STATE OF MICHIGAN

COURT OF APPEALS

RYAN FLEET, BRIDGET ROTHENBERGER, f/k/a BRIDGET FLEET, DARCIE C. PICKREN-FLEET, individually and as Next Friend for CORRINE FLEET and KENDRA FLEET, Minors,

Plaintiffs-Appellants,

v

CHARLES H. KOOP, ANTRIM COUNTY PROSECUTOR'S OFFICE, KEN KOWALSKI, ANTRIM COUNTY FAMILY INDEPENDENCE AGENCY, ANTRIM COUNTY, and STATE OF MICHIGAN, jointly and severally,

Defendants-Appellees.

UNPUBLISHED
February 15, 2002

No. 227202
Antrim Circuit Court
LC No. 97-007448-NZ

Before: Griffin, P.J., and Holbrook, Jr. and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's grant of summary disposition to defendants Charles H. Koop, Antrim County Prosecutor's Office (ACPO), and Antrim County pursuant to MCR 2.116(C)(7), (8), and (10), and defendants Ken Kowalski, Antrim County Family Independence Agency (ACFIA), and State of Michigan pursuant to MCR 2.116(C)(4), (7), and (10). We affirm.

Plaintiffs R.F., B.R., C.F., and K.F. (the victims) were sexually abused by their father. He eventually confessed to this abuse and was sentenced to twenty to forty years in prison. Plaintiffs alleged that defendants Kowalski, ACFIA, and the State of Michigan failed to protect the victims from their father's abuse despite numerous reports from Darcie C. Pickren-Fleet, their mother. Plaintiffs also alleged that defendant Koop facilitated this abuse by filing an abuse and neglect petition regarding C.F. and K.F. one day after Darcie had regained custody of them in 1991. The effect of Koop's petition was that C.F. and K.F. remained in their father's custody until 1996, when his then girlfriend reported that he was having sex with C.F. That report led to his arrest and conviction. Defendants ACPO and Antrim County are alleged to be vicariously liable for Prosecutor Koop's actions and/or inactions.

This Court reviews a motion for summary disposition de novo, in the same manner as the trial court, to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). A motion made under MCR 2.116(C)(4) alleges that the court lacked subject-matter jurisdiction over the plaintiff's claims. A motion under MCR 2.116(C)(10) alleges that there are no genuine issues of material fact and the defendant is entitled to judgment as a matter of law. If summary disposition motions under MCR 2.116(C)(8) are supported by documentary evidence outside the pleadings, such as in the instant case, they are treated and reviewed as MCR 2.116(C)(10) motions. *Spiek v Dep't of Transportation*, 456 Mich 331, 337-338; 572 NW2d 201 (1998). Both summary disposition motions in this case also requested judgment pursuant to MCR 2.116(C)(7), alleging "immunity granted by law." Whether defendants are protected by governmental immunity is a question of law that is reviewed de novo on appeal. *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995). To overcome a claim of governmental immunity, a complaint must plead facts in avoidance of governmental immunity. *Stoick v Caro Community Hosp*, 167 Mich App 154, 160; 421 NW2d 611 (1988).

Defendants State of Michigan and ACFIA were granted summary disposition on grounds of lack of subject-matter jurisdiction and res judicata pursuant to MCR 2.116(C)(4) and (C)(7). In so doing, the trial court noted that

> plaintiffs have not responded to this claim in any fashion and therefore, the court assumes they have no opposition to the defense. Moreover, these claims have previously been decided by the Michigan Court of Claims against the plaintiffs. Finally, the plaintiffs conceded the issue on the record during oral argument.

We agree with this result. The Court of Claims has exclusive jurisdiction over tort claims against the state and state agencies, MCL 600.6419; *Silverman v Univ of Michigan Bd of Regents*, 445 Mich 209, 217; 516 NW2d 54 (1994), and plaintiffs had already litigated their claims against these two defendants. *Fleet v Michigan*, unpublished opinion of the Court of Claims, issued February 24, 1998 (Docket No. 97-016790-CM), aff'd unpublished opinion per curiam of the Court of Appeals, issued June 20, 2000 (Docket No. 210162). Plaintiffs presented a special-danger, constitutional argument, but these claims can only be brought against the state itself, not individual defendants. *Jones v Powell*, 462 Mich 329, 337; 612 NW2d 423 (2000). Therefore, summary disposition was properly granted on the grounds of lack of subject-matter jurisdiction and res judicata.

Defendant ACPO was granted summary disposition after it argued that it did not exist as a legal entity that could be sued and plaintiffs "lodged no counter-argument or opposition." We once again conclude that this was the appropriate result. Although the office of the prosecuting attorney does have a legal existence in connection with some rights due criminal defendants, it does not exist for purposes of a claim for money damages. See, e.g., *Hughson v Antrim Co*, 707 F Supp 304, 306 (WD Mich, 1988).

The trial court likewise properly granted summary disposition in favor of defendant Antrim County. Plaintiffs alleged that the county was vicariously liable for the torts of defendant Koop, the Antrim County Prosecutor. However, as the trial court recognized, governmental agencies (including political subdivisions) are immune from tort damages by statute and plaintiffs had pleaded no exceptions to statutory immunity. MCL 691.1401 *et seq*.; *Nawrocki v*

Macomb Co Rd Comm, 463 Mich 143, 155-156; 615 NW2d 702 (2000). Additionally, even if plaintiffs had pleaded an exception to statutory immunity that caused liability to attach to Koop, damages still would not have been recoverable from Antrim County because governmental agencies are vicariously liable only for the torts of officers, employees and agents, and Koop, as the holder of a constitutionally created office, was none of these. *Ross v Consumers Power Co (On Reh)*, 420 Mich 567, 591-592; 363 NW2d 641 (1984); Const 1963, art 7, § 4.

With regard to defendant Kowalski, the trial court granted summary disposition pursuant to MCR 2.116(C)(10) because plaintiffs did not raise a question of material fact regarding the applicability of governmental immunity to him. We find no error warranting reversal in the court's conclusion.

Kowalski was a supervisor for defendant ACFIA who received various reports regarding sexual abuse of the victims. Employees of state agencies are immune from tort liability for injuries caused in the course of employment if three criteria are met:

> (a) The . . . employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The . . . employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. [MCL 691.1407(2).]

There was no contention that Kowalski was not acting within the scope of his authority or that defendant ACFIA was not engaged in the exercise of a governmental function in receiving reports regarding the victims. Plaintiffs therefore argued that his conduct constituted gross negligence and attached as exhibits to their brief in the trial court several ACFIA documents containing Kowalski's negative evaluation of the reports he had received regarding sexual abuse of the victims. Far from showing "substantial lack of concern for whether an injury results," Kowalski's comments show a careful and sometimes troubled consideration of the facts presented. Moreover, in addition to noting that the factual allegations in the complaint were "somewhat vague and ambiguous," the trial court significantly acknowledged the unusual context in which the allegations arose:

> The initial complaints were made in the context of a bitterly fought divorce between Darcie and Mark Fleet, who had taken up with a third party. One of the children failed a polygraph test and Mark Fleet passed such a test. Criminal charges were lodged against Darcie Fleet and she was convicted of solicitation to commit great bodily harm to Mark Fleet. For good or bad reasons, Darcie Fleet had no credibility with most, if not all, of the public officials involved. Allegations were investigated by other agencies and no charges were ever brought or substantiated against Mark Fleet until 1996.

> Defendant Kowalski was aware of the allegations made by Ryan in 1990 and Bridget in 1993. He was also aware of investigations by the Oakland County FIA and the Michigan State Police that resulted in no charges. He became aware of rumors concerning Mark Fleet and underage babysitters. However, he had no jurisdiction to investigate the allegations concerning young babysitters and was aware of the fact that no charges ever came from the rumors that were investigated by the police.

In *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999), the Supreme Court held that conduct that resulted in a mental patient's death did not constitute gross negligence. Although, as the trial court in the instant case noted, "Kowalski might have conducted further investigations," we agree with the court that in light of the background and previous police investigations, his conduct did not rise to the level of gross negligence as that standard is interpreted in *Maiden*. Plaintiffs also argue that Kowalski had a special relationship with the victims that operated as an exception to the public duty rule, but even if this were true, he would, as noted, still be protected by statutory immunity. Consequently, the trial court did not err in granting summary disposition in favor of defendant Kowalski.

Finally, defendant Koop was granted summary disposition on the ground of statutory governmental immunity. We affirm. As prosecuting attorney for Antrim County, Koop is an "executive official" who is entitled to absolute immunity for all acts that fall "within the scope of his . . . executive authority." MCL 691.1407(5); *Bischoff v Calhoun Co Prosecutor*, 173 Mich App 802, 806; 434 NW2d 249 (1988). All alleged acts by defendant Koop were authorized by law and therefore fell within Koop's executive authority. MCL 49.153; 552.45; *In re Jagers*, 224 Mich App 359, 362, 365; 568 NW2d 837 (1997). Accordingly, defendant Koop is protected by absolute immunity, MCL 691.1407(5).

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra