

STATE OF MICHIGAN
COURT OF APPEALS

CONCERNED PARENTS OF MEDICALLY
SUBSIDIZED ADOPTED CHILDREN,

UNPUBLISHED
July 28, 1998

Plaintiff,

and

WINDWARD CLINIC, INC.,

Plaintiff-Appellant,

v

No. 201000
Court of Claims
LC No. 96-016028 CM

DEPARTMENT OF SOCIAL SERVICES,

Defendant-Appellee.

Before: Sawyer, P.J., and Kelly and Doctoroff, JJ.

PER CURIAM.

Plaintiff Windward Clinic, Inc., appeals by right from an order granting summary disposition in favor of defendant, pursuant to MCR 2.116(C)(4), (7) and (10), regarding plaintiff's defamation, breach of contract, promissory estoppel and account stated claims. We affirm in part, reverse in part and remand.

Plaintiff first argues that the trial court erred in granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(7) with regard to plaintiff's defamation claim. Plaintiff asserts that defendant's governmental immunity does not extend to protect a governmental agency when it is engaged in a nongovernmental function and that defendant's actions in defaming plaintiff and interfering with plaintiff's contractual relationships do not fall within defendant's function in providing medical subsidies to adopted children. Plaintiff is mistaken.

The definition of "governmental function" is to be broadly applied. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 620; 363 NW2d 641 (1984). It only requires that there be some

constitutional, statutory or other legal basis for the activity in which the agency was engaged. *Id.* Tort liability may be imposed only if the agency was engaged in an ultra vires

activity. *Id.*; *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 252-253; 393 NW2d 847 (1986); *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 97; 494 NW2d 791 (1992). Under MCL 400.115f *et seq.*; MSA 16.490(25f) *et seq.*, the Legislature has delegated responsibility to defendant's adoption office to approve, deny and otherwise administer adoption subsidies. The alleged tortious conduct committed by defendant's employees occurred during the course of their employment and was directly related to the general activities of defendant's adoption offices. Although, arguably, defendant's employees' specific conduct could amount to intentional defamation, this conduct arose from defendant's general activities of reviewing and approving adoption subsidies. A determination of whether an activity was a governmental function must focus on the general activity of the agency and its employees and not the specific conduct involved at the time of the tort. *Smith, supra* at 544; *Pardon v Finkel*, 213 Mich App 643, 649; 540 NW2d 774 (1995). The correct focus is not on the nature of the conduct complained of, but rather the function from which it arises. *Smith, supra* at 610. Therefore, defendant's employees' conduct falls under the definition of a "governmental function" and defendant is immune from vicarious liability under MCL 691.1407(1); MSA 3.996(107)(1).

Secondly, plaintiff argues that the trial court erred in granting summary disposition regarding plaintiff's account stated claim. Although this claim was brought by plaintiff in its amended complaint and it was mentioned in passing in plaintiff's appellate brief, plaintiff has not argued the merits of this claim in its brief, nor has it provided any supporting authority for its position that this claim should not have been dismissed. Therefore, we need not consider this issue. *In re Toller*, 193 Mich App 474, 477; 484 NW2d 672 (1992); *Meagher v Wayne State Univ*, 222 Mich App 700, 718; 565 NW2d 401 (1997).

Plaintiff next argues that the trial court erred in finding that plaintiff was not a third-party beneficiary of the contracts between adopted parents and defendant, thus allowing plaintiff to sue defendant for breach of contract. We do not agree. Not every contract that affects the position of a third person creates third-party beneficiary status in that person. One who only incidentally benefits from the performance of some duty required under a contract has no rights under the contract. *Kammer Asphalt Paving Co v East China Twp Schools*, 443 Mich 176, 189; 504 NW2d 635 (1993); *Arrow Sheet Metal Works, Inc v Bryant & Detwiler Co*, 338 Mich 68, 79-80; 61 NW2d 125 (1953). In the instant case, plaintiff has offered no evidence that the medical subsidy contract between defendant and the parents of the adopted children expressly intended to benefit anyone other than the contracting parties themselves. The language of the medical subsidy contract makes no express mention of plaintiff, nor does the contract make any mention of an express promise that would benefit unascertained persons in plaintiff's position, which would have given plaintiff third-party standing under MCL 600.1405(2)(b); MSA 27A.1405(2)(b). Any benefit to plaintiff from the contract is purely incidental. *Dynamic Construction Co v Barton Mallow Co*, 214 Mich App 425, 427; 543 NW2d 31 (1995).

Finally, plaintiff argues that the trial court erred in granting summary disposition in favor of defendant with regard to plaintiff's promissory estoppel claim. We agree. Unlike plaintiff's third-party beneficiary or account stated claims, which seem to focus on the actual intent of the "promisor," a claim for recovery under promissory estoppel focuses more on how a party's actions are perceived by the

party seeking to rely on these actions. *State Bank of Standish v Curry*, 442 Mich 76; 500 NW2d 104 (1993). Specifically noting exhibits B, C and D of plaintiff's brief in response to defendant's second motion for summary disposition, we conclude that a jury could find that the language in these letters from defendant to Windward, while containing some language to support defendant's claim that it only promised to pay for approved services, also induced Windward to continue to perform services in anticipation of future payment.

Windward's relationship with defendant has been ongoing for a number of years and defendant has provided payment in the past for the exact same procedures that defendant refuses to pay for in the instant case. While, under *Curry*, this evidence of past dealing would not alone be enough to establish a promise to continue to pay in the future, *Curry, supra* at 87, looking at the entire circumstances surrounding the relationship between the parties while drawing all inferences in favor of the nonmovant, we conclude that it would be proper to allow a jury to decide whether defendant's actions, when taken as a whole, amounted to a promise to continue to do business as usual. *Curry, supra* at 89; *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987). If a jury does so find, we conclude that, due to the situation Windward found itself in of having to continue to provide medical treatment for children while waiting for payment from a slow administrative process, Windward had no reasonable alternative but to rely on the representation that defendant would continue to pay for services as it had done in the past. Accordingly, the trial court should not have granted defendant's motion for summary disposition with regard to plaintiff's promissory estoppel claim.

Affirmed in part, reversed in part and remanded with regard to plaintiff's promissory estoppel claim. No costs, neither party having prevailed in full. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Michael J. Kelly

/s/ Martin M. Doctoroff