[Cite as *McClellan v. Franklin Cty. Bd. of Commrs.*, 2009-Ohio-3955.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kimberlee McClellan et al.,	:	
Plaintiffs-Appellants,	:	
		No. 08AP-782
v.	:	(C.P.C. No. 07CVC-04-5125)
Franklin County Board of Commissioners et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on August 11, 2009

Lowe Eklund Wakefield & Mulvihill Co., L.P.A., Dennis P. Mulvilhill and *Joseph P. Dunson*, for appellants.

Ron O'Brien, Prosecuting Attorney, for appellees assistant prosecutors William Creedon and Michael Hughes and Franklin County Board of Commissioners; *Nick A. Soulas, Jr.*, for appellee Ron O'Brien.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Plaintiffs-appellants, Kimberlee and Shane McClellan ("appellants"), appeal from a decision of the Franklin County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Franklin County Board of Commissioners ("the commissioners"), Franklin County Prosecuting Attorney Ron O'Brien ("O'Brien"), and

Franklin County Assistant Prosecuting Attorneys Michael Hughes ("Hughes") and William Creedon ("Creedon") (collectively "appellees"). For the following reasons, we affirm.

Background

{¶2} The following facts are relevant to this appeal. On May 26, 2004, A.M.[1] suffered injuries and was brought to Westerville Urgent Care Facility by her mother, appellant Kimberlee McClellan. Upon examination, A.M. was transported to the emergency room at Children's Hospital, where she was intubated and admitted to the intensive care unit. Dr. Phil Scribano, a physician on staff at Children's Hospital, was consulted, and, based on the injuries he observed, he opined:

> The injury of acute subdural hemorrhage with layering over the falx is highly suspicious for abusive head trauma with a shaking mechanism. The history provided of a fall from a crawling height on carpeted stairs, is not consistent with the injury identified. Contact subdural hematomas are generally small, localized to an impact site, and are not layered as is the case here. In addition, other evidence of contact such as fracture, or soft tissue swelling are often present. If the ophthalmologist evaluation identifies retinal hemorrhages, this further supports the diagnosis of abusive head trauma due to shaking.
>
> It is appropriate to report a concern of suspected physical abuse to FCCS and law enforcement (social worker will do so).

(Exhibit 2A to appellees' motion for summary judgment.) Pursuant to Dr. Scribano's recommendation above, A.M. was examined by an ophthalmologist, who observed pre-retinal hemorrhages. Id. at Exhibit 2B.

{¶3} Ann Harr ("Harr"), a social worker employed by Children's Hospital, assessed A.M. and consulted with Dr. Scribano. Harr wrote in her report that "[b]ased on the severity of the head injury, a report has been made to the Franklin County Children

[1] Initials will be used to protect the anonymity of the minor child.

Services so that they may investigate further." Id. at Exhibit 2C. On May 27, 2004, Meredith Reed ("Reed"), an employee of Franklin County Children's Services ("FCCS"), was assigned to investigate the referral made by Harr to the agency regarding A.M.'s injuries. Reed conducted a preliminary investigation, subsequent to which FCCS filed a complaint for abuse, neglect, and dependency on May 28, 2004 ("the abuse case"). That case was assigned number 04JU-05-7682.[2] Subsequent to the filing of that complaint, A.M. was placed in the custody of her grandparents.

{¶4} FCCS referred the case to the Columbus Police Juvenile Bureau, and the matter was assigned to Detective Anthony Monturo ("Monturo"), who conducted an investigation between June 6 and September 7, 2004. Monturo submitted his findings to the Franklin County Prosecutor's Office with the request that "the Grand Jury consider charges." (Monturo's progress investigation report at 2.) On September 10, 2004, a grand jury indicted appellant Kimberlee McClellan on one count of felonious assault and two counts of endangering a child in Franklin County Court of Common Pleas case No. 04CR-7486 ("the criminal case"). Assistant prosecutor David W. Insley was originally assigned to the criminal case, but on March 10, 2006, assistant prosecutors Creedon and Hughes were substituted as counsel and ultimately tried the case to a jury, which found appellant Kimberlee McClellan not guilty.

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[2] The 90-day life span of abuse, neglect, and dependency cases often makes it difficult to thoroughly prepare a case within that time frame, and, as a result, these cases are routinely dismissed and then re-filed. Such was the case here; three successive complaints were filed or re-filed in this matter under case Nos. 04JU-05-7682, 04JU-08-11756, and 04JU-11-15714. Unless necessary to note otherwise, we will, for the sake of clarity, refer to these cases in the singular and collectively as "the abuse case."

{¶5} On April 13, 2007, appellants filed the instant action against appellees, alleging claims of malicious prosecution and negligent and intentional infliction of emotional distress. Thereafter, appellants filed a first amended complaint, which included additional facts but not claims. Appellees ultimately moved for summary judgment on the basis that they are entitled to absolute immunity from appellants' claims, which the trial court granted. Appellants filed a timely appeal and assert the following single assignment of error:

> THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF ABSOLUTE IMMUNITY.

{¶6} Appellants argue that the trial court erred in finding that appellees were entitled to absolute immunity.[3] Specifically, appellants assert that Hughes waived his defense of absolute immunity when he investigated allegations of child abuse of A.M. like a detective. As a consequence of that waiver, appellants contend that O'Brien and the Commissioners are liable for his actions based on the doctrine of respondeat superior.

Standard of Review

{¶7} An appellate court's review of summary judgment is conducted de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. We apply the same standard as the trial court and conduct an independent review without deference to the trial court's

[3] At this juncture, we note that appellants have not pursued their claims against Creedon, or O'Brien and the Commissioners, in their individual capacities. Accordingly, all such claims have been abandoned and will not be addressed by this court. *Parahoo v. Mancini* (Apr. 14, 1998), 10th Dist. No. 97APE08-1071. In fact, despite appellants' inclusion of these individuals on appeal, the record does not disclose that the claims against them were ever developed or meaningfully presented before the trial court.

determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown*, at 711. We must affirm the trial court's judgment if any of the grounds the movant raised in the trial court support the judgment. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶8} Summary judgment is appropriate only where (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. A party seeking summary judgment "bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record * * * which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107.

Statutory Immunity

{¶9} Pursuant to R.C. 2744.03(A)(6), in addition to any immunity or defense referred to in R.C. 2744.03(A)(7), an employee, as defined in R.C. 2744.01(B),[4] is immune from liability unless one of the following applies: "(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities; (b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; [or] (c) Civil liability is expressly imposed

[4] R.C. 2744.01(B) provides, in pertinent part, " '[e]mployee' means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. * * * 'Employee' includes any elected or appointed official of a political subdivision."

upon the employee by a section of the Revised Code." R.C. 2744.03(A)(7) provides as follows:

> The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

As to O'Brien and Hughes, R.C. 2744.03(A)(7) clearly applies due to their statuses as the county prosecuting attorney and assistant prosecuting attorney, respectively. Thus, we must determine whether any defense or immunity available at common law is applicable.

Common Law Immunity

{¶10} Prosecutors are considered "quasi-judicial officers" entitled to absolute immunity granted judges when their activities are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman* (1976), 424 U.S. 409, 430, 96 S.Ct 984, 995; see also *Willitzer v. McCloud* (1983), 6 Ohio St.3d 447, 449. *Imbler* held that a prosecutor has absolute immunity "in initiating a prosecution and in presenting the State's case." Id. at 431. However, "absolute immunity does not extend to a prosecutor engaged in essentially investigative or administrative functions." *Willitzer*, at 449 (quotation omitted) (emphasis added); see also *Van de Kamp v. Goldstein* (2009), 129 S.Ct. 855, syllabus. In order for absolute immunity to attach to a prosecutor's administrative or investigative acts, such must be necessary for the "initiation of a prosecution or for judicial proceedings." *Buckley v. Fitzsimmons* (1993), 509 U.S. 259, 273, 113 S.Ct. 2606, 2609; see also *Ireland v. Tunis* (C.A.6, 1997), 113 F.3d 1435, 1447.

{¶11} To determine whether absolute immunity attaches to a particular prosecutorial activity, the United States Supreme Court in *Imbler* adopted a "functional analysis." *Imbler,* at 430; *Willitzer*, at 449. That approach requires a court to examine "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White* (1988), 484 U.S. 219, 229, 108 S.Ct. 538, 546. The Supreme Court has recognized that it is important to be mindful that the "duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Imbler*, 424 U.S. at 431, fn. 33. Thus, "[i]mmunity extends to 'the preparation necessary to present a case,' and this includes the 'obtaining, reviewing, and evaluation of evidence.' " *Kulwicki v. Dawson* (C.A.3, 1992), 969 F.2d 1454, 1465, quoting *Schrob v. Catterson* (C.A.3, 1991), 948 F.2d 1402, 1414, citing *Imbler,* 424 U.S. at 431, fn. 33. Indeed, there is no bright line between investigative activities, which are protected by qualified immunity and traditional prosecutorial duties, which are granted absolute immunity. *Burns v. Reed* (1991), 500 U.S. 478, 494, 111 S.Ct. 1934, 1944.

Argument

{¶12} The challenged conduct in this case involves a single meeting where Hughes, Monturo, and Dr. Renata Fabia ("Fabia") were in attendance. According to appellants, "Hughes waived his absolute immunity when he called Detective Monturo, the sole police officer assigned by the Columbus Police Department to investigate the allegations of child abuse of [A.M.], and requested a meeting with him and Dr. Renata Fabia, the attending physician at Children's Hospital whose pediatrics team cared for [A.M.]." (Appellants' reply brief at 9.) The evidence relied upon by appellants to support

their argument includes the progress of investigation report generated by Monturo ("Monturo's report"), as well as the deposition testimonies of Hughes and Monturo. Appellants quote portions of Monturo's report, which they assert depicts "the very investigation undertaken by Hughes." (Appellants' reply brief at 9.) They also contend that the depositions of Hughes and Monturo conclusively establish that Hughes was engaged in an investigative function, not a quasi-judicial function, to which absolute immunity does not attach. Appellants also argue that Monturo's deposition contradicts the testimony given by Hughes, and the conflicting testimonies create genuine issues of material fact that render summary judgment inappropriate.

{¶13} Naturally, appellees disagree with appellants' argument and dispute both the treatment and the characterization of the evidence upon which appellants rely. Appellees explain that Hughes met with Fabia for the purpose of clarifying a discrepancy in her medical report; a discrepancy brought to light by appellant Kimberlee McClellan's attorney in a motion to dismiss and depicted as being dispositive of the allegations against her. Thus, appellees contend that "Hughes was merely doing what a competent prosecutor would do in order to respond to significant issues being raised by opposing counsel in a pending case." (Appellees' brief at 8-9.) They further contend that the fact Hughes notified Monturo of the meeting, and Monturo chose to attend, did not "turn the function being performed from being a prosecutorial function into a non-prosecutorial function." (Appellees' brief at 13.) Accordingly, appellees argue that they are protected by both statutory and common law immunity.

{¶14} In their reply, appellants essentially reiterate their argument that Hughes "engaged in essentially investigative or administrative functions when he investigated the evidence in the State's case against Kimberlee McClellan." (Appellants' reply brief at 1.)

Analysis

{¶15} As previously explained, a prosecutor is entitled to absolute immunity when he or she engages in activities that are "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. To determine whether Hughes is entitled to the protection of absolute immunity, we must first decide whether he has performed a quasi-judicial function. Resolution of that issue requires us to consider Hughes' actions as viewed against the framework of the abuse case proceedings.

{¶16} Prior to Hughes' appearance as counsel in the criminal case, Hughes had been assigned on June 4, 2004, to the abuse case in juvenile court. On June 10, 2004, the juvenile court scheduled a hearing for July 9, 2004 in the abuse case. Discovery between the parties ensued. Hughes requested a continuance, which the court granted, rescheduling the hearing for August 16, 2004.

{¶17} On July 13, 2004, Sam Weiner, Esq. ("Weiner"), who had been retained by appellant Kimberlee McClellan, sent Hughes a letter requesting dismissal of the abuse case. In his letter, Weiner asserted that the allegations contained in FCCS's complaint were "belied by the medical records." (Exhibit 9 attached to appellees' reply brief in support of their motion for summary judgment.) Thereafter, on July 29, 2004, Weiner filed a motion to dismiss the abuse case, arguing that:

> The medical records attached herewith indicate that each of the claims in the Complaint that are alleged to have substantiated child abuse are incorrect. The Court will note for example that

> the hematoma is not a "subdural," it is an "epidural" hematoma. Epidural hematomas are caused from a blow as opposed to "Shaken Baby Syndrome."

The medical record, which served as the backbone for the motion, was A.M.'s discharge summary ("discharge summary") authored by Fabia, A.M.'s attending physician at Children's Hospital. The court scheduled a hearing on the motion for August 16, 2004. Hughes filed a motion for a continuance in order "to obtain additional information." (Motion at 12.) The juvenile court granted Hughes' request and rescheduled the motion hearing for August 25, 2004.

{¶18} The additional information Hughes sought to obtain was clarification from Fabia regarding a notation made in A.M.'s medical records. According to Hughes, upon receipt and review of the motion to dismiss filed by Weiner, Hughes observed that the discharge summary was "the only place in all of the medical records" that indicated A.M. had an epidural hematoma, as opposed to a subdural hematoma. (Hughes Depo. at 22.) Thus, it appeared to Hughes that a conflict existed between Fabia's discharge summary and the other medical records he had reviewed at that time.

{¶19} Hughes subpoenaed Fabia on August 20, 2004, as a witness for the hearing scheduled to take place on August 25, 2004. Believing that resolution of the conflict "was very important" before responding to the pending motion, as such could have had the potential to be outcome dispositive, Hughes contacted Fabia on August 23, 2004, and set up a meeting for the next day. (Depo. at 22.) Hughes testified that he knew Monturo was the detective assigned to investigating the case and advised Monturo of the meeting scheduled with Fabia. (Depo. at 20.) At the meeting, which lasted several minutes, Fabia clarified the discrepancy, attributing the same to a transcription error.

{¶20} There is no real dispute that Hughes met with Fabia, a witness who had been subpoenaed for the motion hearing on August 25, 2004, to clarify the discrepancy presented by Fabia's discharge summary. There can also be no real dispute that the purpose for which Hughes sought clarification was so that he could prepare a response to the motion to dismiss filed by appellants' attorney.[5] It is axiomatic that conferring with a witness for the purpose of preparing a response to a motion is plainly a function that is "intimately associated with the judicial phase" of the process, and, therefore, is a quasi-judicial function "to which the reasons for absolute immunity apply with force." *Imbler*, 424 U.S. at 430.[6]

{¶21} With respect to "investigative acts" such as interviewing or conferring with witnesses, the United States Supreme Court in *Buckley* stated:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand.

Buckley, 509 U.S. at 273. Based on the distinction drawn above, Hughes' act of meeting with Fabia clearly falls into to the category of the "advocate's role" and, therefore, his conduct is protected by absolute immunity. See also *Ireland v. Tunis* (C.A.6, 1997), 113 F.3d 1435, 1446-47 ("Absolute prosecutorial immunity will likewise attach to administrative or investigative acts necessary for a prosecutor to initiate or maintain a criminal prosecution."); *Demery v. Kupperman* (C.A.9, 1984), 735 F.2d 1139, 1144

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[5] Appellants assert that "[i]t is unclear exactly what Hughes aimed to do with the evidence that he gathered from Dr. Fabia during his investigation to clarify the medical issues." (Appellants' brief at 16.) Hughes' deposition, as well as the evidence supporting appellees' motion for summary judgment, completely belies this assertion.

[6] We reject appellants' argument that such act could be performed by a layperson.

("conferring with potential witnesses regarding their knowledge of underlying events is plainly part of a prosecutor's preparation of his case."); *Barbera v. Smith* (C.A.2, 1987), 836 F.2d 96, 100 (a prosecutor who gathers evidence is more likely than not performing a quasi-judicial function when the prosecutor is "organizing, evaluating, and marshalling evidence" in preparation for trial, in contrast to the police-type activity of "acquiring evidence which might be used in a prosecution."). The fact that Monturo was advised of and attended that meeting does not somehow transform Hughes' role as an advocate into that of a detective.

{¶22} Further, Hughes testified to the effect that when he initially read the motion to dismiss, it conveyed the impression that the type of hematoma (epidural or subdural) was dispositive of whether A.M.'s injuries could have been the result of Shaken Baby Syndrome. (Hughes Depo. at 25.) In other words, the basis for appellants' motion was the existence of exculpatory evidence vis-à-vis A.M.'s medical records. In that regard, courts have held that a prosecutor's decision to not preserve or turn over exculpatory material before trial is protected by absolute immunity, despite the fact it is a violation of due process. *Broam v. Bogan* (C.A.9, 2003), 320 F.3d 1023, 1030, citing *Imbler*, 424 U.S. at 431-32, fn. 34 (explaining that "deliberate withholding of exculpatory information" is included within the "legitimate exercise of prosecutorial discretion"). And, in *Long v. Satz* (C.A.11, 1999), 181 F.3d 1275, 1279, the Eleventh Circuit agreed that the "task of evaluating the credibility of the alleged exculpatory information and of determining its bearing on the trial requires the exercise of prosecutorial discretion." Given that Hughes' meeting with Fabia can accurately be characterized as the evaluation of potential exculpatory evidence, the foregoing legal authority only serves to buttress our conclusion

that he is entitled to absolute immunity. The converse of this position, which is advocated by appellants, is fraught with peril, as such could deter a prosecutor from evaluating exculpatory evidence — an act that could potentially result in the decision to either forgo or dismiss an indictment. It also defies reason that a prosecutor would be cloaked with absolute immunity for the decision to withhold exculpatory evidence, but that cloak would be removed when examining or evaluating the same.

{¶23} We are also not persuaded by appellants' argument that issues of material fact exist because of contradictions between the deposition testimonies of Hughes and Monturo. This argument brings to mind the parable of the Emperor's New Clothes, and we find that, after thoroughly reviewing each deposition, the emperor, indeed, has no clothes. In other words, the contradictions appellants claim to exist are simply not borne out by the record.

{¶24} Appellees supported their motion for summary judgment with ample Civ.R. 56 evidence. Appellants, however, have not come forward with anything in rebuttal, nor have they proffered any evidence that would support the inference that Hughes engaged in investigative police-type work. Similarly, Monturo's report does not detail any conduct by Hughes that would support appellants' argument. Hughes sought clarification from Fabia regarding a discrepancy in the discharge summary; he did not direct any investigatory work to be done, nor was he trying to acquire evidence. The timing of the meeting, which was scheduled and took place only days before a motion hearing on the motion to dismiss filed by appellants' attorney, further supports the determination that Hughes' conduct was closely connected to his advocacy function.

{¶25} Lastly, we note that "[a]ttorneys have an obligation to be truthful and as accurate as possible and must verify their statements." *Matter of Landberg v. Natl. Enterprises, Inc*. (N.Y.Sup.Ct. July 6, 2007), 2007 N.Y. 32057U (Slip Opinion); see also *Disciplinary Counsel v. Greene* (1995), 74 Ohio St.3d 13, 16. If Hughes had not sought clarification from Fabia regarding the discrepancy contained in the discharge summary, he would not have been able to prepare a response to the motion to dismiss in accordance with this obligation. Hughes' act of seeking clarification to prepare an accurate response to a motion is the type of due diligence that should be viewed as competent, ethical advocacy.

{¶26} The necessity for absolute prosecutorial immunity was explained by the United States Supreme Court in *Imbler*, as follows:

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

Id., 424 U.S. at 422-23. We find our decision in this case fully comports with the foregoing public policy considerations, and this case is the type of action for which the doctrine of absolute immunity exists.

{¶27} Having found that Hughes is entitled to absolute immunity, appellants' claims against O'Brien and the Franklin County Commissioners must fail. In so finding, we need not determine whether appellants could maintain claims based upon the doctrine of respondeat superior.

Conclusion

{¶28} Accordingly, we overrule appellants' assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and TYACK, JJ., concur.

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