STATE OF MICHIGAN

COURT OF APPEALS

PATRICK MCCARTHY,

Plaintiff-Appellant,

v

ALISON SCOFIELD, DEPARTMENT OF HUMAN SERVICES, ANDREA DEAN, OAKLAND COUNTY PROSECUTOR, CAROLE BOYD, OAKLAND COUNTY FRIEND OF THE COURT, THOMAS CALLAHAN, and MILFORD POLICE DEPARTMENT,

Defendants-Appellees,

and

AMY ALLEN and CHILD ABUSE & NEGLECT HOUSE/OAKLAND COUNTY CARE HOUSE,

Defendants.

UNPUBLISHED
October 8, 2009

No. 284129
Oakland Circuit Court
LC No. 2006-079432-NO

Before: Donofrio, P.J., and Wilder and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of the various defendants pursuant to MCR 2.116(C)(7) (governmental immunity), (C)(8) (failure to state a claim), and (C)(10) (no genuine issue of material fact), and thereby dismissing each of plaintiff's claims. We affirm.

I. Underlying Facts and Procedural History

Plaintiff is the divorced father of two daughters, who were 10 and 11 years old at the time of the events giving rise to this action. After plaintiff filed a motion in his divorce case requesting that he be awarded full custody of his children, they made several complaints about him to their daycare provider. These complaints included allegations of inappropriate sexual conduct. The daycare provider notified the children's mother and Children's Protective Services ("CPS"). Defendant Alison Scofield investigated the allegations in the course of her employment as a CPS investigator. Scofield arranged for the children to be interviewed by Amy

Allen at the Oakland County Child Abuse and Neglect House ("Care House"). Also present were defendant Carole Boyd, a family counselor for the Friend of the Court ("FOC"), Sgt. Matthew Brumm of the Milford Police Department, and Assistant Oakland County Prosecutor Shannon O'Brien, who attended the interview as members of a multi-disciplinary investigative team. The children alleged that plaintiff violated their privacy when they changed their clothes, bathed, or used the bathroom, and would watch them while they performed these functions. They also alleged that he looked under their clothes and would sleep with the younger daughter when the children spent the night at his home. The younger daughter also accused plaintiff of touching her breasts, but the older daughter denied that plaintiff touched her breasts, except possibly by accident.

As a result of the children's accusations in the Care House interview, the Department of Human Services ("DHS") filed a petition in the family division of the Oakland Circuit Court requesting that the court assert jurisdiction over the children and terminate plaintiff's parental rights under MCL 712A.19b(3)(b)(*i*) and (k)(*ii*). The Oakland County Prosecutor also brought criminal charges against plaintiff for second-degree criminal sexual conduct, MCL 750.520c. Assistant Prosecutor Andrea Dean was assigned to represent the state in both proceedings. Plaintiff waived probable cause hearings in both proceedings. On the day that the adjudicative trial in the child protective proceeding was scheduled to begin, the children informed Dean that they had fabricated the allegations. They also recanted their allegations in an in-camera interview with the family court judge. Dean thereafter moved to dismiss both the petition in the child protective proceeding and the criminal charges, and the motions were granted.

Plaintiff subsequently brought this action against several defendants, including Scofield and the DHS, Allen and the Oakland County Child Abuse and Neglect House, Dean and the Oakland County Prosecutor, Boyd and the FOC, and Lieutenant Thomas Callahan and his employer, the Milford Police Department, asserting numerous different claims. The trial court granted summary disposition in favor of all defendants, primarily on the basis of governmental immunity, MCR 2.116(C)(7), but the court also ruled that many of the counts alleged in plaintiff's complaint failed to state a claim for which relief could be granted, MCR 2.116(C)(8), and that dismissal of many of the claims was also warranted because there was no genuine issue of material fact, MCR 2.116(C)(10). This appeal followed.[1]

II. Governmental Immunity

The applicability of governmental immunity is a question of law that is reviewed de novo on appeal. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). This Court also reviews de novo a trial court's resolution of a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred because of immunity granted by

[1] After plaintiff filed this appeal, this Court granted a motion to affirm brought by defendants Amy Allen and the Oakland County Child Abuse and Neglect House. *McCarthy v Scofield*, unpublished order of the Court of Appeals, entered October 14, 2008 (Docket No. 284129). Accordingly, these defendants are no longer involved in this appeal.

law. In deciding a motion brought pursuant to MCR 2.116(C)(7), a court must consider the pleadings and any affidavits, depositions, admissions, or other documentary evidence submitted by the parties. MCR 2.116(G)(5); *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). If the pleadings or documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred. *Id.*

The governmental immunity statute, MCL 691.1407 provides, in pertinent part:

> (1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.
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> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
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> (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.
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> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
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> (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.
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> (3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.
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> * * *
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> (5) A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.
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> * * *
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> (7) As used in this section:

(a) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Thus, MCL 691.1407(1) broadly exempts government agencies from tort liability if the agency is engaged in the discharge of a governmental function. 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 Univ of Mich Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003). This definition is to be broadly applied. *Id*. It only requires that there be some constitutional, statutory, or other legal basis for the activity in which the agency was engaged. The definition of governmental function necessarily means that activities unauthorized by law are not immune. *Richardson v Jackson Co*, 432 Mich 377, 381; 443 NW2d 105 (1989); *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 620; 363 NW2d 641 (1984). Thus, a claim that arises from an ultra vires act is not barred by governmental immunity. *Herman, supra* at 144. The determination whether an activity involves a governmental function must focus on the general activity, not the specific conduct involved at the time of the tort. *Tate v City of Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003).

Application of these principles to this case leads to the conclusion that plaintiff's tort claims against the agency defendants are barred. The DHS was discharging its governmental function to investigate reports of child abuse. See MCL 722.621 *et seq*. The Milford Police Department was engaged in the discharge of its function of investigating a report of criminal activity. The county prosecutor's office was discharging its function of prosecuting alleged criminal conduct. The FOC was involved in this case as part of its role of investigating allegations of child abuse that arose during an ongoing custody dispute.

Plaintiff argues that the agencies' actions were ultra vires because government agencies have no authority to pursue criminal charges or seek protective custody of minor children in the absence of probable cause. Plaintiff contends that there was no probable cause supporting the criminal charges and requests for protective custody because all of the involved parties knew, or should have known, that the allegations against him were false. However, this argument focuses on the specific conduct involved at the time of the alleged torts, rather than the general activity, and therefore fails to establish ultra vires actions. *Tate, supra* at 661.

Plaintiff failed to demonstrate factual support for his claim that probable cause for the initiation of criminal charges and a child protective proceeding did not exist in this case. Probable cause that an individual has committed a crime is established by evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the individual's guilt. *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009). In this case, plaintiff's daughters stated in their Care House interview that plaintiff regularly viewed them while they were dressing, bathing, or using the bathroom, that he slept with the younger girl, and that he touched their genitals under the pretext of applying medication. These accusations were sufficient to cause a reasonable person to suspect that plaintiff committed second-degree criminal sexual conduct, MCL 750.520c(1)(a). They also supported a reasonable belief that grounds existed for the family court to exercise jurisdiction over the children pursuant to MCL 712A.2(b)(1) and (2). Indeed, plaintiff waived probable cause determinations in both the criminal and child protective proceedings.

In order to avoid governmental immunity with respect to his claims against the individual defendants, plaintiff was required to show either that they were not acting within the scope of their authority, that they were not engaged in the exercise or discharge of a governmental function, or that they engaged in grossly negligent conduct that proximately caused plaintiff's alleged injury. MCL 691.1407(2). The evidence discloses that all of the individual defendants were acting within the scope of their authority in the exercise or discharge of a governmental function. Scofield was investigating suspected child abuse in the course of her employment as a CPS investigator. Dean was prosecuting a case that had been assigned to her in the course of her duties as an assistant prosecutor. Boyd attended the Care House interview in the course of her duties as a counselor for the FOC. Lt. Callahan interviewed the children, interviewed plaintiff, and interviewed other witnesses, and prepared a report for the prosecutor's consideration, within the scope of his duties as a police officer. Thus, plaintiff's only other avenue for avoiding these defendants' statutory qualified immunity is to establish that they were grossly negligent, i.e., that they engaged in "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). With respect to his intentional tort claims, plaintiff must establish that the individual defendants acted maliciously or with a wanton or reckless disregard of his rights. *Odom v Wayne Co*, 482 Mich 459, 474; 760 NW2d 217 (2008). It is not sufficient for plaintiff merely to show that the individual defendants acted without probable cause. *Id.*

Plaintiff asserts that all of the individual defendants knew, from the time of the Care House interview, that his ex-wife had induced the children to lie, but nonetheless willfully persisted with the proceedings against him with knowledge that the children's accusations were false. He contends that the individual defendants pressured and cajoled the children to lie despite their insistence of his innocence. However, plaintiff failed to provide factual support for his allegations. Plaintiff relies on an excerpt of the Care House interview in which Allen asked the older child whether plaintiff had touched her breasts when he lifted her shirt. She replied that he had done so "maybe once but it was probably an accident." Plaintiff also relies on a paragraph in the second amended petition that was filed in the child protective proceeding in which the DHS alleged that the children were reluctant to cooperate with the proceedings, and that they had asked why their mother wanted plaintiff to go to jail, after plaintiff aggressively confronted them regarding their accusations.

This evidence, viewed in a light most favorable to plaintiff, fails to support his contention that the defendants either knew that the children were lying, or that they induced the children to lie. The older daughter merely indicated that she did not believe that plaintiff had deliberately touched her breasts. However, she did not recant her other statements describing plaintiff's inappropriate conduct, or that he slept with the younger daughter, and the younger daughter did not make any statements characterizing plaintiff's conduct as an accident. In addition, both children had stated that the younger daughter was the primary target of plaintiff's inappropriate conduct. Similarly, evidence that the children felt ambivalent, confused, and uneasy regarding their participation in proceedings that could result in their father's imprisonment or loss of his parental rights, especially after he aggressively confronted them, does not show that defendants were culpable of perpetrating a known falsehood.

Plaintiff also argues that defendants should have known that the children's allegations were false because they were made in the midst of a bitter custody battle. This circumstance

does not render the children's reports inherently incredible. Although the pending custody motion was a relevant factor in assessing the children's credibility, it did not require defendants to disbelieve the children and automatically terminate the investigation. Plaintiff contends that his ex-wife concocted the allegations in a desperate maneuver to sabotage a custody battle in which plaintiff was certain to prevail, because dozens of witnesses, including her own family members, were prepared to testify on his behalf. He insinuates that defendants' failure to recognize this ulterior motive was so unreasonable as to render their actions not only grossly negligent, but intentionally malicious. Plaintiff's self-serving assessment of the likelihood of success in the custody dispute is not supported by evidence. Moreover, there is no evidence supporting plaintiff's speculation that the children's mother coached the children to lie. On the contrary, when recanting the allegations against plaintiff, the children told the family court judge that their mother had instructed them to tell the truth. Plaintiff failed to establish factual support for his allegations that the conduct of any of the individual defendants amounted to gross negligence.

Plaintiff also argues that the Care House interview utilized a method aimed at confirming, rather than testing, a hypothesis, and violated Care House's own protocols. Assuming, arguendo, that there is some merit to plaintiff's criticisms of Allen's methods, he has not shown any flaw that renders the methods so reckless as to demonstrate a substantial lack of concern for whether an injury results. The Care House interview transcript does not reveal that Allen asked leading or suggestive questions, or that she prodded, coaxed, coached, or coerced the girls into making allegations of sexual abuse. Without prompting, the girls freely related how plaintiff "peeked" under their clothes, prohibited them from closing the bathroom and bedroom doors, or from pulling the shower curtain closed, "barged" into the bathroom when they were bathing, and slept with one daughter. There is no indication that Allen persuaded the girls to speak, or used any threats or promises to induce their cooperation with the interviews.

Plaintiff's complaint also alleges several intentional tort claims, including malicious prosecution, wrongful institution of civil proceedings, abuse of process, false imprisonment, obstruction of justice, defamation, and intentional infliction of emotional distress. Michigan's governmental immunity statute does not shield an individual's intentional torts. *Sudul v City of Hamtramck*, 221 Mich App 455, 458; 562 NW2d 478 (1997). But actions by a government agent that would otherwise constitute intentional torts are shielded from liability if those actions are justified because they were objectively reasonable under the circumstances. *VanVorous v Burmeister*, 262 Mich App 467, 483; 687 NW2d 132 (2004).

Here, plaintiff failed to show that any of the defendants' conduct was objectively unreasonable. Scofield, a CPS worker employed to investigate reports of child abuse and neglect, received a report that two children informed their daycare provider that plaintiff regularly engaged in inappropriate conduct of a sexual nature. Acting in her capacity as a CPS investigator, Scofield reported this information to the Milford Police Department and the FOC, and scheduled a Care House interview. Lt. Callahan acted reasonably in conducting a police investigation, which included interviews with plaintiff, the children, the children's mother, and the daycare provider. Scofield and Dean initiated the child protective proceeding and the criminal actions based on the children's statements. Under the circumstances, none of these defendants engaged in conduct that was objectively unreasonable. Plaintiff maintains that defendants blatantly disregarded the custody dispute as proof that the allegations could not be

true. As indicated previously, however, while the custody dispute was relevant in assessing the children's credibility, it was not absolute proof of plaintiff's innocence. This circumstance does not render defendants' conduct unreasonable. Indeed, defendants would be derelict in their law enforcement and social service responsibilities if they were required to automatically reject as false any allegation of child abuse made contemporaneously with a pending custody dispute. There is simply no evidence to support plaintiff's speculation that the defendants purposefully and deliberately acted on allegations that were either known to be false, or were so inherently incredible that they should have been recognized as false, or that defendants themselves fabricated.

Scofield was also entitled to common-law social worker immunity. This Court first recognized social worker absolute immunity in *Martin v Children's Aid Society*, 215 Mich App 88; 544 NW2d 651 (1996). Relying on federal decisions recognizing absolute immunity of social workers initiating and monitoring court-supervised child placement proceedings, this Court stated:

> These precedents recognize the important role that social workers play in court proceedings to determine when to remove a child from the home and how long to maintain the child in foster care. They also recognize that, to do that difficult job effectively, social workers must be allowed to act without fear of intimidating or harassing lawsuits by dissatisfied or angry parents. [*Id.* at 96, citing *Kurzawa v Mueller*, 732 F2d 1456 (CA 6, 1984).]

The Court stated that "[w]hen a court is involved, granting immunity from civil suit does not mean that the parents of a child taken from their home are without recourse to contest wrongful conduct by a social worker," because parents may avail themselves of the safeguards built into the adjudication process. *Id.* at 97. The Court also found persuasive the policy argument that social workers could not effectively perform their functions of intervening in volatile circumstances to protect children and confront parents if they were at risk of lawsuits from aggrieved parents. *Id.* at 97-98.

The Court in *Martin* found the federal precedents persuasive on the basis of public policy concerns that apply with equal force to the pre-adjudication investigatory stages of a child protective proceeding. The public policy interest in granting social workers the "freedom to honestly assess a particular situation," without fear of litigation by angry and frightened parents, is not diminished in the pre-adjudication phase of the proceedings. On the contrary, this might well be the most volatile stage of the proceeding.

Finally, Scofield is also entitled to quasi-judicial immunity granted to witnesses. In *Reno v Chung*, 461 Mich 109, the companion case to *Maiden v Rozwood*, 461 Mich 109, 134; 597 NW2d 817 (1999), the plaintiff alleged that the defendant, an assistant county medical examiner, was grossly negligent when she concluded that a murder victim's injuries left her unable to speak before her death. This finding resulted in criminal charges against the plaintiff, who had previously informed the police that the victim told him the name of her assailant just before she died. *Id.* at 116. Specialists retained by the prosecutor determined that the defendant's conclusions were wrong. Consequently, the prosecutor dismissed the charges. *Id.* at 117. The plaintiff brought an action against the medical examiner, alleging that her conduct was grossly

negligent. *Id.* Our Supreme Court concluded that the medical examiner was entitled to quasi-judicial immunity. The Court explained:

> [W]itnesses who testify during the course of judicial proceedings enjoy quasi-judicial immunity. This immunity is available to those serving in a quasi-judicial adjudicative capacity as well as "those persons other than judges without whom the judicial process could not function." Witnesses who are an integral part of the judicial process "are wholly immunity from liability for the consequences of their testimony or related evaluations." [*Id.* (internal citations omitted)].

The Court rejected the plaintiff's argument that witness immunity was unavailable to the medical examiner because her opinion was not offered in the course of a judicial proceeding. *Id.* at 135. The Court stated that the autopsy "was performed under statutory mandate and was a necessary predicate to defendant's statutorily compelled testimony." *Id.*

Likewise in this case, Scofield's role as the DHS's overseer in the investigation process was done in preparation for legal proceedings in which Scofield would likely be compelled to testify. Therefore, she is entitled to quasi-judicial immunity.

Defendants Dean and the Oakland County Prosecutor are also entitled to prosecutorial immunity. To the extent that plaintiff's complaint is directed at then Chief Prosecutor David Gorcyca, he is entitled to absolute immunity under MCL 691.1407(5), as the elective executive official in his level of government. *Bischoff v Calhoun Co Prosecutor*, 173 Mich App 802, 806; 434 NW2d 249 (1988). To the extent that plaintiff's complaint is directed at the office of the prosecutor, it is entitled to unqualified immunity for government agencies pursuant to MCL 691.1407(1).

Dean is an assistant prosecutor and, therefore, is not entitled to the absolute immunity available to elective executive officials. However, Michigan recognizes quasi-judicial immunity for prosecutors. *Bischoff, supra* at 802. The prosecutor's actions here are clearly quasi-judicial. Dean's involvement in plaintiff's legal proceedings were indisputably concerned with her role as an advocate for the state. Consequently, she is entitled to immunity for her conduct in relation to plaintiff's proceedings.

III. Delay in Removing Plaintiff's Name from the Central Registry

Plaintiff argues that the DHS's failure to remove his name from the central registry until a year after the dismissal of the child protection proceeding constitutes slander, slander per se, libel, libel per se, and "false light." These claims are barred by governmental immunity for the reasons discussed in section II, *supra*.

IV. Entitlement to Destruction of Arrest Records

Plaintiff argues that the trial court erred by failing to order the destruction of his fingerprint record, arrest card, and other arrest records.

Plaintiff relies on MCL 28.243, which provides, in pertinent part:

> (7) [I]f a person arrested for having committed an offense for which he or she was fingerprinted under this section is released without a charge made against him or her, . . . the official taking or holding the person's fingerprints and arrest card shall immediately destroy the fingerprints and arrest card. The law enforcement agency shall notify the department in writing that a . . . charge was not made . . . if the juvenile's or arrested person's fingerprints were forwarded to the department.
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> (8) [I]f an accused is found not guilty of an offense for which he or she was fingerprinted under this section, upon final disposition of the charge against the accused or juvenile, the fingerprints and arrest card shall be destroyed by the official holding those items and the clerk of the court entering the disposition shall notify the department of any finding of not guilty or not guilty by reason of insanity, dismissal, or nolle prosequi, if it appears that the accused was initially fingerprinted under this section . . . .
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> * * *
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> (12) The provisions of subsection (8) that require the destruction of the fingerprints and the arrest card do not apply to a person who was arraigned in circuit court or the family division of circuit court for any of the following:
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> (a) The commission or attempted commission of a crime with or against a child under 16 years of age.
>
> (b) Rape.
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> (c) Criminal sexual conduct in any degree.

Here, subsection (7) does not apply because plaintiff was not released without a charge being made against him. Plaintiff comes within the scope of subsection (8), because he was found not guilty by reason of nolle prosequi. However, subsection (12) provides that plaintiff is not entitled to destruction of his records pursuant to subsection (8), because he was arraigned in circuit court for second-degree criminal sexual conduct against children under 16 years of age. Thus, the trial court properly refused to order the destruction of plaintiff's arrest records under this statute.

V. Amendment

Finally, plaintiff argues that the trial court was required to allow him to amend his complaint in order to avoid summary disposition. Plaintiff's argument is based on the erroneous belief that the trial court granted summary disposition to the named defendants for failure to name Assistant Prosecutor O'Brien and Milford Police Sgt. Brumm as additional defendants. Because summary disposition was granted under MCR 2.116(C)(7), the trial court was not obligated to provide plaintiff with an opportunity to amend his complaint pursuant to MCR 2.116(I)(5). Furthermore, a plaintiff is not entitled to amend his complaint if amendment would be futile. *Shember v Univ of Michigan Medical Ctr*, 280 Mich App 309, 314; 760 NW2d 699 (2008). The immunity available to the other individual governmental defendants would equally

extent to Sgt. Brumm and Assistant Prosecutor O'Brien. Plaintiff has not articulated any non-futile basis for amending his complaint. Thus, he is not entitled to an opportunity to amend his complaint.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kurtis T. Wilder
/s/ Donald S. Owens