STATE OF MICHIGAN

COURT OF APPEALS

NANCY BRICKER,

Plaintiff-Appellee/Cross-Appellant,

v

AUSABLE VALLEY COMMUNITY MENTAL HEALTH SERVICES,

Defendant-Appellant/Cross-Appellee,

and

HOLLIE MCDONALD, LEE D. MERTZ, and FLOYD R. SMITH,

Defendants/Cross-Appellees.

UNPUBLISHED
January 29, 2009

No. 281736
Iosco Circuit Court
LC No. 06-003116-CK

Before: Owens, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Plaintiff Nancy Bricker filed this lawsuit after defendant AuSable Valley Community Mental Health Services (AuSable), terminated her employment at a group home it operated for developmentally disabled individuals. Defendant AuSable appeals by right the trial court's denial of its motion for summary disposition pursuant to governmental immunity. MCR 7.203(A)(1); MCR 7.202(6)(a)(v). Plaintiff cross-appeals the trial court's granting of summary disposition to the individual defendants. MCR 7.207(A). We affirm the trial court's order granting summary disposition to the individual defendants but reverse the trial court regarding its denial of summary disposition to defendant AuSable. We remand for entry of judgment in favor of defendant AuSable.

I. Summary of Facts and Proceedings

AuSable fired both plaintiff and her shift supervisor contending both were responsible for the death of a resident after plaintiff's supervisor administered a scalding hot shower. AuSable's executive director, defendant Floyd R. Smith, explained the basis for AuSable's decision to discharge plaintiff in a May 5, 2003 letter. Plaintiff filed her complaint against AuSable on November 9, 2006, asserting four theories (counts) of liability: (1) wrongful discharge or breach

of contract; (2) violation of the Michigan Mental Health Code; (3) violation of public policy; and (4) intentional infliction of emotional distress. Plaintiff also sued three AuSable managers in their individual and representative capacities; each wrote a letter to plaintiff during the termination process.[1] Plaintiff subsequently voluntarily dismissed her wrongful discharge claim. Thereafter, defendants moved for summary disposition under MCR 2.116(C)(7), (8), & (10), contending plaintiff's claims were barred by governmental immunity. The parties also submitted to the trial court a stipulation of facts pursuant to MCR 2.116(A).

At the hearing on defendant's motion, plaintiff's counsel argued that she had pleaded facts in avoidance of governmental immunity. Specifically, plaintiff argued governmental immunity was not available to the individual defendants because they committed intentional torts. Also, governmental immunity did not apply, "because of gross negligence and ultra vires conduct of the governmental institute." Finally, plaintiff argued that whether defendants' conduct was so extreme and outrageous as to permit recovery was a factual question for the jury to decide.

The trial court provided little insight regarding its reasoning, denying the motion with respect to AuSable because it appeared "there are factual disputes in this matter." On the other hand, the trial court granted summary disposition to the individual defendants for the equally brief and opposite reason: "I don't find that there's sufficient facts to go forward to a jury with regards to the individual defendants."

Defendant AuSable appeals by right the trial court's denial of its motion for summary disposition pursuant to governmental immunity. Plaintiff cross-appeals the trial court's granting of summary disposition to the individual defendants.

II. Standard of Review

We review de novo a trial court's determination to grant or deny summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(7) asserts that a claim is barred by immunity granted by law and need not be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 25-26; 703 NW2d 822 (2005). The allegations of the complaint are accepted as true unless contradicted by documentary evidence. *Maiden*, *supra* at 119. The motion is properly granted when the undisputed facts establish the moving party is entitled to immunity granted by law. *By Lo Oil Co*, *supra* at 26.

This Court also reviews de novo a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(8) to determine whether the claim is so clearly unenforceable

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[1] These letters were written by Hollie McDonald, residential supervisor, dated February 3, 2003, suspending plaintiff; Lee D. Mertz, deputy director, dated March 24, 2003, recommending plaintiff's discharge; and Floyd R. Smith, director, dated May 5, 2003, informing plaintiff of the action of AuSable's board terminating plaintiff's employment.

as a matter of law that no factual development could establish the claim and justify recovery. *Frohriep v Flanagan (On Remand)*, 278 Mich App 665, 680; 754 NW2d 912 (2008). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden, supra* at 119.

When considering a motion brought under MCR 2.116(C)(10), the court must view the proffered evidence in the light most favorable to the party opposing the motion. *Maiden, supra* at 120. A trial court properly grants the motion when the proffered evidence fails to establish any genuine issue of 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). "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." *Id*.

III. Analysis

Defendant AuSable first argues the trial court should have granted it summary disposition as to plaintiff's tort claims on the basis of governmental immunity. We agree.

Except for certain limited exceptions, MCL 691.1407(1) grants tort immunity to governmental agencies "engaged in the exercise or discharge of a governmental function." Immunity is broadly construed; exceptions narrowly. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 544; 688 NW2d 550 (2004). None of the six statutory exceptions apply to the facts of this case. Plaintiff argues governmental immunity does not apply because (1) defendants were not engaged in a governmental function, (2) exceeded the scope of their authority, (3) engaged in ultra vires conduct, or (4) were grossly negligent. These arguments lack merit.

A "governmental function" is an activity expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. MCL 691.1401(f); *Maskery v University of Michigan Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003). This definition must be broadly applied. *Id*. AuSable is a governmental agency because it provides community mental health services as authorized by law. See MCL 330.1200 *et seq*. The parties stipulated that AuSable "is a 'public governmental entity' organized and existing under the constitution and laws of the State of Michigan." Thus, AuSable is a governmental agency performing a governmental function, and its employees are public employees under the supervision of AuSable's executive director. See MCL 330.1204a(3); MCL 330.1230. It is settled that the hiring, supervision, discipline and discharge of a government employee is the exercise of a governmental function. See *Galli v Kirkeby*, 398 Mich 527, 537 (WILLIAMS, J, concurring); 542 (COLEMAN, J, dissenting); 248 NW2d 149 (1976); *Bozarth v Harper Creek Bd of Ed*, 94 Mich App 351, 353; 288 NW2d 424 (1979). Moreover, in determining whether an activity was a governmental function, courts must focus on the general activity and not the specific conduct involved at the time of the tort. *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003). Here, plaintiff presents no credible argument that defendants' general activity of supervising and disciplining a public employee was not a governmental function.

Defendants were also not engaged in ultra vires activity. A governmental function is an activity that is expressly or impliedly authorized by law, while an ultra vires activity is one that is *not* expressly or impliedly authorized by law. *Richardson v Jackson Co*, 432 Mich 377, 381,

385-387; 443 NW2d 105 (1989). Because AuSable was a government agency engaged in activity authorized by law, defendants were expressly or impliedly authorized by law to hire, supervise, and discipline its employees, including plaintiff. Thus, defendants were engaged in a governmental function and not ultra vires activities.

Plaintiff's argument regarding gross negligence and intentional torts also fails with respect to AuSable because the exceptions to governmental immunity stated in MCL 691.1407(2) and (3), apply only to officers and employees, not the government agency itself. There is no intentional tort exception to governmental immunity applicable to government agencies. See *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987). AuSable may be found vicariously liable for the torts of its employees only if (a) an exception to governmental immunity applies and (b) the employees were acting within the scope of their employment. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 625; 363 NW2d 641 (1984). Here, plaintiff has failed to plead an exception to governmental immunity. Consequently, even if its employees might be held liable for gross negligence or an intentional tort, AuSable is protected by governmental immunity from such tort claims. MCL 691.1407(1).

Defendant AuSable next argues that plaintiff's claim that AuSable violated the Mental Health Code is insufficient to overcome governmental immunity. We agree and conclude the trial court erred if it used this claim as a basis for denying AuSable summary disposition.

Plaintiff alleges in her complaint that defendant discharged her for making a statement to the Michigan State Police and other state investigators required by MCL 330.1723(1). This provision provides:

> A mental health professional, a person employed by or under contract to the department, a licensed facility, or a community mental health services program, or a person employed by a provider under contract to the department, a licensed facility, or a community mental health services program who has reasonable cause to suspect the criminal abuse of a recipient immediately shall make or cause to be made, by telephone or otherwise, an oral report of the suspected criminal abuse to the law enforcement agency for the county or city in which the criminal abuse is suspected to have occurred or to the state police. [MCL 330.1723(1).]

Plaintiff contends her discharge violated public policy as stated in MCL 330.1723(5), and thus, her claim survives defendants' assertion of governmental immunity. The cited provision states:

> An individual who makes a report under this section in good faith shall not be dismissed or otherwise penalized by an employer or contractor for making the report. [MCL 330.1723(5).]

We conclude that MCL 330.1723(5) does not create a private tort cause of action or create an exception to governmental immunity. Where a statute creates a new right or imposes a new duty, the remedy provided by the statute is exclusive. See *Pompey v General Motors Corp*, 385 Mich 537, 552; 189 NW2d 243 (1971). Here, the statute does not explicitly create a private cause of action, and none may be read into it.

In *Dockweiler v Wentzell*, 169 Mich App 368; 425 NW2d 468 (1988), the plaintiff was a community mental health patient who brought an action against a therapist, the county, and the county mental health agency because of alleged sexual advances. The Mental Health Code specifically provides that a "recipient of mental health services physically, sexually, or otherwise abused shall have a right to pursue injunctive and other appropriate civil relief." MCL 330.1722(4). But the *Dockweiler* Court held that a tort action for damages against the county and its community mental health agency was not "appropriate civil relief." *Dockweiler*, *supra* at 376-377. The Court reasoned that the plaintiff's claim was barred "because it is based on the action or inaction of these defendants in allowing the alleged sexual abuse to occur and because, at the time of [the] plaintiff's sexual abuse, [the defendants] were engaged in a governmental function, thereby entitling them to the protection of governmental immunity as provided under MCL 691.1407." *Dockweiler*, *supra* at 377.

Plaintiff argues *Dockweiler* is distinguishable because defendants were not engaged in a governmental function at the time they engaged in wrongful conduct. Plaintiff's argument fails because defendants were engaged in a governmental function, one expressly authorized by law. MCL 691.1401(f); *Maskery*, *supra* at 613-614. As discussed already, the hiring, supervision, discipline and discharge of a government employee constitutes the exercise of a governmental function. *Galli*, *supra* at 537, 542; *Bozarth*, *supra* at 353.

Furthermore, our Supreme Court has recently reinforced the rule of *Pompey* and the reasoning of *Dockweiler*. In *Lash v Traverse City*, 479 Mich 180; 735 NW2d 628 (2007), the Court addressed whether a private cause of action could be construed from MCL 15.602, which limits the restrictions public employers may make with respect to employee residency. The *Lash* Court noted the *Pompey* general rule: "where no common-law remedy existed, the remedy provided by statute was the sole remedy." *Lash*, *supra* at 192. Further, the *Lash* Court rejected as dictum that part of *Pompey* that stated "'the statutory remedy is not deemed exclusive if such remedy is plainly inadequate, or unless a contrary intent clearly appears.'" *Lash*, *supra* at 192, n 19, quoting *Pompey*, *supra* at 552 n 14. After reviewing other cases, the Court noted it had "refused to impose a remedy for a statutory violation in the absence of evidence of legislative intent." *Lash*, *supra* at 193. Additionally, regardless of the efficacy of the *Pompey* dictum, it would not be "extended to allow a private cause of action for money damages to be implied *against a governmental entity* such as [the] defendant." *Id*. at 194 (emphasis in original). The Court held that the without an "'express legislative authorization,' a cause of action cannot be created 'in contravention of the broad scope of governmental immunity.'" *Id*., quoting *Mack v Detroit*, 467 Mich 186, 196; 649 NW2d 47 (2002).

In sum, under the rule of *Pompey*, MCL 330.1723(5) cannot be read as creating a private cause of action. Further, even if the statute created such a right of action, plaintiff has produced no evidence the statute was violated. The parties' stipulated facts incorporated defendant Floyd Smith's May 5, 2003, letter informing plaintiff of AuSable's decision to discharge her. The letter plainly states that plaintiff was discharged not because she cooperated with investigators and gave a statement to them but because of the conclusion that the investigators and defendants drew from the investigations. Specifically, investigators and AuSable concluded that although plaintiff did not participate in giving the resident a shower, she was neglectful of her duties because she was aware that the home's water was scalding hot but took no action to correct the

problem and thereby protect the residents. Dr. Floyd wrote in his letter informing plaintiff of her discharge that plaintiff

> should have worked together with your co-worker to make sure the water temperature was checked and appropriate. You failed to take the appropriate precautions in order for the consumer to be showered safely and failed to comply with the established standard of care. This resulted in serious injury and death to this resident.

Plaintiff points to no evidence that the stated reason for her discharge, which is part of the stipulated facts, is a pretext or an ulterior motive for her discharge, i.e., that her termination was essentially punishment for plaintiff's having cooperated with investigators and giving them a statement. Without such evidence, no reasonable jury could conclude that plaintiff was discharged for the ulterior motive that plaintiff suggests. Speculation and conjecture are insufficient to raise an issue of genuine material fact requiring a trial. *West, supra* at 188; *Detroit v GMC*, 233 Mich App 132, 139; 592 NW2d 732 (1998). The trial court erred by not granting defendant AuSable's motion for summary disposition. Consequently, even if MCL 330.1723(5) creates a private cause of action, defendant should be granted summary disposition because there is no factual support for plaintiff's claim. MCR 2.116(C)(10).

Although not entirely clear, plaintiff's public policy claim relies on MCL 330.1723(5) and *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692; 316 NW2d 710 (1982). Plaintiff dismissed her claim of wrongful discharge, i.e., that she was discharged without just cause and apparently seeks to avoid the effect of her "at-will" employment contract. Plaintiff's public policy argument is thus, in essence, a contract claim. She argues that "discharging someone for cooperating with investigating administrative and law enforcement agencies is clearly contrary to public policy, an exception to the at-will employment relationship and gives rise to an actionable claim." The *Suchodolski* Court opined:

> In general, in the absence of a contractual basis for holding otherwise, either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason. See generally *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980). However, an exception has been recognized to that rule, based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable. Most often these proscriptions are found in explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty. [*Suchodolski, supra* at 694-695.]

We conclude that even if this public policy exception applies to plaintiff's at-will employment and plaintiff could bring a wrongful discharge claim against defendant for violating MCL 330.1723(5), her claim still fails. As we have discussed already, plaintiff has produced no evidence to support such a claim. Based on the stipulated facts, no reasonable juror could conclude that defendant discharged plaintiff for making a report of suspected criminal abuse of a mental health patient. MCL 330.1723(1), (5). While reasonable jurors may disagree with the disciplinary action that defendant took as a result of the investigation of the tragic death of the resident, only speculation could support the conclusion that defendant discharged plaintiff *for making a report of suspected criminal abuse* of a mental health patient. Neither speculation nor

conjecture is sufficient to create a genuine issue of material fact requiring a trial. See *West, supra* at 188. The trial court should have granted AuSable's motion for summary disposition.

In plaintiff's cross-appeal, she argues that she has produced evidence to establish the elements of intentional infliction of emotional distress. Plaintiff asserts that defendants engaged in outrageous conduct by accusing her of culpable conduct that resulted in the death of the resident. Plaintiff asserts her claim creates a question of fact for a jury to decide. See *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 342-343; 497 NW2d 585 (1993). Consequently, plaintiff argues that the trial court erred by granting the individual defendants summary disposition. We disagree.

We conclude that the trial court correctly granted summary disposition to the individual defendants on plaintiff's tort claim of intentional infliction of emotional distress. Specifically, the trial court implicitly ruled that even viewed in a light most favorable to plaintiff, the evidence failed to create an issue of material fact that defendants' conduct was so extreme and outrageous that it would support a tort claim for intentional infliction of emotional distress. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985). Accordingly, the trial court properly granted defendants summary disposition pursuant to MCR 2.116(C)(10). *West, supra* at 183.

Although our Supreme Court has not formally recognized the existence of the tort of intentional infliction of emotional distress in Michigan, this Court has. *Heckman v Detroit Police Chief*, 267 Mich App 480, 498; 705 NW2d 689 (2005), overruled in part on other grounds *Brown v Mayor of Detroit*, 478 Mich 589, 594 n 2; 734 NW2d 514 (2007). This Court has "explicitly adopted the definition found in the Restatement Torts, 2d, § 46, pp 71-72." *Rosenberg v Rosenberg Bros Special Account*, 134 Mich App 342, 350; 351 NW2d 563 (1984). The Restatement definition of the tort is reported in *Roberts, supra* at 602:

> § 46. Outrageous Conduct Causing Severe Emotional Distress
>
> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. [Restatement Torts, 2d, § 46, p 71.]

In accord with the Restatement, this Court has found four essential elements to a claim for intentional infliction of emotional distress: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Lewis v LeGrow*, 258 Mich App 175, 196; 670 NW2d 675 (2003). To establish a prima facie case of intentional infliction of emotional distress, it is not "'enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice', or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.'" *Rosenberg, supra* at 350, quoting Restatement 2d, § 46, comment d. Instead, an actor may be found liable "'only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Roberts, supra* at 603, quoting Restatement Torts, 2d, § 46, comment d, pp 72-

73. Moreover, "'conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.'" *Roberts, supra* at 603, quoting Restatement Torts, 2d, § 46, comment g, p 76.

Although plaintiff correctly argues that whether conduct is sufficiently outrageous to justify recovery is generally reserved to the trier of fact, *Linebaugh, supra* at 343, a preliminary question exists for the trial court to decide: whether the alleged conduct rises to the level that reasonable minds could differ in determining whether it was so "outrageous" as to impose liability. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999); *Doe v Mills*, 212 Mich App 73, 92; 536 NW2d 824 (1995). "In reviewing claims of intentional or reckless infliction of emotional distress, it is generally the trial court's duty to determine whether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." *Lewis, supra* 197.

Here, under the stipulated facts, the individual defendants were acting within the scope of their employment in various AuSable management positions. Two investigations determined that plaintiff failed to insure the safety of a patient under her care. Defendant AuSable discharged plaintiff for dereliction of duty. The individual defendants wrote letters to plaintiff that informed her of her suspension, recommended her discharge, advised plaintiff of her right to appear before a review board to answer the allegations, and ultimately informed plaintiff of AuSable's decision to discharge her from employment. Defendants' actions were lawful acts authorized by AuSable's exercising its legal rights as a public employer to hire, fire, discipline, or in this case, discharge a public employee. This conduct is not such that would cause an average member of the community to exclaim: "outrageous!" *Roberts, supra* at 603. Further, although plaintiff disagrees with AuSable's finding of neglect and her feelings may have been hurt, the stipulated facts establish only that defendants exercised their lawful rights. These facts cannot as a matter of law sustain a claim for intentional infliction of emotional distress. *Roberts, supra* at 603, quoting Restatement Torts, 2d, § 46, comment g, p 76. Consequently, the trial court properly granted the individual defendants summary disposition as to plaintiff's claim for intentional infliction of emotional distress.

Finally, plaintiff argues that governmental immunity does not shield the individual defendants from their intentional torts. Further, plaintiff contends that the individual defendants are not entitled to governmental immunity because they were grossly negligent and their actions were the proximate cause of the plaintiff's injuries. Thus, plaintiff argues the trial court erred by granting the individual defendants summary disposition. We disagree again.

The only intentional tort plaintiff has alleged against the individual defendants is a claim for intentional infliction of emotional distress. For the reasons discussed already, that claim fails as a matter of law. While plaintiff alleged in her complaint that defendants violated public policy reiterated in MCL 330.1723(5) that a claim, if viable, is in essence a wrongful discharge claim in the nature of a breach of a statutorily implied contract term of employment. Such a claim would be viable only against plaintiff's employer, defendant AuSable. It could not form the basis of an intentional tort claim against the individual defendants.

Plaintiff also asserts that the individual defendants were grossly negligent. But this allegation does not revive the factually deficit claim of intentional infliction of emotional distress. Further, an assertion of gross negligence by itself is not an independent tort. MCL 691.1407(2) does not by itself create a cause of action called "gross negligence." *Rakowski v Sarb*, 269 Mich App 619, 627; 713 NW2d 787 (2006). Rather, "a plaintiff must first establish that the governmental employee defendant owed a common-law duty to the plaintiff." *Id*. It is axiomatic that the tort of negligence consists of four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). "Duty" is a legally recognized obligation to conform to a particular standard of conduct toward another so as to avoid unreasonable risk of harm. *Maiden v Rozwood*, 461 Mich 109, 131; 597 NW2d 817 (1999). If the individual defendants owed no duty to plaintiffs, a claim for "gross negligence" is unenforceable as a matter of law. *Id*. at 135. Here, plaintiff's complaint and arguments are silent with respect to any duty the individual defendants owed to plaintiff and which may have been breached and caused her injury. Consequently, it is unnecessary to analyze whether the gross negligence exception to government employee tort immunity provided for in MCL 691.1407(2) applies because plaintiff has failed to allege a duty that defendants breached. We note, however, that as the highest appointive executive official of AuSable, defendant Smith is absolutely immune from tort liability pursuant to MCL 691.1407(5).

We affirm the trial court's order granting summary disposition to the individual defendants, but we reverse the trial court's denial of summary disposition to defendant AuSable and remand for entry of judgment for defendant AuSable. As the prevailing parties, defendants may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jane E. Markey