), and various employees of the MDEQ. The lawsuit concerns the contaminated water supply in ***618** Flint, Michigan. Plaintiffs allege that defendants conspired to keep from plaintiffs the seriousness of the pollution and contamination and that defendants allowed delivery of the water supply to continue, which put plaintiffs’ health at risk and caused them damages. The specific causes of action were breach of contract, unjust enrichment, and declaratory relief.

Darnell Earley, Gerald Ambrose, and defendants moved for summary disposition in lieu of answering the complaint. Relevant to the instant matter, before a decision was rendered on that motion, the court, on its own motion, dismissed plaintiffs’ claims against defendants “in accordance with the August 25, 2016 Opinion and Order issued in *Collins v. City of Flint, et al.*, Court of Court of Claims Docket No. 16-115-MZ and *Vale v. City of Flint*, Court of Claims Docket No. 16-116-MK.” In those cases, the plaintiffs commenced intended class action lawsuits in the Genesee Circuit Court regarding the water crisis in Flint against the Governor, the state of Michigan, the city of Flint, the city’s former emergency managers, and several city employees. The plaintiffs asserted that the defendants (1) breached a contract with residents to provide potable water, (2) breached an implied warranty of ****290** fitness for a particular purpose, (3) violated the Michigan Consumer Protection Act, and (4) unjustly enriched the city. In *Collins* and *Vale*, the City transferred the claims against the city, the former emergency manager, and the city employees from the Genesee Circuit Court to the Court of Claims. The plaintiffs in *Collins* challenged the validity of the notice of transfer, contending that the city was not an “arm of the state” as set forth in MCL

600.6419(1)(a). The plaintiff in the *Vale* case sought summary disposition alleging that the Court of Claims lacked subject-matter jurisdiction. The Court of Claims ruled that the city was not an arm of the state and that the claims ***619** against the city and its employees were within the exclusive subject-matter jurisdiction of the circuit court.²

In this case, defendants assert that municipalities act as arms of the state whenever they act in the name of public health and that municipalities operate waterworks in the name of public health. Defendants additionally assert that the state’s emergency management of a municipality under the Local Financial Stability and Choice Act, MCL 141.1541 et seq., transforms the municipality into an arm of the state and that the Court of Claims has exclusive jurisdiction over claims brought against arms of the state. We disagree and conclude (1) that municipality is not an arm of the state when it operates a waterworks plant and (2) that a municipality and its employees operating under the state’s emergency-manager laws are not arms of the state for purposes of jurisdiction in the Court of Claims.

“A challenge to the jurisdiction of the Court of Claims presents a statutory question that is reviewed de novo as a question of law.” *AFSCME Council 25 v. State Employees’ Retirement Sys.*, 294 Mich.App. 1, 6, 818 N.W.2d 337 (2011). “Challenges to subject-matter jurisdiction cannot be waived, and a court must entertain such challenges regardless of when they are raised, or even raise such challenges sua sponte.” *O’Connell v. Dir. of Elections*, 316 Mich.App. 91, 100, 891 N.W.2d 240 (2016).

***620** “The Court of Claims is created by statute and the scope of its subject-matter jurisdiction is explicit.” *Id.* at 101, 891 N.W.2d 240 (2016), quoting *Dunbar v. Dep’t of Mental Health*, 197 Mich.App. 1, 5, 495 N.W.2d 152 (1992). The Court of Claims has exclusive jurisdiction to hear and determine “any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.” MCL 600.6419(1)(a). Included in the definition of “the state or any of its departments or officers” are the state of Michigan and

any state governing, legislative, or

judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state or any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state, acting, or who reasonably ****291** believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties. [MCL 600.6419(7).]

The determination whether the Court of Claims possesses jurisdiction is governed by the actual nature of the claim, not how the parties characterize the nature of the claim or phrase the request for relief. *AFSCME*, 294 Mich.App. at 6, 818 N.W.2d 337.

