STATE OF MICHIGAN

COURT OF APPEALS

EDWARD BIELASKA and CLAUDIA BIELASKA,

Plaintiffs-Appellants,

v

LINDA ORLEY, LAURA ORLEY, and WILLIAM ORLEY,

Defendants,

and

KAREN SCHULTE, FAMILY CONSULTATION & TREATMENT SERVICES, INC., KATHLEEN COULBORN FALLER, JANE MILDRED, and ELLEN DEVOE,

Defendants-Appellees.

UNPUBLISHED
February 9, 2001

No. 215286
Wayne Circuit Court
LC No. 96-614421-NM

EDWARD BIELASKA and CLAUDIA BIELASKA,

Plaintiffs-Appellants,

v

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, and UNIVERSITY OF MICHIGAN SCHOOL OF SOCIAL WORK, d/b/a UNIVERSITY OF MICHIGAN INTERDISCIPLINARY PROJECT ON CHILD ABUSE & NEGLECT, d/b/a FAMILY ASSESSMENT CLINIC,

Defendants-Appellees.

No. 215287
Court of Claims
LC No. 96-016160-CM

Before: Smolenski, P.J., and Holbrook, Jr. and Gage, JJ.

PER CURIAM.

Plaintiffs filed suit against defendants alleging several causes of action, including gross negligence, intentional infliction of emotional distress, defamation, fraud, civil rights violations, and bad faith. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), alleging that they were entitled to immunity, and pursuant to MCR 2.116(C)(8), alleging that they owed no recognized legal duties to plaintiffs.[1] On October 3, 1997, the trial court granted summary disposition to defendants Faller, Mildred, DeVoe, and their employer, the University of Michigan's Family Assessment Clinic, pursuant to both MCR 2.116(C)(7) and (C)(8). On November 7, 1997, the trial court granted summary disposition to defendant Schulte and her employer, Family Consultation and Treatment Services, on the same grounds. Plaintiffs appeal those orders by leave granted. We affirm.

First, defendants Faller, Mildred, DeVoe and the University of Michigan (hereafter the FAC defendants) argue that this Court does not have jurisdiction over plaintiffs' appeal. We disagree. The trial court granted summary disposition to these defendants on October 3, 1997. Plaintiffs filed a claim of appeal in this Court on October 15, 1997, in Docket No 206834. The claim of appeal was dismissed on March 27, 1998, for lack of jurisdiction because the order dated October 3, 1997, was not a final order. Plaintiffs filed a delayed application for leave to appeal on October 23, 1998. Defendants argue that this Court lacks jurisdiction to hear the appeal because plaintiffs filed the delayed application for leave to appeal more than twelve months after the entry of the circuit court order being appealed. This argument has no merit because the twelve month time period for filing a delayed application for leave to appeal provided under MCR 7.205(F)(3) was tolled during the time that appellate proceedings connected with the order at issue were pending in this Court. *People v Kincade (On Remand)*, 206 Mich App 477, 483; 522 NW2d 880 (1994).

In addition to rejecting the jurisdictional challenge, we reject plaintiffs' argument that defendants were not entitled to summary disposition on the ground of witness immunity. The FAC defendants were involved as expert witnesses in a previous child custody case wherein the mother of plaintiff Edward Bielaska's children accused Edward of sexually abusing them. Pursuant to a trial court order, the FAC defendants conducted an evaluation of the case and reached the conclusion that Edward had sexually abused the children. When the trial court later quashed the order appointing the FAC defendants to conduct the independent evaluation, the children's mother used the FAC defendants as her experts at trial. The FAC defendants' evaluations and testimony were taken into account at the custody trial.

Defendant Schulte became involved in the underlying custody case when, while the custody case was pending, the children's mother asked Schulte to evaluate and treat the children

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[1] The civil rights claims were dismissed by plaintiffs before the motions for summary disposition were heard.

for sexual abuse. Schulte did so, and later served as an expert witness at trial, testifying about her evaluation and her conclusion that Edward had abused the children. Like the FAC defendants, Schulte's evaluation was taken into account by the trial court when deciding the custody issue. Ultimately, the trial court determined that Edward had sexually abused both children and awarded custody to the children's mother.

Plaintiffs filed the instant suit against defendants while pursuing an appeal from the underlying custody matter. In *Bielaska v Orley*, unpublished opinion per curiam of the Court of Appeals, issued July 19, 1996 (Docket Nos. 173666, 174949, 175287, 175388), this Court held that the trial court's finding of sexual abuse by Edward was against the great weight of the evidence, and we reversed the trial court's decision granting custody of the children to their mother. On remand, the trial court awarded Edward custody of both children and prohibited the children's mother from seeing them.

In the instant case, we must decide whether defendants were entitled to summary disposition on the ground of witness immunity. Summary disposition may be granted under MCR 2.116(C)(7) if:

> [t]he claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

In *Maiden v Rozwood*, 461 Mich 109, 133-134; 597 NW2d 817 (1999), which was decided after the parties to the instant case filed their briefs on appeal, the Court discussed the issue of witness immunity. In *Maiden's* companion case, *Reno v Chung*, 461 Mich 116, the plaintiff found his wife and daughter brutally stabbed. Before the plaintiff's daughter died, she spoke to the plaintiff and told him who had attacked her. The plaintiff relayed this information to police. *Id.* The medical examiner, who performed a subsequent autopsy, opined that the plaintiff's daughter could not have spoken after being stabbed. *Id.* On the basis of that opinion, the plaintiff was arrested for murdering his wife and daughter and was bound over for trial. *Id.* At the preliminary examination, the medical examiner testified that the plaintiff's daughter could not possibly have identified another person as the attacker. *Id.* Later, the medical examiner's opinions were found to be grossly incompetent and the charges against the plaintiff were dismissed. *Id.* at 117, 128-129. The plaintiff sued the medical examiner and others, alleging gross negligence. *Id.* at 117.

Our Supreme Court affirmed dismissal of the civil action, finding that summary disposition was warranted under MCR 2.116(C)(7) and (8). *Id.* at 118. In that opinion, the Court explained the scope of the witness immunity doctrine in Michigan. The Court stated:

> [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 immune from liability for the consequences of their testimony *or related evaluations.*" Statements made during the course of

> judicial proceedings are absolutely privileged, provided they are relevant, material, or pertinent to the issue being tried. *Falsity or malice on the part of the witness does not abrogate the privilege.* The privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation. As this Court [previously] noted:
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> > "Witness immunity is also grounded in the need of the judicial system for testimony from witnesses who, taking their oaths, are free of concern that they themselves will be targeted by the loser for further litigation. Absent perjury of a character requiring action by the prosecuting attorney, the testimony of a witness is to be weighed by the factfinder in the matter at bar, not by a subsequent jury summoned to determine whether the first lawsuit was tainted . . . ." [*Id.* at 133-134 (citations omitted), (emphasis added).]

The Court specifically rejected the plaintiff's argument that witness immunity was unavailable because the subject of his lawsuit was the autopsy and murder investigations, as opposed to the trial testimony. *Id.* at 134. The Court stated that the gravamen of a plaintiff's action is determined by considering the entire claim, and that the plaintiff could not "avoid the protection of witness immunity by artful pleading." *Id*. at 134-135.

In *Couch v Schultz*, 193 Mich App 292, 294-295; 483 NW2d 684 (1992), this Court determined that witness immunity was not limited to "in court" testimony:

> It is well settled in Michigan that statements made during the course of legislative proceedings, statements made during the course of judicial proceedings, and communications by military and naval officers are absolutely privileged. "Judicial proceedings" may include any hearing before a tribunal or administrative board that performs a judicial function. An absolutely privileged communication is one for which no remedy is provided for damages in a defamation action because of the occasion on which the communication is made. A privileged occasion is an occasion where the public good requires that a person be freed from liability for the publication of a statement that would otherwise be defamatory. Public policy is the principle underlying the doctrine of absolute privilege.
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> If absolute privilege applies, there can be no action for defamation. The question whether a privilege attaches is a question of law for the trial court.
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> In this case, we are concerned with the absolute privilege for statements made during the course of judicial proceedings. Statements made by witnesses during the course of such proceedings are absolutely privileged, provided they are relevant, material, or pertinent to the issue being tried. *The immunity extends to every step of the proceeding and covers anything that may be said in relation to the matter at issue, including pleadings and affidavits.* The judicial proceedings privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation. [(Citations omitted), (emphasis added).]

This Court has also previously ruled that social workers play an important part in the judicial process where the safety and welfare of children are concerned, and are entitled to absolute immunity. *Martin v Children's Aid Society,* 215 Mich App 88, 96-97; 544 NW2d 651 (1996). In that case, the plaintiffs sued the Department of Social Services and numerous other defendants, including the Children's Aid Society, after the plaintiffs were falsely accused of physically abusing their thirteen-week-old daughter and were separated from her for numerous years. The plaintiffs alleged several claims, including negligence, breach of statutory and contractual duties, bad faith, and violation of their constitutional rights. *Id.* at 93. This Court ruled that summary disposition was appropriate for the defendants on immunity grounds, *Id.* at 94-95, and adopted the proposition that absolute immunity exists for social workers involved in probate proceedings. *Id.* at 97. In reaching that decision, this Court found the following argument persuasive:

> Professional assistance to the Probate Court is critical to its ability to make informed, life deciding judgments relating to its continuing jurisdiction over abused children. Its advisors and agents cannot be subject to potential suits by persons, aggrieved by the Court's decision vindictively seeking revenge against the Court's assistant as surrogates for the jurist. Faced with such liability, the social worker would naturally tend to act cautiously and refrain from making difficult decisions, delay in intervening to protect the child, avoid confronting the aggressive parent with the necessity of changing his attitudes and seeking psychiatric help to do so. Such an atmosphere defeats the function of the continuing jurisdiction of the Probate Court in the abstract, and in reality poses the potential for death for an abused child who is not protected because the social worker exercised excessive caution in arriving at a judgment as to whether there is sufficient evidence of abuse to merit action on his or her part.
>
> Mere qualified immunity is not enough protection to prevent the chilling effect of a potential suit on the exercise of a social worker's professional judgment and discretion in operating as an arm of the Probate Court to protect abused children. [*Id.* at 97-98.]

Although *Martin* addressed social workers in the context of child welfare proceedings in probate court, it conferred absolute immunity because it recognized that there is a strong public policy interest in providing expert witnesses with absolute immunity in cases where allegations of abuse are made. The public policy concerns articulated in *Martin* are equally applicable in child custody cases where allegations of abuse have been made and social workers have evaluated those claims and rendered professional assistance to the trial court in deciding the best interests of children.

The instant case falls squarely within the immunity principles previously articulated by our courts. During an acrimonious custody case, the defendants at issue were called upon to evaluate the situation and reach conclusions. They subsequently testified about their evaluations and conclusions in order to assist the trial court in determining the best interests of the children. While the defendants' evaluations may have been deficient, defendants are entitled to absolute witness immunity as described in *Maiden, supra* at 133-134, and *Couch, supra* at 294-295. A

finding of immunity for defendants comports with the articulated scope of witness immunity in Michigan and with the public policies expressed in *Martin, supra*. A separate cause of action based on deficiencies in the experts' evaluations would not serve the public policies of allowing witnesses freedom to render opinions and testify at trial and of providing our courts with professional assistance in determining the best interests of the children of this State.

The FAC defendants only became involved in the underlying custody case as independent evaluators on order of the trial court. Their purpose was to provide the trial court with information to assist it in determining the best interests of the children. Their evaluations and testimony were relevant, material and pertinent to the custody issue being litigated and are clearly protected under the cloak of witness immunity. *Maiden, supra*. The fact that the FAC was later dropped by the court as an independent evaluator and used by the children's mother as her expert witness does not alter the outcome. All of the work which the FAC defendants performed was done for purposes of the custody case and was an integral part of the judicial proceedings.

Although Schulte and her employer, Family Consultation & Treatment Services, are in a slightly different position than the FAC defendants, they too are entitled to immunity from plaintiffs' suit. Schulte became involved in the custody case only after the children's mother sought Schulte out to evaluate and counsel the children for sexual abuse. Schulte was not a court appointed witness. However, when she was retained, the issue of custody was already being litigated in the trial court and one of the three allegations of sexual abuse had already been made. Schulte evaluated the children and was called upon to render expert testimony about her evaluation and conclusions to the trial court. Her conclusions were subject to extensive cross examination at the custody trial. Her trial testimony was based on her evaluation and, as such, her evaluation was an integral part of the judicial proceedings and was relevant, material and pertinent to the custody matter.

While plaintiffs do not dispute that Schulte's trial testimony was protected by immunity, they make the disingenuous argument that everything leading up to her trial testimony was unprotected by the witness privilege. This conclusion is contrary to current law. *Maiden, supra*. Schulte's relationship with the children involved two phases: evaluation and treatment. A review of the pleadings in this case reveals that plaintiffs' allegations do not focus on Schulte's treatment of the children[2] and it does not appear that plaintiffs sustained any damages or are claiming any damages as the result of any treatment Schulte rendered to the children. Schulte's evaluation forms the basis of the causes of action alleged and, as previously noted, that evaluation was a necessary predicate to her testimony and was relevant, material and pertinent to the issue of what was in the best interests of the children. Schulte, like the FAC defendants, is therefore entitled to witness immunity. Plaintiffs' artful attempt to plead and argue around witness immunity fails like the plaintiff's argument in *Reno, supra*.

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[2] Plaintiffs did plead that defendants were grossly negligent in refusing to incorporate plaintiffs in the process of assessment, evaluation, diagnosis, treatment or prognosis. This is not an allegation of deficient treatment but rather is simply an allegation that defendants failed to include plaintiffs in the process, which complaint is part and parcel of plaintiffs' criticism of the evaluations, which were testified about at trial and called into question at that time.

We also find that defendants' immunity extends to all of the claims alleged by plaintiffs. In Michigan, courts have applied witness immunity to defamation actions, *Couch, supra* at 293-294, negligence actions, *Maiden, supra* at 133-134, false imprisonment and battery actions, *Dabkowski v Davis,* 364 Mich 429, 432-433; 111 NW2d 68 (1961), and tortious interference actions, *Meyer v Hubbell*, 117 Mich App 699, 710-711; 324 NW2d 139 (1982).

Finally, plaintiffs argue that summary disposition pursuant to MCR 2.116(C)(8) was inappropriate because defendants owed them a duty when evaluating the children. We need not address this issue because we find that immunity bars the causes of action alleged against plaintiffs. Moreover, we note that, while plaintiffs set forth law with regard to finding a duty, they completely fail to apply that law to the facts of their case. They simply restated general legal principles and then make the following, conclusory statement:

> A fair reading of Plaintiff/Appellants' complaint as well as a rational understanding of "duty" as it has been described by this Court and the Michigan Supreme Court finds adequate support for the very duties these Defendants seek to avoid.

The complaints against defendants do not set forth any specific duties, but simply allege that defendants owed clearly cognizable duties. Because plaintiffs leave this Court to guess at the duties they are trying to establish and to analyze whether those duties are recognized, we decline to review this issue. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *People v Kelly,* 231 Mich App 627, 640-641; 588 NW2d 480 (1998). We note, however, that an expert witness does not owe any duty to an adverse party. *Maiden, supra.*

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage