STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL GEORGE HADDAD,

Plaintiff-Appellee,

v

JOHN S. FROMSON and DEPARTMENT OF CORRECTIONS,

Defendants,

and

DEPARTMENT OF STATE POLICE,

Defendant-Appellant.

UNPUBLISHED
April 20, 2004

No. 242432
Court of Claims
LC No. 00-017537-CM

MICHAEL GEORGE HADDAD,

Plaintiff-Appellee,

v

JOHN S. FROMSON,

Defendant-Appellant.

No. 243567
Ingham Circuit Court
LC No. 00-091215-NZ

Before: Hoekstra, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

In Docket No. 242432, defendant Michigan Department of State Police (MSP) appeals by leave granted[1] the trial court's order denying its motion for summary disposition. In Docket No.

---

[1] Since the time that the MSP filed its application for leave to appeal the trial court's order denying its motion for summary disposition, a new court rule, effective September 1, 2002, (continued…)

243567, defendant John S. Fromson appeals as of right[2] the trial court's order denying his motion for summary disposition.[3] This Court consolidated the two appeals. In both cases, we reverse and remand.

Facts and Procedural History

These cases arise from circumstances that resulted in plaintiff Michael George Haddad's name being placed on the sex-offender registry available to the public. On July 10, 1998, Haddad entered a nolo contendere plea to a charge of fourth-degree criminal sexual conduct, MCL 750.520e. A condition of the plea was that the victim, Haddad's sister, produce certain psychiatric and other medical records. Following the plea, Haddad's case was assigned to probation officer Fromson. Immediately after the plea, Fromson escorted Haddad to the probation office and, among other things, completed a "Michigan Sex Offender Registration" form. The MSP created this form, known as a DD-4, which directs the probation officer to complete the form by asking questions of the person convicted of a sex offense to obtain the necessary information, recording those answers on the form, and obtaining the person's signature once the form is completed. Fromson followed this procedure and Haddad signed the form. Later that same day, Fromson took the completed DD-4 to the Clinton County Central Dispatch, where the information was entered into the Law Enforcement Information Network (LEIN) and electronically transmitted to the MSP's database.

Subsequently, when the victim failed to produce her medical records, Haddad was allowed to withdraw his plea and did so on October 5, 1998. On February 2, 1999, all charges against Haddad were dismissed with prejudice. The next day, Haddad learned from an anonymous telephone call that his name was included on the Internet website where the MSP maintains a list of convicted sex offenders, i.e., the public sex offender registry website, as required by the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*.[4] On the following day, Haddad's criminal attorney notified the MSP of the situation and Haddad's name was removed that day.

(…continued)

became applicable that gives an appeal of right to a governmental agency or its employee from an order denying a motion for summary disposition based on governmental immunity. See MCR 7.202(7)(a)(v). See also MCR 7.203(A)(1).

[2] Fromson appealed the trial court's order denying his motion for summary disposition after the effective date of MCR 7.202(7)(a)(v).

[3] In the order denying Fromson's motion for summary disposition, the trial court also granted the Department of Corrections (DOC)'s motion for summary disposition and dismissed the case against the DOC with prejudice. The DOC is not a party to this appeal.

[4] The Legislature enacted the SORA pursuant to 1994 PA 295, effective October 1, 1995. Since the original enactment, the Legislature has amended the act several times. Citations to the SORA within this opinion are to the act as it was in effect at the time of the complained of conduct in the instant cases.

On January 21, 2000, Haddad filed a complaint in the Court of Claims against the MSP[5] alleging violation of the SORA and defamation. That same day, Haddad also filed a complaint in the circuit court against Fromson[6] alleging violation of the SORA and defamation. The trial court joined the two lawsuits for trial and other proceedings. On May 30, 2000, Haddad filed an amended complaint in these joined cases that added multiple counts alleging federal claims and an additional state claim. After removal to a federal district court where, among other things, Haddad's federal claims against Fromson ultimately were dismissed, the matter returned to state court. Thereafter, the MSP and Fromson filed motions for summary disposition on the remaining state-law claims. The trial court denied both motions for summary disposition and this appeal ensued.

Standard of Review

We review the grant of denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Here, both motions for summary disposition were sought pursuant to MCR 2.116(C)(7) and (C)(10).

"'MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties.'" *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998), quoting *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992).

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

> In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. [*Ghaffari v Turner Const Co*, 259 Mich App 608, 612-613; 676 NW2d 259 (2003).]

Docket No. 242432

The only issue before this Court with respect to Docket No. 242432 is whether the trial court erred in denying the MSP's motion for summary disposition based on governmental immunity under MCL 691.1407(1). The MSP maintains on appeal that the trial court did err because the MSP is a governmental agency that is authorized by the SORA to establish and maintain a registry of convicted sex offenders and to develop all necessary procedures for that

---

[5] The DOC was also listed as a defendant. See n 3, *supra*.

