

STATE OF MICHIGAN
COURT OF APPEALS

JAMES A. BACARELLA, Personal
Representative of the Estate of ZANDER
MAURICE GAMBLE, Deceased,

UNPUBLISHED
July 20, 2004

Plaintiff-Appellant,

v

KATHY CHOLAK-JONES, AL STAKOWIAK,
KAREN HAMLING, DAVID BLEUM, and
GERALDINE REYNOLDS,

No. 248425
Bay Circuit Court
LC No. 02-003989-NO

Defendants-Appellees.

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

PER CURIAM.

Plaintiff appeals as of right from the order granting summary disposition pursuant to MCR 2.116(C)(7) in favor of defendants. We affirm.

On August 31, 2001, five-month-old Zander Gamble died of positional asphyxiation while sleeping in the bed of his father, Edward Gamble. Edward Gamble and Zander's mother, Tasha Marie Lilies,¹ had been under investigation by the Bay County Family Independence Agency (FIA) because Tasha Lilies' parental rights to two other children were previously terminated. That termination was the result of Lilie's neglect of the children and the danger of abuse posed by Gamble, who was previously convicted of second-degree domestic assault. Plaintiff, as personal representative of Zander's estate, filed the present wrongful death action against the four individual FIA workers handling the case. The complaint alleged that defendants had strong indications that Zander should have been removed from his parents, but did not file for authorization to petition for the termination of parental rights as required by MCL 722.638.

Motions granted under MCR 2.116(C)(7) are reviewed de novo. *DiPonio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46-47; 631 NW2d 59 (2001). "When

¹ Tasha Marie Lilies is also known as Tasha Marie Hendrix.

reviewing a trial court's decision granting a motion for summary disposition under MCR 2.116(C)(7), we must accept the nonmoving party's well-pleaded allegations as true and construe those allegations in the nonmovant's favor." *Id.* at 46 n 2. "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003)

Plaintiff asserts that MCL 722.638 and provisions of the Child Protection Law and FIA rules mandated that a petition be filed to terminate parental rights and that, by failing to fulfill their statutory duty to file the petition, defendants were not acting within the scope of their employment and authority and thus were not entitled to the immunity provided in MCL 691.1407(2). We disagree.

MCL 722.638 provides in pertinent part:

The department shall submit a petition for authorization by the court under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, if 1 or more of the following apply:

(b) The department determines that there is risk of harm to the child and either of the following is true:

(i) The parent's rights to another child were terminated as a result of proceedings under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, or a similar law of another state.

In *Richardson v Jackson Co*, 432 Mich 377, 443 NW2d 105 (1989), the Michigan Supreme Court decided an analogous issue. The decedent in *Richardson* drowned "in or near the public swimming area" of a park owned by the defendant county and operated by the defendant township. *Id.* at 380. The personal representative in *Richardson* brought suit alleging that the defendants "acted willfully and wantonly by creating and setting aside a swimming area containing a dangerous drop-off without proper warnings." *Id.*

The Court of Appeals ruled that because defendants had not complied with the buoy application, inspection, permit, and placement requirements of [MCL 281.1141] . . . , defendants' operation of the swimming beach was prohibited by § 192 of the Marine Safety Act and was therefore an ultra vires act outside the protection of the governmental immunity act. [*Id.* at 380-381.]

Despite the mandatory posture of the responsibilities set forth in MCL 281.1141,² the *Richardson* Court concluded that the defendants' actions were not ultra vires. "Improper performance of an activity authorized by law is, despite its impropriety, still authorized" by law, the Court observed. *Richardson, supra* at 385.

The FIA is clearly authorized by statute to investigate reports of abuse and neglect and to petition for authorization to terminate parental rights. The fact that defendants, as agents of the FIA, allegedly failed to file such a petition does not render their actions in this matter ultra vires. Assuming it was improper for a petition not to be filed, defendants were nonetheless still empowered under the child protection laws to pursue the issue of neglect and abuse in the care of Zander. See *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 409; 605 NW2d 690 (1999).³ The trial court did not err in concluding that defendants were acting within the scope of their authority.

Plaintiff also argues that the trial court erred by applying *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000) to conclude that defendants were not *the* proximate cause of Zander's injuries. In *Robinson*, the Court held that the phrase "the proximate cause" as used in the employee provision of the governmental immunity act means the one most immediate, efficient, and direct cause preceding an injury, not "a proximate cause." *Id.* at 445-446. Plaintiff argues that the holding in *Robinson* applies only to cases involving police car chases. However, the *Robinson* Court's holding does not expressly limit itself to these circumstances. Rather, it interprets "the proximate cause" *as used in the employee provision of the governmental immunity act.*" *Robinson, supra* at 446 (emphasis added). Moreover, by overruling *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994), which did not involve police car chases, the Court clearly intended the scope of its ruling to extend beyond the scope of the police-chase context.

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra

² Repealed by 1994 PA 451.

³ The phrase "scope of authority" is defined in *Backus* as follows: "The reasonable power that an agent has been delegated or might foreseeably be delegated in carrying out the principal's business." *Backus, supra* at 409, quoting Black's Law Dictionary (7th ed).