Genesee County v. Wright - New Boundaries for the Government Tort Liability Act

By Peter H. Webster

On July 18, 2019, the Michigan Supreme Court, in *Genesee County v. Wright*,[1] provided a narrow interpretation of the Governmental Tort Liability Act (GTLA), and opened the door to a potential new wave of cases in which plaintiffs may plead a case in avoidance of the GTLA and obtain the same effective relief of money damages for the same occurrence.

Government Tort Liability Act, MCL 691.1401 et seq.

More than 50 years ago, in 1964, the Legislature enacted the GTLA to provide a uniform system of liability across the state for municipal corporations, political subdivisions, state agencies and departments when those entities and their employees are involved in government functions.[2] Under the GTLA, the "state [governmental agencies and their employees] maintains its immunity when 'engaged in the exercise of a governmental function,' unless the plaintiff establishes the existence of a statutorily created exception to that immunity."[3] The GTLA broadly grants immunity to governmental agencies in tort liability claims:

> Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.[4]

Governmental immunity is important public policy because it "protects the state not only from liability, but also from the great public expense of having to contest a trial."[5] From the above statutory language, it is easy to see that the question of what is "tort liability" is key to understanding and advising clients respecting the protections, or the avoidance, of the GTLA.

In re Bradley Estate

During the half-century since the enactment of the GTLA, cases have interpreted various aspects of what claims are barred by governmental immunity, including discussion of what is tort liability as that term is used in the statute. Until *Genesee County*, the most recent and prominent of the cases discussing what is tort liability for GTLA purposes was *In re Bradley Estate*.[6] There, the Michigan Supreme Court determined that a civil contempt petition asking for indemnification or compensatory damages against the sheriff's department was barred by the GTLA. The Court stated, "the GTLA encompasses all legal responsibility for civil wrongs, other than a breach of contract, for which a remedy may be obtained in the form of compensatory damages."[7] Also, the Court stated that "a 'tort' is an act that has long been understood as a civil wrong that arises from the breach of a legal duty other than the breach of a contractual duty."[8] And, the Court concluded that "'tort liability' as utilized in MCL 691.1407(1) means all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages."[9] Importantly, *In re Bradley Estate* noted that where it was clear that a claim is based in a contractual duty, then no tort took place and the GTLA does not apply.[10] But, if a claim is not based on a breach of a contractual duty (*i.e.*, some other legal duty) then the GTLA might apply, depending on the "nature of the liability" and the relief sought.[11]

> However, if the wrong is not premised on a breach of a contractual duty, but rather is premised on some other civil wrong, *i.e.*, some other breach of a legal duty, then the GTLA might apply to bar the claim. In that instance, the court must further consider the nature of the liability the claim seeks to impose. If the action permits an award of damages to a private party as compensation for an injury

> caused by the noncontractual civil wrong, then the action, no matter how it is labeled, seeks to impose tort liability and the GTLA is applicable.[12]

If the relief sought was for an award of compensatory damages for a "noncontractual civil wrong," the GTLA would apply and bar the claim. Because the plaintiff in *In re Bradley Estate* sought compensatory damages for civil contempt actions by the sheriff's department, the claim was barred by the GTLA.[13] Interestingly, and setting the stage for the *Wright* decision, Justice McCormick (and now Chief Justice McCormick) dissented. Chief Justice McCormick authored the Court's opinion in *Wright*.

Genesee County v. Wright

In *Wright*, the defendant, Genesee County, served as an administrator for employee health insurance benefits. The plaintiff, the Genesee County drain commissioner, participated in the plan. The county's insurer conducted a multi-year audit that revealed the insurance premiums, including those the drain commissioner paid, exceeded the appropriate amount due under the policy. The overpayment totaled in the millions of dollars. The insurer refunded the money to the county, which deposited it into its general fund. The drain commissioner demanded his share of the refund. The county refused.[14]

The drain commissioner filed an action initially alleging claims of breach of contract and intentional tort.[15] The trial court ruled on summary disposition that the breach of contract claims were barred by the statute of limitations and the GTLA did not bar the plaintiff's tort claims. The Court of Appeals affirmed in part and reversed in part, holding the contract claim was precluded and also reversing the trial court and determining that the intentional tort claims were barred by the GTLA.[16]

The drain commissioner then amended his complaint to add an unjust-enrichment claim, asserting that the county "wrongfully and unjustly retained a portion of the refunds under the [BCBSM] Plan that belong [to the drain commissioner]."[17] The trial court denied the county's motion for summary disposition and the Court of Appeals affirmed, finding that "a claim based on the equitable doctrine of unjust enrichment involves contract liability, not tort liability."[18] In ordering oral argument relative to the county's application for leave to appeal, the Michigan Supreme Court asked the parties to address "whether the Court of Appeals erred in holding that the plaintiff's claim of unjust enrichment was not subject to governmental immunity under the [GTLA] because it was based on the equitable doctrine of implied contract law."[19]

The Michigan Supreme Court answered the question in the negative and affirmed the Court of Appeals ruling. The importance of the opinion is in the analysis and thinking of the Court relative to the fundamental questions of what is a tort, contract, or an unjust enrichment claim, and what is barred by the tort liability protections of the GTLA. Specifically, the Court held that a "claim for unjust enrichment is neither a tort nor a contract but rather an independent cause of action. And the remedy for unjust enrichment is restitution – not compensatory damages, the remedy for tort. For both those reasons, the GTLA does not bar an unjust-enrichment claim."[20] In elaborating on its holding, the Court reasoned that unjust enrichment "evolved from a category of restitutionary claims with components in law and equity into a unified independent doctrine that serves a unique legal purpose: it corrects for a benefit received by the defendant rather than compensating for the defendant's wrongful behavior. Both the nature of an unjust-enrichment action and its remedy – whether restitution at law or in equity – separate it from tort and contract."[21]

In sum, the Court determined that unjust enrichment was not a tort and, thus, not barred by the tort liability provision of the GTLA. Moreover, the Court determined that because the remedy for unjust enrichment is a money judgment in the form of restitution, the relief for unjust enrichment of restitution is not barred by the compensatory damages aspect of the tort liability prohibition of the GTLA. The Court went through some explanation to narrow in *In re Bradley Estate*: "To the extent that *In re Bradley Estate* implied that tort liability encompassed noncontractual liability without qualification, our decision overstated the scope of tort liability."[22] And, the Court distinguished *In re Bradley Estate*: "Bradley did not contemplate an action like this one, alleging liability not from a "civil wrong," but rather from a "benefit received. In sum, the plaintiff's unjust-enrichment claim is based on the county's unjust benefit received – outside the scope of "civil wrongs."[23] Lastly, the Court further distinguished *In re Bradley Estate* and determined that much of that opinion was obiter dictum.[24]

Applying this thinking to the facts in *Wright*, the Court found that the county "deposited money belonging to the plaintiff, among others, into its general fund, thereby enriching itself at the plaintiff's expense."[25] The Court held that because the gain was "unjust," the drain commissioner's unjust-enrichment claim "would correct for the unfairness flowing from the county's 'benefit received' – its unfair retention of the plaintiff's money, rather than for injury flowing from the county's 'civil wrong'; the claim thus would impose no tort (or contract) liability. And the GTLA therefore does not bar it."[26]

The Markman Concurrence – A Different Approach

In concurring in the result only, Justice Markman disagreed with the majority's conclusion that "an unjust-enrichment claim is not governed by the contract/tort civil-wrong dichotomy laid out in" *In re Bradley Estate*.[27] Justice Markman reasoned that instead of a

narrow reading, distinguishing the facts and asserting that important provisions of *In re Bradley Estate* were dicta, *In re Bradley Estate* could be applied harmoniously. Markman observed that *In re Bradley Estate* straightforwardly required a determination that the claim sound in tort or contract, and that the majority's decision now requires a confused analysis and creates unsettled law.[28]

Markman also recognized the trouble with distinguishing between money judgment that is compensatory damages arising from a tort and money judgment that is restitution arising from unjust enrichment. He realized that in many cases, the money judgment will be similar if not identical. This was an added problem with distinguishing between tort liability and unjust enrichment.[29]

Justice Markman directly warned of the consequences of the majority's holding:

> If this Court now embarks upon the course of disregarding the contract/tort civil-wrong dichotomy by concluding that unjust enrichment stands apart from this dichotomy because it is not a 'civil wrong,' it establishes for future claims against public defendants a very distinctive and uncertain legal premise allowing this Court more readily to conclude that other forms of nontraditional tort claims also stand apart from the *Bradley Estate* framework. And thus the majority (1) effectively diminishes this Court's decision in *Bradley Estate* while elevating the stature of its dissents, unsettling and confusing the law without, as appears to be its inclination, straightforwardly reversing the decision; (2) incentivizes litigation that will explore the new boundaries of the GTLA; and (3) imposes greater litigative costs on public defendants that will erode the primary legislative purpose of that act—all in support of the same result that would have adhered had the majority treated *Bradley Estate* as the legitimate precedent that it is. In place of a principled (and in my judgment, a correct) interpretation of 'tort liability' in MCL 691.1407(1) in *Bradley Estate*, the majority introduces ambiguity and future judicial decision-making of an ad hoc character.[30]

Implications and Considerations

There are a number of immediate implications in the *Wright* decision and analysis:

1) Unjust enrichment is more clearly a separate cause of action and one that is likely not barred by the GTLA;
2) In requesting money judgment relief against governments, plaintiffs will simply plead for the same amount money, but in the form of restitution as opposed to compensatory damages; and
3) The adjudication of nontraditional (*i.e.*, non-personal injury) tort claims will be more expensive and protracted because plaintiffs will be incentivized to pursue such claims against government.

Wright does not stand for the proposition that all unjust enrichment claims are not barred by the GTLA (apologies for the double negative). The law is now more unclear as to whether unjust-enrichment claims that ask for relief other than restitution are barred by the GTLA. Relief such as constructive trusts, equitable liens, subrogation and accounting may still be barred. What is made clear is that unjust-enrichment claims requesting restitution will likely be allowed.[31] Moreover, one would expect to see plaintiffs bringing virtually all non-personal injury tort claims as a claim of restitution for unjust enrichment.[32]

The Flint water crisis in *Collins v. City of Flint* is obviously a serious and profound issue. In using those facts as context, it is easy to see how the alleged wrongdoing of providing contaminated water, which would typically be pled and viewed as a tort for property damage (and which would be barred by the GTLA), can now be pled as a claim for unjust enrichment for the wrongful retention of the water payments (which is alleged not to be barred by the GTLA).

Going forward, wrongdoing of a government that results in property damage will likely be cast as providing some benefit to government and money will be sought for restitution. Moreover, there is no clear analysis that would preclude a claim for restitution for a personal

injury claim resulting in an alleged unjust benefit to a government. Determining how much a government benefited, what is the restitution, and how much money is to be paid in this context will now likely be the subject of new and broader litigation. Public sector practitioners should be aware of the expansive ramifications of the Court's decision in *Wright* and prepare their clients commensurately.

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Footnotes

1 ___; Mich ___; ___ NW2d ___; 2019 WL 3242418 (2019) [MSC Docket 156579 argued on application for leave to appeal April 10, 2019].
2 *Wright*, 2019 WL 3242418, at *9 [Markman, concurring] (citing *Yono v. Dep't of Transp*, 499 Mich 636, 646-646; 885 NW2d 445 (2016) (quoting PA 170 of 1964)).
3 *Wright*, 2019 WL 3242418, at *4 (citing MCL 691.1407(1)).
4 MCL 691.1407(1).
5 *Id. Odom v. Wayne County*, 482 Mich 459, 468; 760 NW2d 217 (2008).
6 494 Mich 367; 835 Mich NW2d 545 (2013).
7 *Id.* at 371.
8 *Id.* at 381.
9 *Id.* at 385.
10 *Id.* at 389.
11 *Id*.
12 *Id.* at 389.
13 *Id*.
14 *Wright*, 2019 WL 3242418, at *3-4.
15 *Id*. at *3.
16 *Id*. *See also, Genesee Co Drain Comm'r v. Genesee Co*, 309 Mich App 317, 334; 869 NW2d 635 (2015).
17 *Id.* at *4.
18 *Id.* (citations omitted).
19 *Id. See also, Genesee Co Drain Comm'r v. Genesee Co*, 501 Mich 1086; 911 NW2d 731 (2018).
20 *Id.* at *3.
21 *Id.* at *7.
22 *Id.* at *7.
23 *Id.* at *6.

24 *Id*. n 6.
25 *Id.* at *7.
26 *Id.*
27 *Id*. at *13.
28 *Id.* at *13.
29 *Id*.
30 *Id* at *14.
31 See *Collins v. City of Flint*, unpublished opinion per curiam of the Michigan Court of Appeals, issued August 22, 2019 (Docket No. 345203) (reversing and remanding in light of *Wright*).
32 *Id.* at *5. ("Plaintiffs have stated a valid claim for unjust enrichment because they allege to have paid for water that was poisonous. It is clear that defendant retained a benefit in keeping the payments for water that proved to be undrinkable. Plaintiffs also allege to have incurred a huge expense in not only being provided contaminated water, but having to pay for that contaminated water.")