At issue in this case is the phrase “arm of the state” in MCL 600.6419(7). More specifically, we must determine when an individual or entity is an arm of the state such that the individual or entity may be considered “the state or any of its departments or officers” and thus an action against that individual or entity would fall under the exclusive jurisdiction of the Court of Claims.

***621** The difficulty in determining when a city or municipality acts as an arm of the state has a long history. In *Tzatzken v. Detroit*, 226 Mich 603, 604, 198 N.W. 214 (1924), our Supreme Court indicated that a municipality exercises dual powers, acting sometimes as an arm of the state, in which all members of the public are concerned, and acting at other times independently by exercising powers of a proprietary character. This Court explained the dual roles undertaken by a city or municipality:

It developed historically that cities operated under one of two personalities. The municipality when acting as an arm of the state possessed a “public” character, but when acting for the concerns of the citizenry of the city it was functioning within its “private” personality. This public versus

private analysis was utilized in evaluating questions of municipal tort immunity. If wearing the public hat, the municipal corporation was said to be performing governmentally and was immune from tort liability as was the state. On the other hand, if the activity was for the benefit of the peculiar locality, then the municipal corporation was deemed equivalent to a private corporation. [*Beauchamp v. Saginaw Twp.*, 74 Mich.App. 44, 48, 253 N.W.2d 355 (1977).]

The conclusions about what municipal activities constitute “public” (i.e., arm of the state) action or “private” (i.e., municipal) action have changed throughout the years. In *Curry v. Highland Park*, 242 Mich. 614, 620–621, 219 N.W. 745 (1928), our Supreme Court recognized and accepted out-of-state authority holding that a city is discharging a governmental function when it engages in the collection and disposal of garbage and in the collection of ashes, refuse, and street sweepings. The *Curry* Court noted, “In each instance the act of the municipality is in the interest of the public health and the municipality acts as the arm ***622** of the State.” *Id.* The *Curry* Court also cited Michigan cases “sustain[ing] ordinances regulating the collection and disposal of garbage upon the ground that they were a valid exercise of the police power” and concluded that the collection and disposal of garbage is a state government function. *Id.* at 621–622, 219 N.W. 745. In *Detroit v. Corey*, 9 Mich. 165, 184 (1861), our Supreme Court held that [t]he sewers of the city, like its works for supplying the city with water, are the private property of the city—they belong to the city. The corporation and its corporators, the citizens, are alone interested in them—the outside public or people of the state at large have no interest in them, as they have in the streets of the city, which are public highways. In *Beauchamp*, 74 Mich.App. at 51, 253 N.W.2d 355, however, this Court stated, “[w]e cannot distinguish sewers [from the collection and disposal of garbage], and find that the construction of ****292** sewers as a public health measure is a governmental function.”

In *Attorney General ex rel. Lennane v. Detroit*, 225 Mich. 631, 196 N.W. 391 (1923),³ the city of Detroit adopted an

ordinance regulating the wages paid to third-party employees working on municipal construction contracts. The Supreme Court stated:

That the municipality performs dual functions, some local in character, the others as agent of the State, will be presently considered; and, while this court from the beginning has vigilantly sustained the right of local self-government, it has with equal vigilance sustained the right of the state in the exercise of its sovereign power. Attempts of the State to meddle with the purely local affairs of a municipality have been promptly checked by *623 this court, and attempts of municipalities to arrogate to themselves power possessed by the State alone in its sovereign capacity must meet a like check at the hands of this court. Neither may trench upon the power possessed by the other alone. [*Id.* at 636, 196 N.W. 391.]

The Court held that in enacting the ordinances at issue, “the city has undertaken to exercise the police power not only over matters of municipal concern but also over matters of State concern; it has undertaken not only to fix a public policy for its activities which are purely local but also for its activities as an arm of the State.” *Id.* at 640-641, 196 N.W. 391. The Court thus found that wage rates were a matter of state concern.

Our Supreme Court, however, overruled *Lennane* in the recent case of *Associated Builders & Contractors v. Lansing*, 499 Mich. 177, 880 N.W.2d 765 (2016). In *Associated Builders*, the Court stated that *Lennane*’s conception of municipal power may or may not have been well-grounded in Michigan’s 1908 Constitution and the legal landscape of the time, but it is certainly incongruent with the state of our law as reflected in our current Constitution. We therefore conclude that *Lennane* has no continuing viability in light of the adoption of our 1963 Constitution. [*Associated Builders*, 499 Mich. at 183, 880 N.W.2d 765.] The *Associated Builders* Court explained that the revisions found in Michigan’s 1963 Constitution

reflected Michigan’s successful experience with home rule and “‘expresse[d] the people’s will to give municipalities even greater latitude to conduct their business[.]’” *Id.* at 186, 880 N.W.2d 765. Michigan’s revised Constitution thus expanded the scope of authority of Michigan’s cities and villages. *Id.* at 187, 880 N.W.2d 765. The Court determined that the wage rates at issue “concern how a municipality acts as a market participant, spending its own money on its own projects” and how “[u]nder our *624 Constitution, cities and villages may enact ordinances relating to ‘municipal concerns, property and government,’ including ordinances and charter provisions regulating the wages paid to third-party employees working on municipal construction contracts, ‘subject to the constitution and law.’” *Id.* at 187, 192, 880 N.W.2d 765 (citation omitted). Thus, as the legal landscape has changed, so too, has the interpretation of what constitutes an action taken as an arm of the state. This is particularly so in the realm of utilities or services.

With respect to waterworks in particular, the Home Rule City Act, **293 MCL 117.1 et seq.⁴, authorizes a municipality to provide for the installation and connection of sewers and waterworks in its charter. MCL 117.4b. The operation and maintenance of waterworks is generally found to be a proprietary or private function of a municipality as opposed to a governmental function. Exceptions, as always, do exist, but they are easily identifiable. “Although a city may in the construction, operation and maintenance of a water works system be acting, under certain factual circumstances, in a governmental capacity, as a general proposition the weight of authority is to the effect that in engaging in such an enterprise the city acts in a proprietary or private capacity.” *Taber v. Benton Harbor*, 280 Mich. 522, 525, 274 N.W. 324 (1937). The cases cited in *Taber* were out-of-state cases and only one, *Miller Grocery Co. v. Des Moines*, 195 Iowa 1310, 192 N.W. 306 (1923), set forth a factual situation in which maintenance of a waterworks was deemed a governmental function.

In *Miller*, the court held that a municipality, acting in a governmental capacity, had the right to maintain *625 and operate waterworks for the purpose of fire protection and also had the right, in its proprietary capacity, to operate waterworks to distribute water to citizens and receive money for the same. *Id.* at 307. The majority of cases cited in *Taber* reiterated that a municipality supplying water to its citizens did so in a proprietary function. *Taber*, 280 Mich. at 525, 274 N.W. 324. See *Woodward v. Livermore Falls Water Dist.*, 116 Me. 86, 100 A. 317 (1917) (holding that a municipal corporation engaged in

the business of supplying water to its inhabitants was engaged in an undertaking of a private nature because it entered into an enterprise that involved the ordinary incidents of a business wherein it sold what people desired to buy and that might become a source of profit); *Canavan v. Mechanicville*, 229 N.Y. 473, 476, 128 N.E. 882 (1920) (“While the business of maintaining a municipal water system and supplying water to private consumers at fixed compensation is public in its nature and impressed with a public interest, it is not an exercise of governmental or police power. A municipal corporation in aggregating and supplying water for the extinguishment of fires discharges a governmental function. In operating a water works system, distributing water for a price to its inhabitants, it acts in its private or proprietary capacity, in which it is governed by the same rules that apply to a private corporation so acting.”).

What is gleaned from these cases is that if a municipality is supplying a utility—or specifically waterworks—to its citizens and the citizens are paying for the waterworks, the municipality is operating the waterworks as a business, and it is doing so as a businessman or corporation, not as a concern of the state government or as the arm of the state. It is, after all, serving only a limited number of people within its boundaries, not the state as a whole. If, on the other *626 hand, the municipality is supplying water for the purpose of protecting its citizens from fire or natural disaster or anything else that has the potential to have statewide impact, and it is not profiting from the provision of that water, it could be deemed to be serving a government function and serving the public in general. Then the municipality could be deemed to be acting as an arm of the state in maintaining and operating waterworks.

Taking all of this into account, we conclude that the city of Flint was not acting as an arm of the state when operating **294 its waterworks. Historically, a municipality’s provision of drinking water to its citizens—which is precisely the issue here—was not considered a government function because the municipality was acting in its role as a proprietor, and not in a governmental capacity. And, with the enactment of the Home Rule City Act and the adoption of the 1963 Constitution, municipalities were provided with even more power and control over activities such as providing utilities or services to their populations. The city has provided no persuasive argument or binding authority to indicate that the city was acting as an arm of the state when operating its waterworks. The Court of Claims therefore did not have exclusive jurisdiction over

plaintiffs’ claims against defendants.

The city has also provided no persuasive argument or binding authority to indicate that the state of Michigan’s emergency management of a municipality under the Local Financial Stability and Choice Act transforms the municipality into an “arm of the state.” The Act. That Act states, at MCL 141.1543:

The legislature finds and declares all of the following:

(a) That the health, safety, and welfare of the citizens of this state would be materially and adversely affected by *627 the insolvency of local governments and that the fiscal accountability of local governments is vitally necessary to the interests of the citizens of this state to assure the provision of necessary governmental services essential to public health, safety, and welfare.

(b) That it is vitally necessary to protect the credit of this state and its political subdivisions and that it is necessary for the public good and it is a valid public purpose for this state to take action and to assist a local government in a financial emergency so as to remedy the financial emergency by requiring prudent fiscal management and efficient provision of services, permitting the restructuring of contractual obligations, and prescribing the powers and duties of state and local government officials and emergency managers.

(c) That the fiscal stability of local governments is necessary to the health, safety, and welfare of the citizens of this state and it is a valid public purpose for this state to assist a local government in a condition of financial emergency by providing for procedures of alternative dispute resolution between a local government and its creditors to resolve disputes, to determine criteria for establishing the existence of a financial emergency, and to set forth the conditions for a local government to exercise powers under federal bankruptcy law.

(d) That the authority and powers conferred by this act constitute a necessary program and serve a valid public purpose.

Under the act, the governor appoints an emergency manager after the governor has determined that a local government is in a state of financial emergency. MCL 141.1546(1)(b); MCL 141.1549(1). When appointed, an emergency manager shall act for and in the place and stead of the governing body and the office of chief administrative officer of the local government. The

emergency manager shall have broad powers in receivership to rectify the financial emergency and to assure the fiscal accountability of the local *628 government and the local government's capacity to provide or cause to be provided necessary governmental services essential to the public health, safety, and welfare. [MCL 141.1549(2).] The state of Michigan provides **295 the financial compensation for the emergency manager, MCL 141.1549(3)(e) and (f), and all powers and duties of the emergency manager are conferred on that position by the Legislature, MCL 141.1549(4) and (5); MCL 141.1550 to MCL 141.1559. An emergency manager, as an appointee of the state government, is an employee of the state government. *Mays v. Governor*, 323 Mich.App. 1, 54, 916 N.W.2d 227 (2018). While this means that claims against an emergency manager acting in his or her official capacity clearly fall within the subject-matter jurisdiction of the Court of Claims, it does not necessarily follow that the municipality itself is transformed into an arm of the state while under the direction of an emergency manager.

The only Michigan authority that attempted to specifically define “arm” of the state was *Manuel v. Gill*, 481 Mich. 637, 753 N.W.2d 48 (2008). In that case, our Supreme Court noted that though it was not aware of any law creating an “arm” of the state, “the term is commonly defined as ‘an administrative or operational branch of an organization’” *Id.* at 650, 753 N.W.2d 48. The *Manuel* Court had to determine whether the Tri-County Metro Narcotics Squad was a *state agency* that could only be sued in the Court of Claims, and the Court consulted MCL 600.6419(1)(a) and the various listed state entities over which the Court of Claims had exclusive jurisdiction. In doing so, the *Manuel* Court reviewed examples of those various entities—departments, commissions, boards, institutions, agencies—and employed a standard dictionary to define an “arm” of the state. The definition recited in *Manuel* is dicta; the *629 Court attempted to define only the term “arm,” and the definition provided gives only limited guidance on the matter at hand.

Because the term is not defined in the relevant statute, we are to ascribe to the term its plain and ordinary meaning. *Inter Co-op. Council v. Dep’t of Treasury*, 257 Mich.App. 219, 223, 668 N.W.2d 181 (2003). It is appropriate to consult a dictionary for definitions. *Anzaldua v. Neogen Corp.*, 292 Mich.App. 626, 632, 808 N.W.2d 804 (2011). “Arm of the state” is defined in Black’s Law Dictionary (10th ed.) as, “[a]n entity created by a state and operating as an alter ego or instrumentality of the state, such as a state university or a state department of transportation.”

“Instrumentality” is defined as “[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body.” *Id.* It is unclear why the *Manuel* Court chose to look to a standard dictionary rather than the law dictionary when touching on the definition of an “arm” of the state. In any event, employing the definitions set forth in Black’s Law Dictionary, it is clear that even while under emergency management, the city was not operating as an alter ego or instrumentality of the state.

As indicated in the Local Financial Stability and Choice Act, “it is a valid public purpose for this state to take action and to assist a local government in a financial emergency so as to remedy the financial emergency....” MCL 141.1543(b). The primary purpose of the act, then, is for the state of Michigan to temporarily *assist* local governments during a financial crisis. The emergency manager, in place of the chief administrative officer and governing body, acts for and on behalf of the local government only. MCL 141.1549(2); MCL 141.1552(2). At all times, then, the *630 city remained a municipality, albeit with a state employee temporarily overseeing the financial management of the municipality’s affairs. The city was at no time operating as “a means or agency through which a **296 function of another entity [i.e., the state] is accomplished[.]”⁵ No function or purpose of the state was accomplished by the emergency manager’s oversight of the city. The City was instead always operating as a means through which its own functions were accomplished. The state simply engaged a state employee to temporarily assist the city with performing its local functions and serving its local purposes on behalf of its citizens. Moreover, were we to find that whenever a state employee assists in, or even temporarily takes over the management of a private (for lack of a better word) entity, that entity then becomes an arm of the state, we would be opening the state of Michigan up to liabilities that were never intended and undermining the Governmental Tort Liability Act, MCL 691.1401 et seq. We thus do not find that the state’s emergency management of a municipality under the Local Financial Stability and Choice Act transforms the municipality into an “arm of the state.” Therefore, the Court of Claims does not have exclusive jurisdiction over plaintiffs’ claims against defendants.

Affirmed.

Servitto, P.J., and Markey and O’Connell, JJ., concurred.

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All Citations

Footnotes

- ¹ We refer to these particular defendants-appellants as “defendants” throughout this opinion for ease of reference even though the action was filed against additional parties.
- ² The Court of Claims concluded that it did have jurisdiction over claims against emergency manager Darnell Earley because he was an officer of the state at all times during his oversight of the city’s receivership. Nevertheless, because Earley had the right to a jury trial and because the circuit court had concurrent jurisdiction of the case, the Court of Claims concluded that the circuit court was the more appropriate venue to resolve the claims against Earley.
- ³ Overruled by *Associated Builders & Contractors v. Lansing*, 499 Mich. 177, 880 N.W.2d 765 (2016), as discussed later in this opinion.
- ⁴ Enacted in 1909, the Home Rule City Act provided for the incorporation of cities and set out specific powers and duties, among other things.
- ⁵ *Black’s Law Dictionary* (10th ed.) (defining “instrumentality”).