[6] Also listed as defendants were "unknown" DOC and MSP officials who are not involved in this appeal.

purpose. According to the MSP, the improper performance of an activity authorized by law, i.e., the development of procedures to implement the act that are in conflict with requirements of the act, is not ultra vires conduct, and thus it was entitled to summary disposition in its favor on the basis of governmental immunity.

In contrast, Haddad asserts that the MSP had no statutory authority to register him under the SORA or to promulgate policies and procedures that required the DOC probation officers to do so, nor to maintain his name on a computerized database of registrations or to make his registration available to the public, because he was not convicted of a listed offense. Haddad further asserts that, without statutory authority, the MSP designed the DD-4 form to include instructions that are contrary to the SORA. In essence, Haddad's claim is that the DD-4 form and the procedures used to place his name on the public sex offender registry resulted from ultra vires activity of the MSP, and thus the MSP is not entitled to governmental immunity from tort liability and the trial court's denial of the MSP's motion for summary disposition was proper.

Generally, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). A governmental function is defined as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). The term "governmental function" is broadly construed while the statutory exceptions to governmental immunity are narrowly construed. *Maskery v University of Michigan Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003), citing *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). Tort liability may be imposed on a governmental agency if the agency "was engaged in an ultra vires activity, i.e., an activity which is not expressly or impliedly mandated or authorized by constitution, statute, or other law." *Hyde v University of Michigan Bd of Regents*, 426 Mich 223, 253; 393 NW2d 847 (1986), citing *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 620; 363 NW2d 641 (1984). To determine whether the conduct at issue was a governmental function, the focus is the general activity, not the specific conduct at the time the alleged tort occurred. *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003), quoting *Pardon v Finkel*, 213 Mich App 643, 649; 540 NW2d 774 (1995). "Improper performance of an activity authorized by law is, despite its impropriety, still 'authorized' within the meaning of the *Ross* governmental function test." *Richardson v Jackson Co*, 432 Mich 377, 385; 443 NW2d 105 (1989). The *Richardson* Court summarized, "ultra vires activity is not activity that a governmental agency performs in an unauthorized manner. Instead, it is activity that the governmental agency lacks legal authority to perform in any manner." *Id.* at 387.

In the instant case, the MSP purports to have undertaken the complained of conduct under the authority of the SORA. The SORA expressly authorizes the compilation of a registry of convicted sex-offenders, the dissemination to the public of certain registration information, the development of a form for the registration of convicted offenders, and the maintenance of the registries. MCL 28.721 *et seq.* The MSP is an agency of Michigan government that was assigned to fulfill these requirements of the SORA. MCL 28.722(b); MCL 28.727. Viewed, as we are required to do, from the standpoint of the general activity, not the specific conduct at the time the alleged tort occurred, *Tate*, *supra*, the activities of the MSP of designing and promulgating a registration form and promulgating procedures to accomplish the mandates of the SORA are governmental functions.

With regard to the DD-4 form, Haddad focuses on the procedure set forth in MCL 28.724(4),[7] which at the time of the alleged tortious conduct provided:

> For an individual convicted of a listed offense in this state after October 1, 1995, the individual shall register before sentencing, entry of the order of disposition, or assignment to youthful trainee status. *The probation officer or the juvenile division of the probate court shall give the individual the registration form after the individual is convicted, shall explain the duty to register, and shall accept the completed registration for processing* pursuant to section 6. [Emphasis supplied.]

Section 6 of the act provides in relevant part that "[t]he officer, court, or agency registering an individual or receiving or accepting a registration under section 4 … shall forward the registration … to the department by the law enforcement information network within 3 business days after registration …." MCL 28.726(2).[8]

In contrast to the provisions of MCL 28.724(4), the first line of instructions for the DD-4 form states, "The registration form shall be filled out completely by the agency official." Immediately following this sentence, in parentheses, the form instructs, "Do NOT allow offender to fill out form." Further, admittedly the MSP was responsible for creating and promulgating for use by probation officers the DD-4 form, and Lieutenant Robert Carr, now retired from the MSP, candidly admitted in his deposition that the MSP drafted the instructions of the DD-4 form to require that the probation officer fill out the form, even though MCL 28.724(4) directs that the registration form be given to the individual, because it believed that to be a better procedure.

We do not agree with the apparently willful disregard by the MSP of the policy choices expressed by the Legislature in MCL 28.724(4). Nevertheless, to the extent that the DD-4 form that resulted from the MSP's efforts is contrary to the will of the Legislature, that fact does not preclude application of governmental immunity. Rather, in our opinion, the situation is one where the MSP improperly performed an otherwise authorized activity, see MCL 28.727, and

---

[7] 1999 PA 85 redesignated this subsection as (5) and rewrote it to now provide:

> [A]n individual convicted of a listed offense in this state after October 1, 1995 shall register before sentencing, entry of the order of disposition, or assignment to youthful trainee status. The probation officer or the family division of circuit court shall give the individual the registration form after the individual is convicted, explain the duty to register, verify his or her address, and provide notice of address changes, and accept the completed registration for processing under section 6. The court shall not impose sentence, enter the order of disposition, or assign the individual to youthful trainee status until it determines that the individual's registration was forwarded to the department as required under section 6.

[8] This subsection, as originally enacted, was amended by 1996 PA 494, effective April 1, 1997.

despite the improper performance, it is still an authorized governmental function. *Richardson, supra*. Because designing and promulgating a registration form is an authorized governmental function for the MSP, its improper execution of that task does not make the activity ultra vires.

Likewise, to the extent that Haddad maintains that he was not "convicted" as defined by the SORA, and thus registering him as a sex-offender or promulgating a policy that would cause an employee of the DOC to submit his name for registration was ultra vires, we find his argument unpersuasive.

At the relevant time, MCL 28.722(a), which sets forth definitions, provided that "convicted" means one of the following:

> (i) Having a judgment of conviction or a probation order entered in a court having jurisdiction over criminal offenses, including a conviction subsequently set aside pursuant to Act No. 213 of the Public Acts of 1965, being sections 780.621 to 780.624 of the Michigan Compiled Laws.
>
> (ii) Being assigned to youthful trainee status pursuant to sections 11 to 15 of chapter II of the code of criminal procedure, Act No. 175 of the Public Acts of 1927, being sections 762.11 to 762.15 of the Michigan Compiled Laws.
>
> (iii) Having a disposition entered pursuant to section 18 of chapter XIIA of Act No. 288 of the Public Acts of 1939, being section 712A.18 of the Michigan Compiled Laws, that is open to the general public pursuant to section 28 of chapter XIIA of Act No. 288 of the Public Acts of 1939, being section 712A.28 of the Michigan Compiled Laws.

Haddad claims that, when the requirements for conviction are applied to his case, he was never convicted because "[a] certified copy of the docket entries in the underlying … [c]ircuit [c]ourt case reveals that a [j]udgment of [c]onviction, assignment to youthful trainee status, or having a disposition entered in a juvenile proceeding never occurred." And despite the absence of a court entered "judgment of conviction", the MSP registered him and, by its policies, caused Fromson to complete the registration process without determining whether a judgment of conviction was entered on the record. In essence, Haddad maintains that these acts are ultra vires.

Even if we were to agree with Haddad that these facts constitute a defect in the registration policy,[9] we nevertheless conclude that the acts of registering Haddad and promulgating a policy to be followed by DOC employees are, like the preparation of the DD-4 form, acts that are governmental functions that at most were done imperfectly. The fact that a

[9] Whether a document labeled "judgment of conviction" must be entered in the case file before registration may occur or whether acceptance of a nolo contendere plea on the record and scheduling for sentencing is sufficient to constitute a "judgment of conviction" as required by MCL 28.722(a) is not before us.

document labeled judgment of conviction is not in the court file does not render the MSP's procedure for registration following acceptance of a plea of nolo contendere to be ultra vires.

In sum, the MSP is entitled to summary disposition on the basis of governmental immunity.

Docket No. 243567

Similar to Docket No. 242432, the only issue before us with regard to Docket No. 243567 is whether the trial court erred in denying Fromson's motion for summary disposition based on governmental immunity under MCL 691.1407(2). Fromson claims that he, too, is entitled to summary disposition on the basis of governmental immunity because his conduct of registering Haddad as a sex offender in conformity with established agency procedures is not grossly negligent. We agree.

MCL 691.1407(2) provides that employees of governmental agencies are immune from tort liability while in the course of employment if all three of the following conditions are met:

> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Our Supreme Court has addressed the issue of when a material factual question regarding a governmental employee's alleged gross negligence exists, warranting denial of a summary disposition motion. In keeping with the statutory requirement, the party opposing summary disposition must proffer evidence of conduct "'so reckless as to demonstrate a substantial lack of concern for whether an injury results.'" *Maiden, supra* at 123, quoting MCL 691.1407(2)(c). The *Maiden* Court stated that proof of ordinary negligence "does not create a material question of fact concerning gross negligence." *Id.* at 122-123, citing *Jackson v Saginaw County*, 458 Mich 141, 150-151; 580 NW2d 870 (1998).

In this case, Haddad maintains that Fromson's conduct of registering him on the public sex offender registry when Haddad "was never, ever convicted of a sexual offense" is gross negligence. However, in registering Haddad as a sex offender, Fromson merely acted in conformity with established agency procedures. Reasonable minds could not agree that Fromson's conduct, i.e., following directives, was so reckless as to demonstrate his substantial lack of concern for whether an injury results, MCL 691.1407(2)(c); *Maiden, supra* at 123, 127, and thus Fromson's conduct was not grossly negligent. Fromson too is entitled to summary disposition.

Conclusion

In sum, the trial court erred in denying summary disposition in favor of the MSP and Fromson.

Reversed and remanded for entry of summary disposition in favor of the MSP and Fromson. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot