STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA BARACHKOV, CAROL DIEHL, and NANCY ENGLAR, Plaintiffs-Appellants/Cross-Appellees,	UNPUBLISHED December 29, 2009
v	No. 284197 Macomb Circuit Court
41B DISTRICT COURT and CHIEF JUDGE LINDA DAVIS, Defendants-Appellees/Cross-Appellants.	LC No. 06-004856-CZ

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition to defendants on the basis of collateral estoppel. We affirm.

In 2004, plaintiffs were terminated from their employment[1] at the 41B District Court (41BDC) in Clinton Township. Plaintiffs contend that they were terminated under the pretext that they had been dishonest during a State Court Administrative Office (SCAO) investigation, allegedly initiated by Chief Judge Linda Davis of the 41BDC. They contend that the actual reason for their firing was their social and (in the case of plaintiff Nancy Englar, who is his sister-in-law) family ties to Judge William Cannon of the 41BDC, who, according to plaintiffs, had become a "political liability" to Judge Davis.

Plaintiffs contend that Judge Davis wanted to merge two divisions of the 41BDC, to her political advantage, and that Judge Cannon opposed such a merger. They contend that Judge Davis began working with the SCAO to investigate the possible abuse of office by Peggy Cannon, Judge Cannon's wife and the 41BDC court administrator.[2] Peggy Cannon was fired on

[1] Nancy Englar and Patricia Barachkov were court clerks and Carol Diehl was a cashier.

[2] Judge Davis contends that the investigation began simply because the 41BDC was losing money annually and because there had been complaints about the efficiency of the 41BDC.

June 24, 2004. Soon thereafter, a SCAO investigation occurred, with Deborah Green, Region One Administrator for the SCAO, interviewing plaintiffs and with some of the questions focusing on possible wrongdoing by the Cannons. Plaintiffs were later fired, purportedly for being dishonest during the interviews. Judge Davis testified that she only fired plaintiffs at the directive of the SCAO.

After the firings, Judge Davis communicated to the court and to local newspapers that plaintiffs had been fired for "lying" during their interviews.

Plaintiffs filed a federal lawsuit. They asserted (1) a First Amendment/retaliation claim, stating that they were retaliated against for failure to provide false information to the SCAO, (2) a procedural due process claim, stating that they should have been granted a hearing in connection with their termination, and (3) a substantive due process claim, stating that they should have been provided a "name-clearing hearing." They also alleged state-law claims of wrongful discharge, tortious interference with a contractual relationship, defamation, "a public policy tort," and a violation of the Whistleblower Protection Act (WPA), MCL 15.361 *et seq*.

Judge Paul Borman of the Eastern District of Michigan dismissed the case, granting summary disposition concerning the federal claims and dismissing the state-law claims without prejudice. Plaintiffs then filed the instant lawsuit against the 41BDC and Judge Davis in the Macomb Circuit Court. They alleged (1) wrongful discharge, (2) tortious interference with a contractual relationship or business expectancy against Judge Davis, (3) defamation, (4) a violation of the WPA, (5) a "public policy tort," (6) a freedom of speech and association claim, and (7) a due process violation. Judge Mary Chrzanowski (hereinafter "the trial court") granted defendants' motions for summary disposition of that case, concluding that plaintiffs' claims were barred by collateral estoppel, given the factual findings made by Judge Borman. Essentially, the trial court analyzed each of plaintiffs' claims and determined that the specific factual and legal findings made by Judge Borman in his analysis of the three federal claims raised in the federal lawsuit served to bar the instant state-court lawsuit.

On appeal, plaintiffs first argue that the trial court's order granting summary disposition on the basis of collateral estoppel should be reversed[3] because "the companion case upon which the collateral estoppel determination was based [i.e., the federal case] is on appeal, subject to reversal."[4]

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[3] The trial court proceeded through each of plaintiffs' claims in their lawsuit, explaining why they were barred by collateral estoppel. In their main appellate brief, plaintiffs do not address each claim separately but merely focus on the federal appeal.

[4] We note that the trial court dismissed plaintiffs' claim for a "public policy tort" using reasoning aside from collateral estoppel, and plaintiffs do not appeal that dismissal on appeal. While they discuss the "public policy tort" in their response to the cross-appeal, they do not adequately appeal the initial ruling of the trial court.

"We review de novo both a trial court's decision to grant or deny a motion for summary disposition and issues concerning the application of the doctrine of collateral estoppel." *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999).

> Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding. [*Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006).]

Moreover,

> [u]nder federal standards, there are three necessary criteria that must be met for collateral estoppel to apply:
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> (1) that the issue at stake be identical to the one involved in the prior litigation;
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> (2) that the issue has been actually litigated in the prior litigation; and
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> (3) that the determination of the issue in the prior litigation [has] been a critical and necessary part of the judgment in that earlier action. [*Walker v Kerr-McGee Chemical Corp*, 793 F Supp 688, 694 (ND Miss, 1992).]

This Court "must apply federal claim-preclusion law in determining the preclusive effect of a prior federal judgment." *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380-381; 596 NW2d 153 (1999); see also *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 688-689; 762 NW2d 529 (2008). "[T]he established rule in the federal courts is that a final judgment retains all of its preclusive effect pending appeal." *Erebia v Chrysler Plastic Products Corp*, 891 F2d 1212, 1215 n 1 (CA 6, 1989); see also *United States v Szilvagyi*, 398 F Supp 2d 842, 847 (ED Mich 2005) ("[t]he winner at the trial court level should not have to wait in limbo while the case makes its way through the appellate process").

At any rate, after plaintiffs filed their initial brief in this Court, the Sixth Circuit issued its ruling in the pending federal appeal. Judge Borman had ruled, with regard to plaintiffs' claims that their First Amendment rights were violated and they were discharged in retaliation for engaging in certain speech, that "a reasonable official could have concluded that Plaintiffs knowingly or recklessly made false statements" and that "[t]he First Amendment does not extend to protect false statements that are knowingly or recklessly made." The Sixth Circuit affirmed Judge Borman's decision on alternative grounds, ruling that (1) First Amendment protection in this context requires that the government employee was speaking "as a citizen," and (2) plaintiffs were speaking at the behest of their employer and "their comments regarding the work habits of Judge Cannon were not made 'as citizens.'" *Barachkov v 41B District Court*, unpublished opinion of the Sixth Circuit Court of Appeals, issued February 20, 2009 (Docket No. 06-2512), slip op at 10, 12. The court stated, "Consequently, Appellants have no First Amendment cause of action and summary judgment was therefore properly granted." *Id*. at 12-13. The court stated:

> As we have determined that Appellants spoke pursuant to their employment responsibilities, we need not address the district court's holding . . . that Judge Davis would be entitled to qualified immunity against this claim [because] a reasonable official could conclude that the speech at issue constituted false statements knowingly or recklessly made. [*Id*. at 13.][5]

In the federal district court, plaintiffs had made an additional claim that defendants violated their procedural due process rights by failing to provide a hearing in connection with the termination of their employment. Plaintiffs contended that they were "just-cause" and not "at-will" employees and that a hearing therefore was warranted. Judge Borman engaged in a comprehensive evaluation of the evidence submitted by the parties and concluded that "Plaintiffs have not produced sufficient evidence to demonstrate that they had legitimate expectations of 'just cause' employment." The Sixth Circuit evaluated the evidence pertaining to "just-cause" or "at-will" employment and stated that

> there exists a direct conflict in the evidence regarding the exact contours of the termination policy – if any existed – employed by Judge Cannon, and whether such a policy was ever communicated to, and understood by, all of his employees. This is a genuine issue of material fact which requires further development of the record and cannot be properly resolved on summary judgment. [*Id*. at 15-16.]

In sum, the Sixth Circuit reversed Judge Borman's findings concerning at-will versus just-cause employment and also declined to address Judge Borman's conclusion that "a reasonable official could conclude that the speech at issue constituted false statements knowingly or recklessly made."[6]

Plaintiffs contend, in a supplemental brief filed in this Court, that "any collateral estoppel effect of the Borman decision has 'evaporated'" because of the Sixth Circuit's opinion. Plaintiffs cite *Erebia, supra* at 1215, in which the court stated:

> It is well established that "[w]hen a judgment has been subjected to appellate review, the appellate court's disposition of the judgment generally provides the key to its continued force as res judicata and collateral estoppel. A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel" . .

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[5] The Sixth Circuit's decision, while made on different grounds from those employed by the district court, itself can have preclusive effect. See, e.g., *Gregory Construction Co v Blanchard*, 691 F Supp 17, 21 (WD Mich, 1988) (discussing collateral estoppel in the context of an appellate decision).

[6] The Sixth Circuit also ruled that the district court must determine whether the state of Michigan will be potentially liable for a judgment against the 41BDC and also held that plaintiffs could properly make a claim against Judge Davis for prospective injunctive relief. No party has raised these rulings as part of an issue on appeal.

> . . *Where the prior judgment, or any part thereof, relied upon by a subsequent court has been reversed, the defense of collateral estoppel evaporates.* [Emphasis added.]

We do not agree that the *Erebia* decision mandates that the entire collateral estoppel effect of the Borman decision has evaporated simply because the Sixth Circuit reversed the district court on one of the pertinent claims. *Erebia* states that "[w]here the prior judgment, or any part thereof, *relied upon by a subsequent court* has been reversed, the defense of collateral estoppel evaporates." *Id.* In ruling on the pertinent claims *aside from those involving the issue of just-cause versus at-will employment* (i.e., the claims of wrongful discharge and a related due process violation[7]), the trial court did not at all "rely on" the reversed portion of the Sixth Circuit decision. In *Erebia* itself, the court stated:

> The district court did not enter its decision in the instant case, *Erebia III*, until November 30, 1988[,] *by which date that part of the district court's decision in* Erebia II *addressing the issue of reinstatement had been stripped of its preclusive effect.* Consequently, since the court of appeals in *Erebia II* had reversed and remanded the issue of reinstatement to the district court in that case, the reliance upon the doctrine of res judicata and/or collateral estoppel in disposing of the instant case was improper and of no legal force or effect. [*Erebia, supra* at 1215 (emphasis added).]

This statement by the *Erebia* court is evidence that the focus for purposes of collateral estoppel is on the specific issues addressed and resolved by the appellate court and not simply on whether the final judgment as a whole was reversed or altered by the appellate court.

Accordingly, aspects of Judge Borman's decision remain viable in terms of applying collateral estoppel to bar certain state-court claims, although the wrongful discharge claim remains in play, as does the related due process claim. See footnote 7, *supra*.

The Sixth Circuit, in addition to reversing Judge Borman's conclusions regarding just-cause versus at-will employment, also adopted different reasoning from Judge Borman in analyzing the First Amendment claim made in the federal lawsuit. Significantly, the Sixth Circuit specifically declined to address Judge Borman's finding that "a reasonable official could have concluded that Plaintiffs knowingly or recklessly made false statements." An examination of the trial court's opinion in the instant case reveals that its dismissal of the state-court defamation claim was based on this specific finding by Judge Borman. When an "appellate court terminates [a] case by final rulings as to some matters that leave it unnecessary to resolve other matters, preclusion is limited to the matters actually resolved by the appellate court." *Levine v McLeskey*, 164 F3d 210, 213 (CA 4, 1998) (internal citation and quotation marks omitted); see

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[7] Plaintiffs contended that, according to due-process principles, they were entitled to a hearing regarding their termination because they essentially had a "property interest" in their employment. Therefore, the due process claim was integrally related to the wrongful discharge claim.

also *Gelb v Royal Globe Ins Co*, 798 F2d 38, 45 (CA 2, 1986). Therefore, the statement in question made by Judge Borman cannot be used to bar the defamation claim, and the issue of defamation remains in play along with the wrongful discharge claim and the related due process claim.

With regard to the WPA claim, the trial court relied on Judge Borman's findings that there was

> "no merit" to the allegation that [plaintiffs] were dismissed for their close relationship to Judge Cannon and his family, and also "no evidence of any connection between the unionization meeting and their termination". These factual findings preclude relitigation in this [c]ourt under collateral estoppel . . . .

Judge Borman made these findings in connection with his conclusion that plaintiffs had failed to establish a violation of their freedom of association rights. The Sixth Circuit, for whatever reason, simply did not address this "freedom of association" claim, and therefore Judge Borman's findings and ruling remain in good stead. Accordingly, there is no basis on which to reverse the trial court's ruling that the WPA claim is barred by collateral estoppel.

With regard to the *state-court* freedom of association claim, the trial court again relied on Judge Borman's findings that there was no evidence of termination motivated by plaintiffs' association with the Cannons or by union activities. Accordingly, there is no basis on which to reverse the trial court's ruling that the state-court freedom of association claim is barred by collateral estoppel.[8]

With regard to the tortious interference claim, the trial court's findings were somewhat ambiguous. It stated:

> Given the factual findings of Judge Borman and their effect on this litigation pursuant to collateral estoppel, Plaintiffs' claim for intentional interference with [a] contractual relationship and/or business expectancy fails, as Plaintiffs' [sic] cannot establish a genuine issue of material fact that Defendant Davis' actions were wrongful done [sic] or done with malice.

Given Judge Borman's statements concerning the freedom of association claim – statements emphasizing the dearth of evidence concerning certain alleged wrongdoing – we are inclined to

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[8] To the extent that plaintiffs also raised a "freedom of speech" claim in the instant lawsuit, we conclude that the claim is barred by collateral estoppel, given the Sixth Circuit's opinion. The Sixth Circuit conclusively dismissed plaintiffs' First Amendment claim by affirming Judge Borman's grant of summary disposition concerning that issue. See *Barachkov*, *supra* at 17. The Sixth Circuit indicated that plaintiffs' comments were not made as "citizens" and that a First Amendment claim was therefore unavailable. *Id*. at 12. Plaintiffs themselves acknowledge, on page 13 of their January 5, 2009, brief, that their current First Amendment claim hinges, in part, on whether they were speaking as "citizens."

conclude that there is no basis on which to reverse the trial court's ruling that the tortious interference claim is barred by collateral estoppel. At any rate, we conclude that we need not even reach the issue, given plaintiffs' inadequate briefing. In the applicable brief filed after the Sixth Circuit's decision, plaintiffs make no argument specific to the tortious interference claim but merely emphasize that the claims of wrongful discharge and due process remain viable. As stated in *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998):

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.[9]

At this juncture, then, three claims remain in play: wrongful discharge and a related due process claim, and defamation. After considering Judge Davis's cross-appeal, we find no basis on which to reverse the grant of summary disposition with respect to these claims.

In her cross-appeal, Judge Davis argues that absolute governmental immunity applies. The applicability of governmental immunity is a question of law that we review de novo. *Pierce v City of Lansing*, 265 Mich App 174, 176; 694 NW2d 65 (2005).

MCL 691.1407(5) states that

> [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.

Plaintiffs contend that Judge Davis's actions did not fall within the purview of this statute because she was not acting within the scope of her judicial authority "when she terminated [plaintiffs] and when she made defamatory statements about them to the newspapers and to a group of court personnel." However, the significant distinction is that Judge Davis was the *chief judge* of the 41BDC. The Supreme Court has clearly granted chief judges the authority to hire and fire employees. MCR 8.110(C)(3)(d) unambiguously indicates that a chief judge's authority encompasses the "authority and responsibility . . . to supervise the performance of all court personnel, with authority to hire, discipline, or discharge such personnel, with the exception of a judge's secretary and law clerk, if any . . . ."

In *Marrocco v Randlett*, 431 Mich 700, 710-711; 433 NW2d 68 (1988), the Court stated:

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[9] Even if we *were* to address this issue, we would find the claim barred based on absolute immunity. See *infra*.

> We hold that the highest executive officials of local government are not immune from tort liability for acts not within their executive authority. The determination whether particular acts are within their authority depends on a number of factors, including 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.

Although *Marrocco* dealt with executive authority, we find it helpful here by analogy. Given the position held by Judge Davis, the nature of the acts, and the law describing her authority, absolute immunity was applicable.[10] She was entitled to make firing decisions, and we conclude that explaining to members of the court and to the public *why* those firings occurred went hand-in-hand with her authority to fire. In addition, MCR 8.110(C)(2)(e) states that a chief judge shall "represent the court in its relations with the Supreme Court, other courts, other agencies of government, the bar, the general public, and the news media, and in ceremonial functions." It was therefore incumbent upon Judge Davis to explain the changes made within the court.

Plaintiffs rely on *Forrester v White*, 484 US 219; 108 S Ct 538; 98 L Ed 2d 555 (1988), to argue that immunity is not applicable here. In *Forrester*, *supra* at 220-221, the United States Supreme Court held that a judge was not entitled to immunity for firing decisions because he was not acting in his *judicial* capacity when hiring and firing. This case is inapposite, however; it involved a lawsuit under federal civil-rights statutes and did *not* involve Michigan state-law claims to which MCL 691.1407(5) applies.

Additionally, we note that in its opinion, the trial court stated the following:

> The [c]ourt is satisfied that Defendant Davis is not entitled to absolute immunity [because] the issue was decided in Judge Borman's decision. The Court is satisfied that this issue was fully litigated and essential to the judgment. Consequently, the issue is barred from relitigation based upon collateral estoppel.

However, as noted by Judge Davis on appeal, Judge Borman's decision regarding absolute immunity was rendered *solely* with regard to a possible defense against a federal "§ 1983" claim and therefore was inapplicable to the claims discussed here. Thus, collateral estoppel does not apply to bar the application of absolute immunity to plaintiffs' instant claims.

As noted earlier, in their complaint plaintiffs alleged (1) wrongful discharge, (2) tortious interference with a contractual relationship or business expectancy against Judge Davis, (3) defamation, (4) a violation of the WPA, (5) a "public policy tort," (6) a freedom of speech and association claim, and (7) a due process violation. Plaintiffs have not adequately appealed the issue concerning the "public policy tort" and it has therefore been abandoned. The WPA and the

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[10] We note that there is no "intentional tort" exception to absolute immunity under MCL 691.1407(5). See *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143-144; 560 NW2d 50 (1997).

freedom of speech and association claims are precluded by collateral estoppel. We deem the tortious interference claim inadequately briefed and therefore do not address it. With regard to wrongful discharge and defamation, we conclude that absolute immunity applies.[11] This leaves the due process claim. A review of this count of the complaint reveals that this claim is largely a reiteration of the wrongful-discharge claim and is therefore not viable. We will not allow plaintiffs to use a different label to somehow get a second bite at the apple concerning their wrongful-discharge claim. To the extent, however, that plaintiffs requested a "name-clearing hearing" in this count of the complaint, we adhere to Judge Borman's conclusion that "[s]ince Plaintiffs never requested a name-clearing hearing, their claim fails as a matter of law."

Plaintiffs have failed to set forth adequate arguments for reversal concerning any counts of their complaint, and we therefore affirm the grant of summary disposition. Although our reasoning on some points differs from that of the trial court, we may affirm a trial court as long as it reached the right result. *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005).

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering

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[11] Plaintiffs' complaint makes clear that the potential liability of the 41BDC was derivative of Judge Davis's potential liability. As noted, Judge Davis is immune from suit. Although in their "defamation" count plaintiffs state that "other agents of Defendant" 41BDC made defamatory statements, there has been no briefing concerning these purported "other agents." Plaintiffs include the following heading on page 13 of their main appellate brief: "Plaintiffs are Defamed *by Judge Davis*" (emphasis added). Moreover, under MCL 691.1407(1), "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." We conclude that that was the case here, and none of the statutory exceptions to agency governmental immunity applies. See *Pohutski v Allen Park*, 465 Mich 675, 689; 641 NW2d 219 (2002). Finally, we note that no party makes the argument on appeal that the wrongful-discharge claim sounded in contract and not in tort. In fact, plaintiffs *specifically refer to the wrongful discharge claim as a tort claim* on page two of their brief filed on November 25, 2008.