COURT OF APPEALS DECISION DATED AND FILED

December 19, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP760 | **Cir. Ct. No. 2004CV1518**

STATE OF WISCONSIN | **IN COURT OF APPEALS DISTRICT III**

DANIEL D. WHETTER, AS SPECIAL ADMINISTRATOR FOR THOMAS P. BURKE, DECEASED, AND PAULA M. ROUSH,

PLAINTIFFS-APPELLANTS,

V.

BROWN COUNTY, BROWN COUNTY DEPARTMENT OF HUMAN SERVICES AND BROOKE K. JAUQUET,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Brown County: MICHAEL T. JUDGE, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. This is a wrongful death action against Brown County, the Brown County Department of Human Services, and Brooke Jauquet

(collectively, the County) arising out of the death of two-year-old Thomas P. Burke (Tommy).[1] The circuit court granted summary judgment, holding the County was immune from liability under WIS. STAT. §§ 48.981(4) and 893.80(4).[2] Daniel Whetter, as administrator of Tommy's estate, and Tommy's mother Paula Roush (collectively, Roush)[3] argue disputed facts make summary judgment inappropriate in this case. Because no facts in the record establish any conscious or intentional wrongdoing on the part of the County, the County is immune from liability under WIS. STAT. § 48.981(4). We therefore affirm the judgment.

BACKGROUND

¶2 Tommy Burke was born February 23, 1999, and died August 23, 2001. His death was caused by severe head trauma inflicted by his father's live-in girlfriend, Erin Hill. Hill was convicted of three counts, including first-degree reckless homicide, in his death.

¶3 Prior to Tommy's death, the County received six reports from persons concerned about Tommy's welfare. The first three reports, which were made January 12, January 31, and March 6, 2001, involved allegations against Paula, Tommy's mother. One reporter claimed to have seen Paula scream at

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[1] Throughout this opinion we refer to young Thomas P. Burke as Tommy, and his father Thomas Burke, Sr. as Thomas.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[3] Throughout this opinion we refer to the plaintiffs collectively as Roush and Paula Roush personally as Paula.

Tommy and shake him in an attempt to make him stop crying.[4] The other reports involved allegations of neglect by Paula, including unsanitary conditions at Paula's apartment and one instance where Tommy was seen outside in winter without a shirt on. The assigned Human Services investigator had a conversation with Paula and concluded the "concerns, although valid, are not considered maltreatment" under the applicable statute. Paula then moved and the investigator was unable to determine her whereabouts.

¶4 The fourth report was received just before midnight on June 11, 2001. The reporter indicated Tommy had been taken to the emergency room by his paternal grandmother and Hill after he had vomited blood. The vomiting had been caused by a head injury. Tommy also had other injuries consistent with abuse.

¶5 Over the next two days, Brooke Jauquet, the Human Services investigator assigned to the case, interviewed Thomas, Hill, Paula, Paula's boyfriend, and Tommy's babysitter. The interviews indicated Hill had been the last adult alone with Tommy, but others had been alone with him prior to noon on June 11.[5] Jauquet concluded the allegation of abuse was "substantiated with an unknown maltreater," and that "all persons were questioned with no real indication of who caused the injury." Jauquet closed her investigation on August 2, 2001. In

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[4] The reports in Tommy's file originally included information identifying the person(s) reporting abuse to the County. That information was redacted pursuant to statute. *See* WIS. STAT. § 48.981(7)(a)1.

[5] Jauquet's report does not include any medical information on when the head injury could have occurred based on the timing of Tommy's symptoms. Tommy had been alone with Paula the morning of June 11 and had been at his babysitter's on June 9. In her deposition, Jauquet stated she did not recall asking the emergency room doctor when the injury could potentially have occurred.

her deposition, Jauquet said she believed Paula was the most likely suspect because of the past complaints against her, but Jauquet did not take action because she was unable to prove either parent had abused or neglected Tommy.

¶6 On August 16, Human Services received a fifth report. The report indicated Paula had noticed bruises on Tommy's back and believed the abuse was taking place at Thomas's home. Another Human Services investigator, Theresa Gereau-Schurer, and a police detective attempted to contact Paula the next day but were unable to do so. August 17 was a Friday, and Gereau-Schurer and the detective agreed the detective would attempt to contact Paula over the weekend, and possibly contact Thomas later the following week.

¶7 At approximately 9 a.m. on August 21, 2001, Human Services received the sixth and final report regarding Tommy. The caller, who was Thomas's neighbor, stated around midnight the previous night he heard a child crying and "a lot of banging going on, for a long time" in Thomas's home. The neighbor stated it sounded like someone was "hitting the child very loud" and the sound stopped after he went outside and yelled loudly at the perpetrator. The report was marked "no urgency factors present" and given to Gereau-Schurer at 1:50 p.m. Gereau-Schurer faxed a copy to the police detective but did not attempt to contact Tommy's parents or take custody of Tommy. In her deposition, Gereau-Schurer stated she thought the report was "basically secondhand information" and nothing in it indicated any urgency.

¶8 On August 21, around 8 p.m., Tommy was admitted to St. Vincent's Hospital with injuries that included a severe head injury. Human Services took formal custody of him at 10 p.m. that evening. Despite surgery to relieve the pressure on his brain, Tommy died from his injuries two days later.

¶9 On August 16, 2004, Roush filed a wrongful death action against Brown County, the Brown County Department of Human Services, and Jauquet. Roush alleged the County had negligently failed to investigate the case and negligently failed to protect Tommy. The County argued it was immune from suit under WIS. STAT. §§ 48.981(4) and 893.80(4). The circuit court agreed and granted summary judgment on February 22, 2006.

STANDARD OF REVIEW

¶10 We review a grant of summary judgment without deference to the circuit court. ***Phillips v. Behnke***, 192 Wis. 2d 552, 558, 531 N.W.2d 619 (Ct. App. 1995). Summary judgment is appropriate where no disputed issue of material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2); ***Phillips***, 192 Wis. 2d at 558. This case also requires us to interpret WIS. STAT. § 48.981(4). The meaning of a statute is also a question of law reviewed without deference to the circuit court. ***Phillips***, 192 Wis. 2d at 559.

DISCUSSION

¶11 On appeal, the parties disagree whether the County is statutorily immune from liability. Generally speaking, immunity for governmental agencies and their officers is an attempt to balance the public's need for its officials to perform their functions free from the fear of a lawsuit against the right of aggrieved parties to seek redress for their injuries. *See* ***Kierstyn v. Racine Unified School Dist.***, 228 Wis. 2d 81, 89, 596 N.W.2d 417 (1999). Put another way, statutory immunity is a legislative attempt to keep courts from second guessing decisions within "the province of coordinate branches of government." ***Scarpaci v. Milwaukee County***, 96 Wis. 2d 663, 687, 292 N.W.2d 816 (1980) (citations omitted).

¶12 The specific statute at issue here, WIS. STAT. § 48.981(4), provides:[6]

> **(4)** IMMUNITY FROM LIABILITY**.** Any person or institution participating in good faith in the making of a report, conducting an investigation, ordering or taking of photographs or ordering or performing medical examinations of a child or of an expectant mother under this section shall have immunity from any liability, civil or criminal, that results by reason of the action. For the purpose of any proceeding, civil or criminal, the good faith of any person reporting under this section shall be presumed….

¶13 Roush concedes this section applies to all of the defendants, and the presumption of good faith applies to their actions. In order to defeat summary judgment, Roush has the burden of putting forward facts which, if true, would rebut the presumption of good faith. *See* ***Phillips***, 192 Wis. 2d at 563.

¶14 To rebut the presumption in WIS. STAT. § 48.981, a plaintiff must demonstrate conscious or intentional wrongdoing, such as a conscious violation of a statute. ***Drake v. Huber***, 218 Wis. 2d 672, 678, 582 N.W.2d 74 (Ct. App. 1998). Roush makes one specific allegation of wrongdoing by the County.[7] Under WIS. STAT. § 48.981(3)(c), the County is required to "initiate a diligent investigation to determine if the child … is in need of protection or services" within twenty-four

[6] The County also argues it is entitled to immunity under WIS. STAT. § 893.80. Because we conclude the County is entitled to immunity under WIS. STAT. § 48.981(4), we need not reach this alternative argument. *See* ***Patrick Fur Farm, Inc. v. United Vaccines, Inc.***, 2005 WI App 190, ¶9 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 (court of appeals decides cases on the narrowest possible grounds).

[7] Throughout her brief, Roush argues the County failed to follow its own guidelines in its investigation and its decision not to take custody of Tommy after reports indicated he was being abused. However, except for the alleged statutory violation discussed above, these general allegations are not supported by any explanation of any particular rule or exactly what action by the County violated it. Roush cites the guideline calling for contact with a parent within five days. However, at least for the last three reports, contact was attempted within a day or two, and contact with at least one parent was made within five days of receipt of the report.

hours of receiving a report. Roush argues the investigation here was not "diligent," and that whether the investigation was diligent is a question for a jury.

¶15 However, even assuming the investigation was not diligent, Roush fails to point to anything in the record indicating the failure to investigate diligently was an intentional violation of the statute. Both Human Services investigators involved stated they believed they had done a proper investigation, and Roush does not point to anything in the record rebutting their testimony. While an objective observer might disagree with the investigators' assessment, this disagreement is not enough to show the investigators intentionally or consciously disregarded the statute.

¶16 Roush argues even if there was no conscious wrongdoing, summary judgment is inappropriate because there is a factual dispute as to whether the County's actions were grossly negligent. Roush recognizes that the doctrine of gross negligence has been abolished in Wisconsin,[8] but argues gross negligence survives as a severe degree of ordinary negligence and is sufficient to defeat the presumption of good faith.

¶17 Roush's argument is contrary to ***Drake*** and ***Phillips***. ***Phillips*** specifically held that negligence is not sufficient to defeat the presumption of good faith found in WIS. STAT. § 48.981(4). ***Phillips***, 192 Wis. 2d at 565. ***Drake***, expanding on ***Phillips***, held that a showing of intentional or conscious wrongdoing is required in order to rebut the presumption. ***Drake***, 218 Wis. 2d at 678. If, as

[8] *See* ***Bielski v. Schulze***, 16 Wis. 2d 1, 14, 114 N.W.2d 105 (1962), *overruled in part on other grounds*, ***Wangen v. Ford Motor Co.***, 97 Wis. 2d 260, 275, 294 N.W.2d 437 (1980).

Roush argues, gross negligence is a severe degree of ordinary negligence, and the degree of negligence is a question for a jury, then WIS. STAT. § 48.981(4) would never prevent lawsuits based on negligence. That result would be directly contrary to ***Drake*** and ***Phillips***.

¶18 In addition, Roush's argument relies for the most part on contract cases defining good faith. *See* ***Leuch v. Egelhoff***, 260 Wis. 356, 361, 51 N.W.2d 7 (1952); ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 796, 541 N.W.2d 203 (Ct. App. 1995); ***Amoco Oil Co. v. Capitol Indem. Corp.***, 95 Wis. 2d 530, 542, 291 N.W.2d 883 (Ct. App. 1980). However, in contract law the obligation of good faith and fair dealing is a tool used by courts to force parties to comply in substance, rather than in form, with their contractual obligations. *See* ***Wisconsin Natural Gas Co. v. Gabe's Const. Co.***, 220 Wis. 2d 14, 21, 582 N.W.2d 118 (Ct. App. 1998). On the other hand, the good faith requirement here is part of a definition of immunity. Immunity is designed to keep courts from passing judgment on decisions within "the province of coordinate branches of government." ***Scarpaci***, 96 Wis. 2d at 687 (citations omitted). We see no reason why good faith as used in WIS. STAT. § 48.981(4) cannot have a meaning tailored to that statute's purpose. Even more important, we see no reason why cases defining good faith in the contract context are more applicable than ***Drake*** and ***Phillips***, which define good faith in the specific context of § 48.981(4).

¶19 Tommy's death was a tragedy, made even more so because of the missed opportunities—by the County and others—to take actions that in hindsight might have saved his life. However, there is simply no evidence the County engaged in any conscious or intentional wrongdoing, and for that reason it is entitled to immunity. We therefore affirm the judgment.

By the Court—Judgment affirmed.

Not recommended for publication in the official reports.