

STATE OF MICHIGAN
COURT OF APPEALS

MARK LANGTON,

Plaintiff-Appellee,

v

STATE OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
December 20, 2011

No. 300639
Court of Claims
LC No. 08-000085-MH

Before: CAVANAGH, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order denying in part its motion for summary disposition premised on governmental immunity. We reverse and remand.

This case arises from a relationship between plaintiff and a prison psychiatrist that developed while plaintiff was incarcerated. In 2003 the psychiatrist began providing plaintiff mental health care while plaintiff was incarcerated in a facility in Muskegon. Plaintiff asserts that, between May and October of 2004, the psychiatrist grabbed and squeezed plaintiff's genitals without plaintiff's consent, and that, between May and October of 2004, the psychiatrist again assaulted him by kissing him without consent. The psychiatrist imposed no subsequent sexual contacts on plaintiff, but the two did exchange letters, and those from the psychiatrist were of a distinctly romantic or sexual nature.

According to plaintiff, the psychiatrist's professional treatment of him continued beyond those incidents, extending through the end of 2005, such treatment taking place in various DOC facilities under the auspices of the Department of Community Health. Only when plaintiff was transferred to a facility in Macomb County did plaintiff report to a prison officer of the psychiatrist's romantic or sexual advances. A complaint for sexual abuse and investigation followed, and the psychiatrist was ultimately convicted of second-degree criminal sexual conduct.¹

¹ MCL 750.520c(1)(i).

Plaintiff filed a civil rights lawsuit against the psychiatrist, and obtained a default judgment from the federal district court of several million dollars.

Plaintiff brought the instant suit in August 2009, charging defendant with vicarious liability for the psychiatrist's medical malpractice and assault and battery. Filed with the complaint was an affidavit of merit, in which a physician certified in psychiatry and neurology opined, among other things, that the offending psychiatrist violated the applicable standard of care by "continuing to provide psychiatric services" to plaintiff after having "engaged in an [sic] significant boundary violation . . . thereby making each subsequent act of medical care and treatment, in effective [sic], and psychologically damaging."

Defendant moved the trial court for summary disposition on grounds of governmental immunity. Plaintiff responded that this action stemmed from several acts or omissions beyond the offending psychiatrist's conduct that led to his criminal conviction, and cited the exception to governmental immunity for "providing medical care or treatment." See MCL 691.1407(4).

The trial court held that neither the psychiatrist's groping of plaintiff, nor his writing of love letters to him, could be considered medical care or treatment, but that the practitioner's continuing treatment of plaintiff after having expressed, and otherwise acted upon, his romantic or sexual yearnings for him constituted malpractice that might be imputed to defendant. Accordingly, the court dismissed all of plaintiff's claims but for that of malpractice insofar as it related to the psychiatrist's treatment of plaintiff after the "boundary violation" of the professional relationship.

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). MCR 2.116(C)(7) authorizes motions for summary disposition premised upon "immunity granted by law." A motion for summary disposition based on governmental immunity is decided by examining all documentary evidence submitted by the parties, accepting all well-pleaded allegations as true, and construing all evidence and pleadings in the light most favorable to the nonmoving party. *Tarlea v Crabtree*, 263 Mich App 80, 87; 687 NW2d 333 (2004). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by its pleadings alone. This Court reviews de novo a trial court's decision on a motion brought under that rule to determine "whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). In so doing, this Court accepts as true all factual allegations in the claim and reasonable inferences that may be drawn from them. *Id.*

Governmental agencies in this state are generally immune from tort liability for actions taken in furtherance of governmental functions. MCL 691.1407(1). "[T]he immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000) (emphases in the original). The exception at issue in this case is set forth in MCL 691.1407(4), which states that the immunity act "does not grant immunity to a governmental agency or an employee or agent of a governmental agency with respect to providing medical care or treatment to a patient." That "medical care or treatment" for purposes of the immunity act includes care or

treatment for mental health infirmities is not here in dispute. See *McLean v McElhaney*, 289 Mich App 592, 599-600; 798 NW2d 29 (2010).

Again, plaintiff's expert opined that all attempts at continued psychiatric care after the psychiatrist made sexual or romantic advances upon plaintiff were bound to be both ineffective and damaging to plaintiff. Although plaintiff does not point to any specific aspect of the doctor's treatment of him as deficient or harmful, he and his expert suggest that the continuing attempt to exercise the psychiatrist-patient relationship itself constituted malpractice per se.

Defendant argues that the offending psychiatrist's continued treatment of plaintiff after accosting him with sexual or romantic gestures did not constitute treatment, but rather a continuation of the doctor's course of criminal conduct, suggesting that the practitioner continued to offer plaintiff services as both a means of covering up his earlier criminal acts, and of gaining further opportunities to molest him. We reject this reasoning. Defendant cites no authority for the proposition that benign conduct undertaken after commission of a crime, even if done in hopes of averting suspicions of the crime, itself becomes criminal for that reason.

However, defendant ably challenges its vicarious responsibility for that improper and possibly damaging continuation of treatment on the ground that defendant did not have sufficient notice to trigger any duty to intervene to prevent that further treatment.

An employer may share liability for intentional torts committed by an employee if the employer knew, or should have known, of the employee's tortious tendencies. *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 412-413; 189 NW2d 286 (1971). However, "Employers generally do not assume their employees are potential criminals, nor should they." *Brown v Brown*, 478 Mich 545, 554; 739 NW2d 313 (2007). In this case, there is no dispute that plaintiff first spoke to a state official of the offending psychiatrist's improper sexual or romantic advances upon him only after he was transferred to a new correctional facility and out of that psychiatrist's proximity, and that the result was the prompt filing of a complaint against the offender. Plaintiff further fails to explain how any state actor other than the psychiatrist himself might be charged with such knowledge before plaintiff spoke up.

Because plaintiff has failed to show that defendant had reason to intervene in his relationship with the offending psychiatrist, as the latter treated the former between the time of the sexual aggression and romantic advances and when the relationship ended with plaintiff's transfer to a new facility, plaintiff has failed to plead in avoidance of governmental immunity in the matter.

Accordingly, we reverse the trial court's decision to deny summary disposition in connection with the offending psychiatrist's continuing provision of psychiatric services after he had crossed the boundary into making sexual or romantic advances, and remand this case to the trial court with instructions to grant defendant's motion for summary disposition in its entirety.

Reversed in pertinent part and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Patrick M. Meter