STATE OF MICHIGAN

COURT OF APPEALS

COLETTA ESTES and All Others Similarly Situated,

Plaintiffs-Appellees,

v

ADRIAN ANDERSON and NORTH POINT ADVISORS, L.L.C.,

Defendants,

and

DAVID CLARK, SUSAN GLASER, SHEILA KNEESHAW, GERALD FISCHER, RONALD GRACIA, WENDALL ANTHONY, KENNETH V. COCKREL, JR., KATHLEEN LEAVEY, JEFFREY BEASLEY, MONICA CONYERS, and DEDAN MILTON,

Defendants-Appellants.

UNPUBLISHED
November 15, 2012

No. 294515
Wayne Circuit Court
LC No. 09-010080-NZ

COLETTA ESTES, TERRY SMITH-JACKSON, TERITTHA KINNEY, ELEANOR BENNETT, ANTHONY WHEELER, ANDREIA JOHNSON, REGINALD BRYANT, DYNITA MCCASKILL, ANTHONY SCANDOVAL, ELEANOR BENNET, MARK MAPP, and RONALD MORRING,

Plaintiffs-Appellees,

v

DAVID CLARK, SUSAN GLASER, SHEILA KNEESHAW, GERALD FISCHER, RONALD GRACIA, WENDALL ANTHONY, KENNETH V. COCKREL, JR., KATHLEEN LEAVY,

Nos. 294537
Wayne Circuit Court
LC No. 09-010080-NZ

JEFFREY BEASLEY, MONICA CONYERS, and DEDAN MILTON,

Defendants-Appellants,

and

ADRIAN ANDERSON and NORTH POINT ADVISORS, L.L.C.,

Defendants.

COLETTA ESTES, TERRY SMITH-JACKSON, TERITTHA KINNEY, ELEANOR BENNETT, ANTHONY WHEELER, ANDREIA JOHNSON, REGINALD BRYANT, DYNITA MCCASKILL, ANTHONY SCANDOVAL, ELEANOR BENNET, MARK MAPP, and RONALD MORRING,

Plaintiffs-Appellees,

v

No. 294555
Wayne Circuit Court
LC No. 09-010080-NZ

DAVID CLARK, SUSAN GLASER, SHEILA KNEESHAW, GERALD FISCHER, RONALD GRACIA, WENDALL ANTHONY, KENNETH V. COCKREL, JR., KATHLEEN LEAVY, JEFFREY BEASLEY, MONICA CONYERS, and DEDAN MILTON,

Defendants-Appellants,

and

ADRIAN ANDERSON and NORTH POINT ADVISORS, L.L.C.,

Defendants,

and

NATIONAL CONFERENCE ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS,

Amicus Curiae.

COLETTA ESTES, TERRY SMITH-JACKSON, TERITTHA KINNEY, ELEANOR BENNETT, ANTHONY WHEELER, ANDREIA JOHNSON, REGINALD BRYANT, DYNITA MCCASKILL, ANTHONY SCANDOVAL, ELEANOR BENNET, MARK MAPP, and RONALD MORRING,

Plaintiffs-Appellees,

v

No. 294559
Wayne Circuit Court
LC No. 09-010080-NZ

DAVID CLARK, SUSAN GLASER, SHEILA KNEESHAW, GERALD FISCHER, RONALD GRACIA, WENDALL ANTHONY, KENNETH V. COCKREL, JR., KATHLEEN LEAVY, JEFFREY BEASLEY, MONICA CONYERS, and DEDAN MILTON,

Defendants,

and

ADRIAN ANDERSON and NORTH POINT ADVISORS, L.L.C.,

Defendants-Appellants.

DAVID MALHALAB and All Others Similarly Situated and MARY PHELPS and All Others Similarly Situated,

Plaintiffs-Appellees/Cross Appellants,

v

No. 294541
Wayne Circuit Court
LC No. 09-012332-NZ

MARTY BANDEMER, JEFFREY BEASLEY, GREGORY BEST, GARY CHRISTIAN, SETH

DOYLE, FRANK ENGLISH, DEDAN MILTON, JAMES MOORE, TYRONE SCOTT, PAUL STEWART, ALBERTA TINSLEY-TALABI, ROGER CHEEK, BARBARA ROSE COLLINS, WILLIAM FAIRWEATHER, JOHNNY GOLDEN, LAURA ISOM, MARTY KNOWLES, SHARON MCPHAIL, JEFFREY PEGG, and CLARENCE WILLIAMS,

Defendants-Appellants/Cross Appellees,

and

ADRIAN ANDERSON and NORTH POINT ADVISORS, L.L.C.,

Defendants.

NATHAN JACK CHASE and All Others Similarly Situated,

Plaintiffs-Appellees/Cross Appellants,

v

No. 294543
Wayne Circuit Court
LC No. 09-010940-NZ

REV. WENDALL ANTHONY, DAVID CLARK, MONICA CONYERS, KENNETH V. COCKREL, JR., SHEILA COCKREL, CEDRIC COOK, GERALD FISCHER, RONALD GRACIA, JEFFREY BEASLEY, SUSAN GLASER, KWAME M. KILPATRICK, SHEILA KNEESHAW, KATHLEEN LEAVY, STEPHANIE MILLEDGE, DEDAN MILTON, and TIMOTHY NGARE,

Defendants-Appellants/Cross Appellees,

and

ADRIAN ANDERSON and NORTH POINT ADVISORS, L.L.C.,

Defendants.

DAVID MALHALAB and MARY PHELPS,

Plaintiffs-Appellees,

v

No. 294728
Wayne Circuit Court
LC No. 09-012332-NZ

MARTY BANDEMER, JEFFREY BEASLEY, GREGORY BEST, ROGER CHEEK, GARY CHRISTIAN, BARBARA ROSE COLLINS, SETH DOYLE, FRANK ENGLISH, WILLIAM FAIRWEATHER, JOHNNY GOLDEN, LAURA ISOM, MARTY KNOWLES, SHARON MCPHAIL, DEDAN MILTON, JAMES MOORE, JEFFREY PEGG, TYRONE SCOTT, PAUL STEWART, ALBERTA TINSLEY-TALABI, and CLARENCE WILLIAMS,

Defendants-Appellants,

and

ADRIAN ANDERSON and NORTH POINT ADVISORS, L.L.C.,

Defendants.

NATHAN JACK CHASE and ANDREW DANIELS EL,

Plaintiffs-Appellees,

v

No. 294729
Wayne Circuit Court
LC No. 09-010940-NZ

REV. WENDALL ANTHONY, JEFFREY BEASLEY, DAVID CLARK, MONICA CONYERS, KENNETH V. COCKREL, JR., SHEILA COCKREL, CEDRIC COOK, GERALD FISCHER, RONALD GRACIA, SUSAN GLASER, KWAME M. KILPATRICK, SHEILA

KNEESHAW, KATHLEEN LEAVY,
STEPHANIE MILLEDGE, DEDAN MILTON,
and TIMOTHY NGARE,

Defendants-Appellants,

and

ADRIAN ANDERSON and NORTH POINT
ADVISORS, L.L.C.,

Defendants.

Before: MURRAY, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

These eight consolidated appeals arise from three cases filed in the Wayne Circuit Court that challenge pension fund investments made by the city of Detroit's General Retirement System (LC Nos. 09-010080-NZ and 09-010940-NZ), and the city's Police and Fire Retirement System (LC No. 09-012332-NZ). We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Four appeals derive from LC No. 09-010080-NZ. In Docket No. 294515, 11 present and former members of the General Retirement System's Board of Trustees (the trustee defendants) appeal as of right a September 2009 circuit court order denying their motion for summary disposition premised on governmental immunity. In Docket No. 294537, the trustee defendants appeal by leave granted a separate September 2009 order certifying a plaintiff class. In Docket No. 294555, the trustee defendants appeal by leave granted portions of the circuit court's September 2009 order denying summary disposition on grounds unrelated to governmental immunity. And in Docket No. 294559, Adrian Anderson and North Point Advisors, L.L.C. (the investment advisor defendants), two other defendants who advised the General Retirement System on financial matters, appeal by leave granted the circuit court's September 2009 order denying their motion for summary disposition.

Two appeals derive from LC No. 09-010940-NZ. In Docket No. 294543, 16 current and former members of the General Retirement System's Board of Trustees (the trustee defendants) appeal as of right an October 2009 circuit court order denying their motion for summary disposition premised on governmental immunity. Plaintiffs cross-appeal, challenging the circuit court's dismissal of a breach of contract claim and refusal to allow amendment of their complaint. In Docket No. 294729, the trustee defendants appeal by leave granted portions of the circuit court's October 2009 order denying summary disposition unrelated to governmental immunity.

Lastly, two of the appeals derive from LC No. 09-012332-NZ. In Docket No. 294541, 20 current and former members of the Police and Fire Retirement System's Board of Trustees (the trustee defendants) appeal as of right an October 2009 circuit court order denying summary disposition on the basis of governmental immunity. Plaintiffs cross-appeal, challenging the circuit court's dismissal of a breach of contract claim and refusal to allow amendment of their complaint. In Docket No. 294728, the trustee defendants appeal by leave granted portions of the court's October 2009 order denying summary disposition unrelated to governmental immunity.

I

In LC No. 09-010080-NZ, plaintiffs filed an eight-count second amended complaint against 11 current and former trustees of the General Retirement System and their investment advisors. Count I alleged that defendants "repeatedly and flagrantly" violated their fiduciary duties to participants in the General Retirement System as set forth in the Public Employee Retirement System Investment Act (PERSIA), MCL 38.1132 *et seq*., and that governmental immunity did not shield the trustee defendants from their grossly negligent conduct. Count II alleged a breach of common-law fiduciary duties based on "grossly ill-advised and high risk investments." Count III, alleged a breach of common-law fiduciary duties based on the shredding and loss of Plan-related documents, i.e., "spoliation of evidence." The allegations in Count IV, entitled "gross negligence," included self-dealing, improper and extravagant travel, and approving improper investments. Count V averred a claim of "Waste," in that defendants "improperly dissipated the Plans' assets." Count VI set forth instances of common-law and statutory conversion committed by the trustee defendants, including with regard to extravagant, unnecessary, and improper travel. Count VII contained a request for "declaratory and injunctive relief." And Count VIII alleged that, because of defendants' gross negligence, the Plan suffered losses beyond normal market risk and amounted to "unconstitutional diminishment and/or impairment of accrued financial benefits of the Plan" in violation of Const 1963, art 9, § 24.

In LC Nos. 09-010940-NZ and 09-012332-NZ, substantially similar first amended complaints were filed against 16 current and former trustees of the General Retirement System and 20 current and former trustees of the Police and Fire Retirement System, respectively, as well as the same financial advisors. Count I of the first amended complaints alleged that defendants' investment decisions violated their statutory fiduciary responsibilities under the PERSIA, MCL 38.1132 *et seq*. Count II, captioned "City of Detroit Ordinance," asserted that Detroit ordinances "permit[] Plaintiffs to bring this civil action for relief against Defendant-Trustees" for violating their fiduciary duties under the PERSIA. Count III was a negligence claim. Count IV alleged that the trustee defendants had caused the city to breach its agreements with pension plan participants, like plaintiffs. Count V, titled "Breach of Third-Party Contract," alleged that plaintiffs were third-party beneficiaries of the contracts between the investment advisor defendants and the trustee defendants and plaintiffs were harmed by the investment advisor defendants' unreasonable performance. Count VI averred breaches of common-law fiduciary duties; Count VII alleged gross negligence; and Count VIII sought "declaratory and injunctive relief."

II

In Docket Nos. 294555, 294559, 294728, and 294729, appeals arising from each of the three circuit court actions, the trustee defendants and the investment advisor defendants assert that plaintiffs do not have standing to pursue any of the claims in their complaints. Defendants sought summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), but the circuit court relied on subrule (C)(10) in denying defendants' motions pertaining to standing. Whether a party has legal standing to assert a claim constitutes a question of law that this Court considers de novo. *Heltzel v Heltzel*, 248 Mich App 1, 28; 638 NW2d 123 (2001). We also review de novo a circuit court's summary disposition ruling. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004).

A motion brought pursuant to MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

Pursuant to longstanding Michigan jurisprudence on standing, "a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010).

A. STANDING UNDER THE PERSIA, LEGAL CAUSE OF ACTION

1. THE TRUSTEE DEFENDANTS

Defendants initially contend that plaintiffs cannot bring a private cause of action under the PERSIA because it does not include a civil enforcement provision.

The PERSIA is analogous to the federal Employee Retirement Income Security Act, ERISA, 29 USC 1001 *et seq*. ERISA sets minimum standards for pension plans offered by private employers, but does not apply to pension plans established by governmental entities. See 29 USC 1003(b)(1); *Bd of Trustees of City of Birmingham Employees' Retirement Sys v Comerica Bank*, 767 F Supp 2d 793, 798 (ED Mich, 2011). Neither ERISA nor the PERSIA requires the establishment of pension plans; however, when a pension plan is established, the PERSIA requires that certain minimum standards be met. Like ERISA, the PERSIA requires that fiduciaries of employee pension plans "act with the same care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a similar capacity and familiar with those matters would use in the conduct of a similar enterprise with similar aims." MCL 38.1133(3)(a); see, also, 29 USC 1104(a)(1)(B). And the PERSIA requires that fiduciaries

give appropriate consideration to the facts and circumstances relevant to the particular investment or investment course of action and act accordingly. MCL 38.1133(3)(d).

ERISA, however, includes a civil enforcement provision which provides that participants and beneficiaries may bring civil actions to redress violations of the Act, including violations by fiduciaries. See 29 USC 1109; 29 USC 1132(a)(1) and (l)(1). The PERSIA does not include a civil enforcement provision. But this lack of a specific civil enforcement provision is consistent with the broad constitutional grant of powers of local self-government enjoyed by municipalities as relates to local governmental issues like their retirement plans. See, e.g., *Brouwer v Bronkema*, 377 Mich 616, 649-650; 141 NW2d 98 (1966); *Dooley v City of Detroit*, 370 Mich 194, 212; 121 NW2d 724 (1963); *Davidson v Hine*, 151 Mich 294, 296; 115 NW 246 (1908).

The city of Detroit is a home rule city pursuant to the Home Rule City Act, MCL 117.1 *et seq*. As our Supreme Court observed in *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44, 66; 214 NW2d 803 (1974), the Home Rule City Act "reflect[s] the position now expressed in Const 1963, art 7, s 22 that Michigan is a strong home rule state with basic local authority." Specifically, Const 1963, art 7, § 22, provides that a city has the power and authority to adopt a charter, as well as resolutions and ordinances "relating to its municipal concerns, property and government, subject to the constitution and law." Accordingly, subject to the constitution and law, home rule cities are governed by their city charter. "Retirement plans are a 'permissible charter provision' adoptable under the broad grant of authority bound in [MCL 117.4i and 117.4j] of the Home Rule Cities Act." *Detroit Police Officers Ass'n*, 391 Mich at 66. As our Supreme Court has held "the entire subject of pensions, including the manner of proving the right thereto, is subject to control by the people of the municipality in the adoption of their charter." *Kelly v City of Detroit*, 358 Mich 290, 299; 100 NW2d 269 (1960). That is, "[p]ension matters . . . in a municipality operating under a home-rule or freeholders' charter are generally held to be within the exclusive control of the municipality." *Id*. at 298 (citation omitted).

The Detroit City Charter provides for retirement plans in Article 11. In particular, Section 11-101 provides:

> 1. The City shall provide, by ordinance, for the establishment and maintenance of retirement plan coverage for city employees.
>
> 2. Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and that funding shall not be used for financing unfunded accrued liabilities.
>
> 3. The accrued financial benefits of active and retired city employees, being contractual obligations of the city, shall in no event be diminished or impaired.

Section 11-103 provides that two governing bodies exist to administer the city's General Retirement System and the Police and Fire Retirement System.

The Detroit Municipal Code, in Chapter 47, sets forth provisions related to the retirement system. Article 1 sets forth the common provisions of the retirement system and several provisions cite to the PERSIA as authority. See, e.g., Sections 47-1-12 and 47-1-15. Article 4 of Chapter 47 sets forth miscellaneous provisions of the retirement system, and includes the following provision which appears to have been effective since 2001:

> **Sec. 47-4-3. - Enforcement; civil action.**
>
> A civil action for relief against any act or practice which violates the state law, the 1997 Detroit City Charter, 1984 Detroit City Code or the terms of this Plan, may be brought by:
>
> (1) A Plan participant who is or may become eligible to receive a benefit;
> (2) A beneficiary who is or may become eligible to receive a benefit;
> (3) A Plan fiduciary, including a Trustee;
> (4) The Finance Director, on behalf of the City as Plan sponsor.[1]

In this case, plaintiffs, as plan participants or beneficiaries, alleged that defendant trustees violated a state law, in particular their fiduciary duties arising under the PERSIA, including MCL 38.1133(3)(a) and (3)(d). "[A]pplicable general laws of the state must be read into the charters of municipal corporations." *Council of City of Saginaw v Bd of Trustees of Policemen & Firemen Retirement System of City of Saginaw*, 321 Mich 641, 647; 32 NW2d 899 (1948). But it is a tort claim because plaintiffs alleged breach of duties imposed by law, the PERSIA. Although a municipality like Detroit has broad authority, that authority is subject to statutory limitations, Const 1963, art 7, § 22, including the governmental tort liability act (GTLA) which provides that a governmental agency is immune from tort liability if "engaged in the exercise or discharge of a governmental function." MCL 691.1407(1).

A "governmental function" is activity expressly or impliedly mandated or authorized by charter or ordinance. MCL 691.1401(f); *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003). The focus is on the general activity, not the specific conduct involved at the time of the alleged tort. *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003). In this case, Article 11 of the city charter provides for the establishment of two boards of trustees as governing bodies for administering the city's retirement plans. Plaintiffs' claims arise from the trustee defendants' alleged acts related to administering the city's retirement plans, i.e., a governmental function. The Legislature has not specifically authorized a private cause of action under the PERSIA in avoidance of governmental immunity. See *Lash v Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007). Although the Detroit

[1] In accordance with this provision, for example, the Police and Fire Retirement System and the General Retirement System of the City of Detroit have brought a civil action as "pension plan[s] and trust[s] established by the Charter and Municipal Code of the City of Detroit." *Police & Fire Retirement Sys of City of Detroit v Watkins*, unreported opinion, No. 08-12582 (ED Mich, Sept 30, 2009).

Municipal Code may appear to have authorized such a cause of action, the city could not create a cause of action against itself in contravention of the broad scope of governmental immunity. See *Mack v Detroit*, 467 Mich 186, 196; 649 NW2d 47 (2002). Thus, contrary to the circuit court's conclusion that Detroit ordinances invested plaintiffs with standing to challenge investment decisions of the trustee defendants, none of the plaintiffs in these cases may pursue a legal cause of action for the alleged PERSIA violations against the trustee defendants. See *Lansing Sch Ed Ass'n*, 487 Mich at 372.

2. THE INVESTMENT ADVISOR DEFENDANTS

Defendant Anderson works as the president of defendant North Point Advisors, a private entity, which rendered services to the retirement system. Because the investment advisor defendants were not engaged in a "governmental function" when they rendered such services, they are not entitled to the protection of governmental immunity. See *Rambus v Wayne Co Gen Hosp*, 193 Mich App 268, 273; 483 NW2d 455 (1992). As set forth above, the Detroit Municipal Code authorized plan participants, beneficiaries, fiduciaries, and the Plan sponsor to bring "[a] civil action for relief against any act or practice which violates the state law." "The framers of the charter, and the people of the city in its adoption, must be presumed to have intended that the provision be construed as it reads." *Kelly*, 358 Mich at 296.

Plaintiffs, as plan participants or beneficiaries, alleged that the investment advisor defendants violated state law, in particular, the PERSIA. Pursuant to the PERSIA, the investment advisor defendants constitute "investment fiduciaries," which MCL 38.1132c(1)(b) defines as including a person who "[r]enders investment advice for a system for a fee or other direct or indirect compensation." Plaintiffs alleged that the investment advisor defendants violated their investment fiduciary duties as set forth in MCL 38.1133(3). Accordingly, as the trial court concluded, plaintiffs have standing to pursue their cause of actions against the investment advisor defendants for violations of the PERSIA.

B. DECLARATORY RELIEF UNDER THE PERSIA

Governmental immunity prohibits plaintiffs from pursuing tort claims against the trustee defendants, but such immunity does not prevent the enforcement of the PERSIA by declaratory judgment if the requirements of MCR 2.605 are met. See *Lansing Sch Ed Ass'n*, 487 Mich at 372; *Lash*, 479 Mich at 194-196. According to MCR 2.605(A)(1), "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." "An 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Groves v Dep't of Corrections*, 295 Mich App 1, 10; 811 NW2d 563 (2011) (internal quotation and citation omitted). And the purpose of a declaratory judgment is "to enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law or breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants." *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 294; 732 NW2d 160 (2006).

In this case, an "actual controversy" does not exist because a declaratory judgment is not necessary to guide plaintiffs' "future conduct in order to preserve [their] legal rights." *Groves*, 295 Mich App at 10. And, because plaintiffs have alleged actual injury and violations of the law, the objectives of the declaratory judgment rule cannot be met. Accordingly, plaintiffs do not have standing to pursue a declaratory judgment action against either the trustee defendants or the investment advisor defendants with regard to their PERSIA-based claims.

C. PLAINTIFFS' STANDING TO BRING OTHER CLAIMS (LC NO. 09-010080-NZ)

In their complaint, plaintiffs also alleged that the trustee defendants breached their common-law fiduciary duties. It is clear that a fiduciary relationship existed between plaintiffs as plan participants or beneficiaries and the trustee defendants. See *In re Karmey Estate*, 468 Mich 68, 75 n 2; 658 NW2d 796 (2003), quoting Black's Law Dictionary (7th ed). Accordingly, the trustee defendants had a duty to act for the benefit of plaintiffs on matters within the scope of that relationship. *Id*. "Relief is granted when such position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Vicencio v Ramirez*, 211 Mich App 501, 508; 536 NW2d 280 (1995).

Here, plaintiffs alleged and offered evidence[2] that the trustee defendants breached their fiduciary duties in several respects, including by making imprudent and improper investments causing losses of retirement funds, destroying evidence, and engaging in self-dealing such as spending funds on unnecessary and extravagant travel.[3] However, this state treats a breach of fiduciary duty claim as a common-law tort. *Miller v Magline, Inc*, 76 Mich App 284, 313; 256 NW2d 761 (1977). As discussed above, the trustee defendants are entitled to immunity for tort claims. See MCL 691.1407(1). But in Count IV of their complaint, plaintiffs alleged that the trustee defendants were not entitled to immunity because their conduct was grossly negligent. MCL 691.1407(2)(c) sets forth as a condition of immunity that "conduct [ ] not amount to gross negligence that is the proximate cause of the injury or damage." Because plaintiffs pleaded in avoidance of governmental immunity, the circuit court properly denied the trustee defendants' motion for summary disposition on the basis of standing with regard to plaintiffs' claims that the trustee defendants violated their common-law fiduciary duties.

We also conclude that plaintiffs have standing to assert their claims of common-law and statutory conversion set forth in Count VI, legal causes of action grounded in the trustee

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[2] The newspaper articles that plaintiffs attached to their summary disposition response qualify as hearsay. *Baker v Gen Motors Corp (After Remand)*, 420 Mich 463, 512; 363 NW2d 602 (1984). But the articles may contain at least some admissible content. MCR 2.116(G)(5) ("documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that *the content or substance would be admissible as evidence*") (emphasis added).

[3] We note that Count III (spoliation of evidence and document destruction) and Count V (spending funds on unnecessary travel) were properly dismissed as distinct causes of action by the circuit court.

defendants allegedly spending plan funds "on extravagant, unnecessary and improper trips." And plaintiffs possess standing to assert their claims set forth in Count VIII, that both the trustee defendants and investment advisor defendants violated Const 1963, art 9, § 24, which declares: "The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby."

D. PLAINTIFFS' STANDING IN LC NOS. 09-010940-NZ AND 09-012332-NZ

Unlike the plaintiffs in LC No. 09-010080-NZ, plaintiffs in LC Nos. 09-010940-NZ and 09-012332-NZ did not submit with their responses to the trustee defendants' motions for summary disposition an affidavit explaining how defendants' course of conduct (poor investments, self-dealing) harmed or placed at risk plaintiffs' interests in the retirement system. Nor did plaintiffs attach any affidavit, court records, or documentary evidence in admissible form; they attached copies of *Detroit Free Press* articles that reported on excessive travel by some board members and failed investments. The newspaper articles themselves do not constitute admissible evidence, *Baker v Gen Motors Corp (After Remand)*, 420 Mich 463, 512; 363 NW2d 602 (1984), but the contents of some of the articles might be admissible. MCR 2.116(G)(5). Even assuming that plaintiffs in LC Nos. 09-010940-NZ and 09-012332-NZ inadequately supported their summary disposition responses, the trustee defendants' motions for summary disposition were inappropriate given the early stage of these litigations.

E. DISCOVERY INCOMPLETE IN ALL THREE CIRCUIT COURT ACTIONS

With respect to all three circuit court actions, a basic, well-established procedural proposition supported the circuit court's denial of defendants' motions for summary disposition contesting plaintiffs' standing: "[I]ncomplete discovery generally precludes summary disposition, [unless] . . . further discovery does not stand a fair chance of finding factual support for the nonmoving party." *VanVorous v Burmeister*, 262 Mich App 467, 476-477; 687 NW2d 132 (2004). The circuit court record in LC No. 09-010080-NZ contains four voluminous files, but when defendants filed their motions for summary disposition discovery remained ongoing. Plaintiffs filed their initial complaint on April 29, 2009, and the trustee defendants filed their motion for summary disposition on July 17, 2009, just 79 days later. The Court in *VanVorous*, 262 Mich App at 477, noted that a "party opposing a motion for summary disposition because discovery is not complete must provide some independent evidence that a factual dispute exists." (Internal quotation and citation omitted). In plaintiffs' summary disposition response, they appended many exhibits tending to substantiate the allegations in their second amended complaint, including an affidavit and other documents tending to suggest that defendants had invested unwisely and squandered plan funds. In summary, plaintiffs in LC No. 09-010080-NZ have presented "some independent evidence that a factual dispute exists" in this case, and that further discovery "stand[s] a fair chance of finding factual support for the nonmoving party." *VanVorous*, 262 Mich App at 477. The circuit court thus correctly denied defendants' motions for summary disposition on the basis that plaintiffs lacked standing.

In LC Nos. 09-010940-NZ and 09-012332-NZ, summary disposition likewise was inappropriate because no discovery had occurred. See *VanVorous*, 262 Mich App at 476-477. The newspaper articles attached to plaintiffs' summary disposition responses in these cases

comprise at least some independent evidence in support of their bad investment and self-dealing allegations. *Id*. at 477. There is a reasonable likelihood that plaintiffs could secure some admissible evidence supporting their breach of fiduciary duty and gross negligence claims, which they had standing to bring. *Lansing Sch Ed Ass'n*, 487 Mich at 372.[4] The circuit court correctly denied defendants' motions for summary disposition on the basis that plaintiffs lacked standing, even assuming that the court may have erred in premising its ruling on the Detroit retirement system ordinances and dismissing the declaratory relief count of the complaint. See *Klooster*, 488 Mich at 313.

F. CONCLUSIONS CONCERNING STANDING

In LC No. 09-010080-NZ, the trustee defendants' motion for summary disposition on the basis of standing with regard to Count I, the alleged PERSIA violations, should have been granted, and summary disposition of Count VII, the request for declaratory relief, was properly granted. The investment advisor defendants' motion for summary disposition on the basis of standing with regard to Count I, the alleged PERSIA violations, was properly denied. The circuit court properly denied the trustee defendants' and the investment advisor defendants' motions for summary disposition on the basis of standing with regard to (1) Count II, breach of common-law fiduciary duties, (2) Count IV, gross negligence, (3) Count VI, conversion, and (4) Count VIII, the violation of Const 1963, art 9, § 24. The court properly dismissed Count III, spoliation, and Count V, waste, as separate counts.

In LC Nos. 09-010940-NZ and 09-012332-NZ, the trustee defendants' motion for summary disposition on the basis of standing with regard to Count I, the alleged PERSIA violations, should have been granted, and summary disposition of Count VIII, the request for declaratory relief, was properly granted. The investment advisor defendants' motion for summary disposition on the basis of standing with regard to Count I, the alleged PERSIA violations, and Count II, the ordinances under which plaintiffs sought relief, was properly denied. The circuit court properly denied defendants' motions for summary disposition of (1) Count III, negligence, (2) Count VI, breach of common-law fiduciary duties, and (3) Count VII, gross negligence. Plaintiffs' inadequately pleaded breach of contract claims, as set forth in Counts IV and V, were properly dismissed.

III

In Docket Nos. 294515, 294541, and 294543, the trustee defendants in each circuit court action assert that the circuit court erred in denying their motions for summary disposition

[4] In Docket Nos. 294541 and 294543, plaintiffs in LC Nos. 09-010940-NZ and 09-012332-NZ cross-appeal contesting the circuit court's summary dismissal of their breach of contract counts (Counts IV and V) pursuant to MCR 2.116(C)(8). We affirm the dismissal because these counts do not reference any specific agreements and consist entirely of conclusory allegations. On remand, plaintiffs may seek leave to file more specific breach of contract counts in amended complaints. See MCR 2.118(A)(2).

premised on governmental immunity. The circuit court stated that it denied the motions for summary disposition premised on governmental immunity under MCL 2.116(C)(7).

> Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law. To survive such a motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity. [The reviewing court] consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. [*Fane v Detroit Library Comm'n*, 465 Mich 68, 74; 631 NW2d 678 (2001).]

A. LC NO. 09-010080-NZ

Pursuant to MCL 691.1407(7)(a), "gross negligence" is defined as "conduct so reckless as to demonstrate a substantial disregard for whether an injury results." MCL 691.1407(7)(a). Accepting as true plaintiffs' allegations in LC No. 09-010080-NZ, including that the defendant trustees entered into multiple "grossly ill-advised and high-risk" pension fund investments with little investigation and contrary to the advice of most investment consultants, as well as spent pension funds on numerous unnecessary and extravagant trips, a reasonable inference arises that the trustee defendants engaged in "conduct so reckless as to demonstrate a substantial disregard for whether" injury resulted to the retirement system. See MCL 691.1407(7)(a). The complaint also maintained that "Defendants' breaches of duty and gross negligence are the proximate cause of the injury." The trustee defendants did not submit with their motion any documentary evidence contradicting the complaint's assertions. Thus, the motion for summary disposition was properly denied.

B. LC NOS. 09-010940-NZ AND 09-012332-NZ

In LC Nos. 09-010940-NZ and 09-012332-NZ, the first amended complaints mentioned the defendant trustees' series of ill-advised and high risk pension fund investments, as well as their excessive travel that included attending numerous meetings in California, Chicago, Arizona, Florida, New York, and Singapore in a six-month period of time. The first amended complaints also contain a gross negligence count, Count VII. The first amended complaints do not as extensively describe the allegedly reckless conduct as the second amended complaint does in LC No. 09-010080-NZ. However, accepting as true the allegations in the first amended complaints as a whole, they at least arguably suggest that defendants engaged in "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results," MCL 691.1407(7)(a), and that defendants proximately caused the injuries alleged.

C. DISCOVERY INCOMPLETE

Moreover, summary disposition on the issue of governmental immunity also is improper because discovery remains incomplete in LC No. 09-010080-NZ, and there has been little to no discovery in LC Nos. 09-010940-NZ and 09-012332-NZ. The circuit court reached the correct result in denying defendants' motions for summary disposition based on governmental immunity. However, we caution that bad investment decisions as determined in hindsight do not constitute gross negligence.

IV

Lastly, in Docket No. 294537, the trustee defendants argue that the circuit court erred in several respects when it granted plaintiffs' motion for class certification. For the reasons discussed above, we reject the trustee defendants' first contention that the class certification was a mistake because plaintiffs lacked standing.

The trustee defendants next submit that "the record does not reveal . . . whether the trial court engaged in *any* analysis of whether the prerequisites were met, let alone a sufficient analysis to satisfy the standard set by" the Michigan Supreme Court. [Emphasis in original.]

"Pursuant to MCR 3.501(A)(1), members of a class may only sue or be sued as a representative party of all class members if the prerequisites dictated by the court rule are met." *Henry v Dow Chem Co*, 484 Mich 483, 496; 772 NW2d 301 (2009). Our Supreme Court elaborated as follows, in *Henry*, 484 Mich at 502-504, concerning the quantum of information that a party seeking class certification must supply a circuit court:

> [A] certifying court may not simply "rubber stamp" a party's allegations that the class certification prerequisites are met. However, the federal "rigorous analysis" requirement does not necessarily bind state courts. . . . Given that MCR 3.501(A) expressly conditions a class action on satisfaction of the prerequisites, a party seeking class certification is required to provide the certifying court with information sufficient to establish that each prerequisite for class certification in MCR 3.501(A) is in fact satisfied. A court may base its decision on the pleadings alone *only if* the pleadings set forth sufficient information to satisfy the court that each prerequisite is in fact met. The averments in the pleadings of a party seeking class certification are only sufficient to certify a class if they satisfy the burden on the party seeking certification to prove that the prerequisites are met, such as in cases where the facts necessary to support this finding are uncontested or admitted by the opposing party.
>
> If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper. However, when considering the information provided to support class certification, courts must not abandon the well-accepted prohibition against assessing the merits of a party's underlying claims at this early stage in the proceedings. . . . [S]tate courts also have broad discretion to determine whether a class will be certified. . . . [Emphasis in original.]

In LC No. 09-010080-NZ, plaintiffs' second amended complaint recited 14 paragraphs under the heading, "Class Action Allegations," which addressed the class action prerequisites in MCR 3.501(A)(1). Later, plaintiffs filed a motion and brief seeking class certification in which they summarized the facts underlying the claims of the entire proposed class, and added specific details to their complaint's class action allegations, including that:

- approximately 9,000 active members of the Plan were damaged by defendants' conduct,

- the claims of the proposed class members had "questions of law and fact in common," including whether defendants "violated their statutory fiduciary duties established by PERSIA," "violated common law fiduciary duties owed to the Plan and Plan participants," and "were negligent [or grossly negligent] with respect to the Plan,"

- "the only individual issue will be that of each individual Class member's damages,"

- plaintiffs' counsel had "particular and extensive experience in litigating complex class actions" and "[c]ertifying the Class . . . is the superior, if not only, mechanism by which to proceed" because "[a]djudication of the legality of Defendants' actions will determine most . . . liability issues for all Class members,"

- the class members' best interests weighed in favor of certifying the proposed class,

- the proposed class' claim for declaratory and injunctive relief "weigh[ed] heavily in favor of class certification,"

- the case did not present any disparate issues that might render the class action unmanageable,

- certification "will bring finality to the litigation on this issue and it will avoid additional litigation by other members of the plaintiff Class," and

- in light of the relatively small damages suffered by individual class members, the present case was well-suited "to the class action procedural device, because Class members may be precluded from pursuing their rights individually, due to the economics of doing so."

On September 23, 2009, the circuit court entered an order granting the motion for class certification. The order provides:

> Plaintiff[s] having filed a Motion for Class Certification; Defendants having opposed Plaintiffs' Motion for Class Certification; *the Court having reviewed all of the Briefs and supporting material submitted* [emphasis added], and having heard oral argument of counsel for the Parties; and being fully advised in the premises:
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> * * *
>
> IT IS . . . ORDERED that Plaintiffs' Motion for Class Certification is GRANTED as this Court is satisfied that:
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> (a) The class is so numerous that joinder of all members is impracticable as there are approximately 9,000 members;

(b) There are questions of law, breach of fiduciary duty, and gross negligence; or questions of fact, Plaintiffs lost money; common to the members of the class that predominate over questions affecting only individual members;

(c) The claims or defenses of the representative parties, as derivative Plaintiffs that lost a percentage of the Plan money, are typical of the claims or defenses of the class;

(d) The representative parties have fairly and adequately asserted the interests of the class; and

(e) The maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

Further, this Court is satisfied:

(a) That this class action is the superior method of adjudicating because the prosecution of separate actions by or against individual members of the class could create a risk of:

i. Inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; and

ii. Adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(b) Equitable or declaratory relief might be appropriate with respect to the class;

(c) The action will be manageable as a class action;

(d) The separate claims of individual class members are insufficient to support separate actions;

(e) It is probable that the amount which may be recovered by the derivative class members justifies a class action; and

(f) Members of the class have a significant interest in controlling the prosecution and defense of all actions.

The class shall be certified as follows: all active Detroit employee and retiree participants in the Detroit General Retirement System, and all beneficiaries of a participant in the Detroit General Retirement System;

* * *

> IT IS FURTHER ORDERED that the Class shall receive notice pursuant to MCR 3.501(C)(5), and that the Class Notice will be published in the following newspapers, for the following time periods: The Detroit Free Press *and* The Detroit News, one 5.5 inch-by-5 inch display to run Monday through Friday for two consecutive weeks and on two consecutive Sundays. Also, Plaintiffs' counsel shall receive any responses to the various forms of notice, and shall promptly inform the Court of any class members who choose to opt out of this litigation. [Emphasis in original.]

Our review of the record confirms that plaintiffs satisfied their obligation "to provide the certifying court with information sufficient to establish that each prerequisite for class certification in MCR 3.501(A) is in fact satisfied." *Henry*, 484 Mich at 502. The circuit court considered the many class action allegations in plaintiffs' complaint, the documentation that plaintiffs submitted to substantiate their motion for class certification, and the parties' many briefs pertaining to certification. In light of the complaint's class action allegations and the evidence plaintiffs appended to their motion for class certification, which the circuit court referenced in deciding the motion, we conclude that (1) the circuit court's order adequately explains that the prerequisites for class certification existed in this case; (2) the circuit court's order contains no clearly erroneous findings of fact; and (3) the circuit court acted within its discretion in entering the order certifying the plaintiff class. See *Henry*, 484 Mich at 495-496.

Contrary to the trustee defendants' inadequate notice arguments, the order granting certification satisfied court rule notice requirements. "As soon as practicable, the court shall determine how, when, by whom, and to whom the notice shall be given; the content of the notice; and to whom the response to the notice is to be sent." MCR 3.501(C)(3). The order granting certification makes evident that notice shall occur (1) by publication (how), a notice method specifically contemplated in MCR 3.501(C)(4)(b), in the *Detroit Free Press* and the *Detroit News*; (2) "Monday through Friday for two consecutive weeks and on two consecutive Sundays" (when); (3) to "all active Detroit employee and retiree participants in the Detroit General Retirement System, and all beneficiaries of a participant in the Detroit General Retirement System" (to whom); (4) "the Class shall receive notice pursuant to MCR 3.501(C)(5)," which sets forth in subrules (a)-(h) mandatory notice contents (the content of the notice); (5) "Plaintiffs' counsel shall receive any responses to the various forms of notice, and shall promptly inform the Court of any class members who choose to opt out of this litigation" (to whom responses should be sent); and (6) the trustee defendants do not contradict plaintiffs' appellate contention that they prepared the notice.[5] Although the trustee defendants complain that the "court did not review nor make any findings with respect to the sufficiency of the form, substance or manner of class notice," the trustee defendants do not mention any specific information that the court purportedly failed to consider in formulating the notice, and they do

[5] In MCR 3.501(C)(6)(a), the Supreme Court placed on the plaintiff the burden of paying for the notice to the class.

not explain any manner in which the failure to take into account the information could have prejudiced anyone—the potential class members, plaintiffs, or defendants. MCR 2.613(A). Accordingly, the circuit court's order granting plaintiffs' motion for class certification is affirmed.

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

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens