STATE OF MICHIGAN

COURT OF APPEALS

JASON BAKER,

Plaintiff-Appellee,

v

MICHAEL COUCHMAN,

Defendant-Appellant,

and

PINCKNEY COMMUNITY SCHOOLS,

Defendant.

FOR PUBLICATION
May 30, 2006
9:00 a.m.

No. 264914
Livingston Circuit Court
LC No. 04-020847-CD

Official Reported Version

Before: Smolenski, P.J., Whitbeck, C.J., and O'Connell, J.

O'CONNELL, J. (*concurring in part and dissenting in part*).

I concur with the lead opinion that it was within the scope of a superintendent's authority "to express his concerns to plaintiff's superiors, to the school board, and to the public in general and even to petition these groups for plaintiff's removal as" the school resource officer (SRO). *Ante*, p ___. Additionally, I concur that "it was within the scope of defendant's authority [as superintendent] to create appropriate boundaries on the nature and extent of plaintiff's proactive law enforcement activities while acting as SRO." *Ante*, p ___. However, I would hold that this authority provides defendant with absolute immunity for every allegedly "wrongful" action supporting plaintiff's claim for tortious interference with business relations.[1] Therefore, I respectfully dissent.

[1] The lead opinion states that plaintiff's primary complaint is that "defendant 'intentionally, maliciously and improperly interfered with and disrupted' his employment relationship with the [Livingston County Sheriff's Department (LCSD)] by interfering with his investigations, threatening him with removal, and improperly influencing LCSD to remove him from the position of SRO." *Ante*, p ___. Assuming, arguendo, that defendant did exactly what plaintiff

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The primary shortcoming of the lead opinion is its overly narrow interpretation of the term "scope of authority." By narrowly construing the term "scope of authority," the lead opinion exposes all public officials to civil liability for an inartful statement or an alleged wrongful decision. Any individual can now claim that a factual question exists about the public official's "scope of authority," thereby avoiding summary disposition and subjecting that public official to a lawsuit when, as in this case, one of the primary motivations of the lawsuit is personal animosity or bias toward the public official. While I neither approve nor disapprove of the superintendent's and the SRO's actions in this matter, rather than bring the business of the public official to a standstill while frivolous matters are litigated, the law should, and does, grant immunity to the public official for such matters.

Defendant receives "absolute" immunity if it was within his authority to protect his students from what he perceived[2] as an overzealous monitoring officer who routinely overexerted his dual authority[3] as school official and police officer in minor matters ranging from stolen gym shorts to haphazard driving in the school parking lot. MCL 691.1407(5). In the superintendent's opinion, plaintiff's investigative fervor in fairly trivial matters criminalized the students and disrupted the school's order and operations, requiring defendant to exercise his own, concededly superior, administrative and disciplinary authority to truncate plaintiff's investigations and student interrogations. Unfortunately, neither plaintiff nor defendant learned discretion, and defendant's posture toward plaintiff became adversarial, leading defendant to call for plaintiff's removal. Nevertheless, plaintiff has failed to demonstrate any tortious incident that falls outside the scope of defendant's superior authority. Therefore, I am of the opinion that

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alleges, I would hold that (a) defendant has done nothing improper and (b) defendant, pursuant to MCL 691.1407(5), has absolute immunity for his actions.

[2] Whether his perception is correct or wrong, defendant is entitled to immunity if monitoring the SRO is within the scope of defendant's authority.

[3] The lead opinion concedes that the SRO has a dual employment role because the SRO works for and at the direction of the superintendent (while working for the school district, the defendant is plaintiff's supervisor) and simultaneously for and at the direction of the sheriff's department.

This concession, if true, renders plaintiff's lawsuit meritless. To prosecute a cause of action for intentional interference with a business relationship, the law requires the intervention of a third party. An employee's supervisor is not a third party to the employment relationship, but a representative agent of the employer, so a supervisor cannot be sued for intentional interference with the employee's business relationship. If this were the case, each time a dual employment supervisor fired an employee, the supervisor would be subject to a similarly meritless lawsuit. The majority's holding creates an untenable situation for all dual and contract employers by leaving supervisors open to suit for taking any disciplinary action that could "interfere" with an employee's "other" business relationship.

Imagine the everyday situation in which a Manpower employee, working for General Motors Corporation (GM), is dismissed from service by his GM supervisor. The majority's holding would allow the employee to sue the supervisor for intentional interference with the employee's business relationship with Manpower. Our courts have never extended this tort so far beyond its original, legitimate purpose.

the trial court incorrectly ruled that plaintiff's disgruntlement with his employment situation provides him with legal recourse against defendant.

Because of the nature of the case, a full review of the record is warranted. The record reflects that plaintiff repeatedly pursued minor school incidents with vigor, often seeking to arrest, write citations, or launch lengthy investigations rather than defer to the school's administration for routine admonition and correction. For example, plaintiff's relationship with the school began to break down when plaintiff, who was investigating a theft that had occurred over the summer, launched an investigation into alleged fraud and embezzlement by school staff and demanded to see various school records. Defendant balked at bringing his administration to a standstill to pacify plaintiff's investigative curiosity, and the prosecutor's office eventually directed plaintiff to turn the matter over to a disinterested detective at the sheriff's office. Nothing apparently came of the matter except, of course, an incalculable loss of respect for plaintiff's judgment among the school's staff and defendant.

Soon afterward, plaintiff participated in an investigation of a sexual assault involving some of the school's students. Later, plaintiff also directed undercover investigations into drug activity. These problems garnered negative press coverage for the school, but plaintiff readily provided the media with commentary. Defendant did not interfere with these investigations, but he vocalized displeasure that plaintiff apparently relished his role as commentator and intentionally fed the media frenzy. He also voiced his ire at plaintiff's indiscretion to plaintiff's superiors. The following summer, members of the sheriff's department and school administrators met regarding plaintiff's future at the school. Defendant told the department that he thought the relationship was irreconcilable.

Plaintiff returned the following school year, but defendant intervened in some of his investigations and entirely preempted others. One might presume this intervention to be improper until one learns that the investigations involved matters like stolen gym shorts and physical altercations or threats (which plaintiff categorized as "assaults") between students. Moreover, the intervention initially amounted to nothing more than defendant discouraging plaintiff from pursuing the matter, as in the "assault" cases, or defendant telling plaintiff to stop his investigation, as in the matter of the gym shorts.[4] In each of these cases, plaintiff provided his LCSD supervisor with reports of defendant's behavior, but the sheriff's department never tried to supersede defendant's authority. At this point, the evidence demonstrates that defendant did not interfere at all with plaintiff's most serious and damaging investigations, but instead took

[4] Plaintiff argues that defendant primarily interfered with his investigations by ordering him to discontinue them or forbidding him from talking to various students. This argument self-destructs. Either defendant had the authority to call off plaintiff's investigations (and, implicitly, the authority to limit them), or plaintiff yielded to defendant's requests even though defendant could not force him to stop investigating. The first option means that all of plaintiff's investigations fell within defendant's scope of authority, and that defendant is absolutely immune. The second option means that plaintiff generally acquiesced to defendant's requests, and that he cannot now claim that they improperly interfered with his job.

reasonable preemptive measures only when an investigation inappropriately intensified or veered into areas under defendant's direct authority.

Plaintiff again overreacted to an incident of careless driving in the school parking lot, however, and the parents of the accused student driver understandably recoiled at plaintiff's typical zeal and overbearing demeanor. For example, plaintiff threatened their son with charges of reckless driving and malicious destruction of property and warned the parents that if they did not work something out with the victim's parents, he would turn the case over to the local prosecutor's office. The parents met with defendant, who personally drove them to the sheriff's office to complain about plaintiff's investigative practices. In the meantime, plaintiff had tracked down the young driver and pressed him to produce his driver's license, registration, and proof of insurance. The student explained that they had been provided to an assistant principal. Discontented with that avenue of administration and resolution, plaintiff went to the assistant principal and demanded the documents. The assistant principal informed plaintiff that defendant had the documentation forwarded directly to the parents of the other student involved in the incident. The assistant principal further explained that defendant had directed her to withhold the documents from plaintiff and instruct plaintiff not to question the student further. Plaintiff again complained to his supervisor that defendant was obstructing his investigations, and the supervisor again removed plaintiff from the case. Plaintiff was reassigned to road patrol a few months later.

Even though defendant admittedly interfered with plaintiff's authority, plaintiff still fails to demonstrate how the interference fell outside the scope of *defendant's* authority. A superintendent's role includes any act taken as chief administrator and disciplinarian in the school district, even in school districts that decide to engage monitoring police officers for additional manpower, surveillance, and protection. Superintendents are the highest-level executives of school districts, so they are entitled to absolute immunity for actions they take pursuant to that authority. *Nalepa v Plymouth-Canton Community School Dist*, 207 Mich App 580, 590-591; 525 NW2d 897 (1994), result only aff'd 450 Mich 934 (1995); MCL 691.1407(5). The absolute immunity extended to highest-level executives does not contain an intentional-tort or "malevolent-heart" exception, and the executive's motivation for acting is irrelevant to the analysis. *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143; 560 NW2d 50 (1997). Instead, whether an action falls within an executive's scope of authority depends on factors such as '"the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of government."' *Id.* at 141, quoting *Marrocco v Randlett*, 431 Mich 700, 711; 433 NW2d 68 (1988).

Overseeing the handling of minor criminal incidents or civil unrest on school grounds is always within the scope of a superintendent's authority. Otherwise, a principal or superintendent lacks the authority to break up a fistfight or detect and punish the theft of a yo-yo. The school would always resort to calling in the police to preserve the crime scene, conduct an investigation, and cart away the culprits. The structure and allocation of powers in the school placed defendant as the primary authority in managing these school affairs. As plaintiff's superior in this regard, defendant was acting within his authority to stop plaintiff's investigation into the automobile incident and the missing shorts, just as plaintiff was within his authority to resort to his supervisor for further instruction. Until plaintiff received a contrary direction regarding a

criminal matter from the sheriff's office, the prosecutor's office, or a judge, his authority to act was subject to, and limited by, defendant.

Although the last incident undoubtedly interfered with plaintiff's investigation, the majority concedes that "it was within the scope of defendant's authority to create appropriate boundaries on the nature and extent of plaintiff's proactive law enforcement activities . . . ." *Ante,* p ___. It stands to reason that withholding the documentation from plaintiff was within the scope of defendant's discretionary authority to set those boundaries. Every other time defendant instructed plaintiff to stop an investigation or refrain from interrogating a student, plaintiff complied. Because defendant permissibly terminated plaintiff's investigation into a school matter, turning the documents over to him would be unnecessary and counterproductive.

Rather than rely entirely on defendant's control of plaintiff's investigation, the lead opinion turns to defendant's decision to drive the unhappy parents to the sheriff's department to lodge their complaints directly with plaintiff's supervisors. As an initial matter, this action, in context, was an effort to control the school's personnel and institute correct remedial procedures for the angry parents. Therefore, I would find that this act falls within defendant's executive authority. Assuming, arguendo, that driving angry parents to a sheriff's station to register a complaint falls outside the scope of a superintendent's authority, there was nothing tortious about it.

To sustain a claim for tortious interference with contract or business relations, a plaintiff must demonstrate a wrongful act, which means that the act must be wrongful per se or otherwise malicious and unjustified. See *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996). If the interference results from legitimate business reasons or stems from a privileged attempt to persuade others of the interferer's position in a dispute, then no cause of action for tortious interference will lie. *Id*.; *Lakeshore Community Hosp, Inc v Perry*, 212 Mich App 396, 401-404; 538 NW2d 24 (1995). Moreover, the interferer in the business relationship must be a stranger to the established relationship. *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993).[5] In this case, removing undesirable personnel was part of defendant's job, so the desire to remove plaintiff from the district was a legitimate justification for his actions, not a malicious design that rendered his acts wrongful. Furthermore, plaintiff is essentially complaining that defendant interfered with his business relationship with the school district, not his relationship with the sheriff's department. Plaintiff has not demonstrated any adverse effect defendant's actions had on his standing in the department;[6] instead, all his claims relate to the benefits he no

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[5] I note that defendant is not only closer to the business relationship than a "stranger," he acted as plaintiff's supervisor while plaintiff was a member of the school district's staff.

[6] Plaintiff has not asserted that he lost any wages or ordinary employment benefits related to his job as a deputy sheriff for Livingston County. Plaintiff is apparently still employed with the LCSD and performs investigative and policing functions similar to those he performed before the department reassigned him. Nevertheless, plaintiff complains that defendant, his superior, interfered with his "right" to work in one of defendant's schools by acting on his dissatisfaction

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longer enjoys because of his failed relationship with the district. Under the circumstances, defendant acted on the district's behalf to terminate its relationship with plaintiff, and in cases of such a direct relationship, we should leave the parties to negotiate their own contract remedies rather than assign them rights and responsibilities through tort.[7] See *id*.

Addressing the concurrence, if I have belabored my rhetoric, it reflects my frustration with what should be a simple case. I have presented the issue from every viewpoint imaginable, and used expressive language only because I find the correct answer obvious and the contrary result and precedent alarming. If Chief Judge Whitbeck thinks that I have overstated the issue, perhaps he should consider the following hypothetical "others" that would now have a cognizable claim under the majority's holding.

In a controversy over union fees, a teacher openly and carelessly airs his dispute with the media and his students. Should the superintendent stand mum or candidly respond to the media's questions with an equally slanted perspective? Should the superintendent voice disagreement at a school board meeting and order the teacher to stop venting to his students and the press? Should he consider his potential individual liability for possibly interfering with the teacher's business relations?

An individual appears, without invitation, at a superintendent's private personnel meeting and will not leave. Should the superintendent avoid personal liability by allowing the individual to stay and influence the meeting, or remove the individual with force if necessary? What if the individual is a school board member?

A superintendent takes a controversial opposing view on the assignment of a proposed physical education teacher about whom the superintendent has received disparaging correspondence from an acknowledged authority. The teacher seeks to arbitrate her denial of the assignment and wins. A successive appeal is initiated and then dropped, and the uninformed public begins grumbling about the expense and futility of the school's seemingly baseless stubbornness. Should the superintendent stand mute and face the unjustified wrath of a confused public, or should she read the information received into the record at a school board meeting and face personal liability dependent only on whether making slanderous statements and invading someone's privacy falls within the scope of her authority?

A superintendent discovers a spiritually uplifting movie that contains a particularly shocking scene in which a young amputee fails in a suicide attempt, only to find later that he has

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with plaintiff's job performance. I am surprised that this allegation's obvious paradox is not self-evident.

[7] This case is akin to a situation I recently addressed in *Neill v Delphi Automative Systems Corp*, unpublished opinion per curium of the Court of Appeals, issued January 27, 2004 (Docket No. 243834), in which the panel unanimously held that terminated contract employees may not sue their de facto employers in tort for interfering with their business relationships with the contract employer. Because the supervising employers must retain some authority to terminate the assigned workers, the employers are too involved to be considered third parties to the business relationship. *Id.*

value beyond his physical form. The superintendent personally oversees the distribution of the movie to his district's second graders, one of whom has severe issues regarding his own self-worth. Should the superintendent pull the student from the class, cancel the showing, or show the film to all the children and risk personal liability on a wrongful death suit if the second grader successfully commits suicide in the manner shown by the film?

These are not easy situations for school officials,[8] and all the options for resolution have real ramifications, but the majority approach makes the judiciary, not the voters, the final arbiters of whether an official correctly responded to a politically charged question. The majority tries to pull this case out of the political mire and elevate it to the level of a philosophical discussion over whether interfering with a police officer is arguably wrongful in the abstract. This case is not a purely academic exercise about whether a superintendent may theoretically prevent a police officer from investigating a crime. In this, and hundreds of other real instances of police officers in schools, the question of who authorizes and controls everyday investigation, interrogation, and monitoring of students is unsettled. Schools, not police officers, are provided a tremendous measure of authority because of their responsibilities *in loco parentis*, but serious questions develop when police officers act as school officials pursuant to this expansive authority without any accountability to the school authorities from which the authority derives.[9]

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[8] My examples of situations that arguably fall outside the scope of authority may appear fanciful, so I provide the following citations to the very real cases on which they are based. In each case, the superintendent or similar official was found totally immune from liability because the personal action was found to fit generally within the scope of their authority, notwithstanding the arguably "wrongful" nature of each act. *Sullivan v River Valley School Bd*, unpublished opinion per curiam of the Court of Appeals, issued July, 11, 1997 (Docket No. 181913) (tortious interference with business relations); *Planutis v Hilling*, unpublished opinion per curiam of the Court of Appeals, issued August, 29, 2000 (Docket No. 219972) (forcible ejection); *Graziano v Hawkins*, unpublished opinion per curiam of the Court of Appeals, issued November, 15, 2005 (Docket No. 255030) (invasion of privacy); *Nalepa*, *supra* (suicide movie).

[9] In response to my concurring colleague's insinuation that I do not believe police officers should investigate crimes in schools, I defer to the reader's judgment whether such a rhetorical and unfounded suggestion can be found in this opinion. What bothers me is not police activity in schools, but the highly potent marriage of police power with power *in loco parentis* without discernible accountability to the school in which those powers are used. Add to this troublesome concoction the judiciary's willingness to enforce the unbridled exercise of that power against a school official trying to regain control of it, and the results are disastrous. Holding a superintendent civilly liable for money damages when he acts in the place of the student's parents to protect students from unjustified acts sets an untenable precedent indeed. According to the majority's holding a student's parents would equally be liable to plaintiff if they insisted that he stop questioning their child. In fact, those issues should be easier to resolve without the legal complications of immunity.

If we are hunting down what lurks beneath the rhetoric, should I presume that Chief Judge Whitbeck's failure to acknowledge defendant's role *in loco parentis* means that we should disavow the doctrine entirely? If so, we should hold school administrators to the identical standard to which we hold patrol officers and judges, allowing discipline and dispute resolution

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These sticky issues are not made easier by selectively divorcing a superintendent's actions from his or her public office or by making blanket statements about what is "wrongful" and therefore subject to a jury's determination of personal liability. The fact that defendant took it upon himself to act or that his actions were arguably improper does not remove the actions from the scope of his authority. The plain language of the statute and the traditional approach to absolute immunity suggest that an expansive application of the phrase "scope of . . . executive authority" is appropriate. MCL 691.1407(5). Applying a narrow view of an official's scope has historically been perceived as a threat to the proper application of absolute immunity.

> "The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him." [*Barr v Matteo*, 360 US 564, 572; 79 S Ct 1335; 3 L Ed 2d 1434 (1959) (opinion of Harlan, J.), quoting Judge Learned Hand's opinion in *Gregoire v Biddle*, 177 F2d 579, 581 (CA 2, 1949).]

In other words, while the lead opinion diligently searches for a question of fact about defendant's true motives, the issue of scope is whether the use of power would have been justified assuming that defendant's motives were pristine. This presumption aligns with the understanding that issues regarding absolute immunity should be discerned by a judge at the outset of litigation. *Mitchell v Forsyth*, 472 US 511, 526; 105 S Ct 2806; 86 L Ed 2d 411 (1985). Without early intervention, the immunity is "effectively lost," *id.*, so taking preemptive action preserves the official from the rigors of trial and civil scrutiny, which alone threaten to "'seriously cripple the proper and effective administration of public affairs as entrusted to the

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only under the strictures of full judicial process. I note that plaintiff did not feel bound by such strictures when he threatened to press criminal charges to influence the resolution of a civil matter. The public grants administrators latitude in managing student issues that arise, and plaintiff took full advantage of that latitude. That additional power sprang from his position with the school, not his badge, and it is ultimately traceable to the highest school executive, defendant. With defendant's authority to adjust process to what is due and institute appropriate remedial and disciplinary measures comes the authority to limit the implementation of investigative and punitive resources. The lead and concurring opinions strip the school's administration of these tools, but do not eliminate them. Instead, they grant these powers to an assigned deputy and back his actions with the full power of the gavel, even when those actions contravene the will of the disarmed administration. This case further erodes the already diminished authority of our educators, who can ill afford to take action that would expose them to individual liability. We should not discourage our educators from doing the job the public has hired them to do.

executive branch . . . .'" *Barr, supra* at 570 (opinion of Harlan, J.; emphasis added), quoting *Spalding v Vilas*, 161 US 483, 498; 16 S Ct 631; 40 L Ed 780 (1896).

> "The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." [*Barr, supra* at 571-572, quoting *Gregoire, supra* at 581.]

The concurring opinion ignores this presumption of good faith in nonconstitutional situations and rejects any notion that the law should preserve defendant from trial. This view runs contrary to the intention clearly and unambiguously expressed in the statute. The concurring opinion's interpretation, if adopted, would open widely the courthouse doors to those who would seek to influence public affairs through the threat and abuse of litigation.

This case sets an abominable precedent because it blurs the previously unmistakable lines marking the boundaries of a superintendent's personal liability. Now superintendents must second-guess how their administrative decisions may peripherally cause damage to subordinates and third parties. I disagree with any decision that requires superintendents to protect themselves by placing the concerns of others over the interests of the children in their charge. I would reverse.[10]

/s/ Peter D. O'Connell

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[10] The lead opinion fails to state with any degree of certainty what business relationship defendant has interfered with. The only interference allegations by plaintiff concern interference with the business relationship at one of defendant's schools. Because defendant is the head of the school district, it is impossible for him to be a third party who interferes with the school district's business. Neither plaintiff nor the majority takes the bold stance that the incidents involving defendant's staff, defendant's students, and the district's property were none of the district's business. Naturally, plaintiff and his interaction with students were the district's business, and the tort of interference with a business relationship does not prevent the district from tending to its own business.