IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard P. Glunk, M.D.,	:	
Appellant	:	
	:	
v.	:	No. 2052 C.D. 2012
	:	SUBMITTED: May 17, 2013
Mark Greenwald	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE LEADBETTER **FILED: September 19, 2013**

Richard P. Glunk, M.D. appeals *pro se* from the order of the Court of Common Pleas of Philadelphia County (trial court or common pleas) granting the preliminary objection of Mark Greenwald, an attorney formerly employed by the Department of State, and dismissing Dr. Glunk's third amended complaint with prejudice upon the conclusion that Greenwald was protected by sovereign immunity.[1] Because our review of the operative complaint reveals that Dr. Glunk has averred facts which, if proven, would demonstrate that Greenwald acted outside the scope of his employment, we reverse in part.

[1] In the underlying civil action, Glunk sued both Greenwald and the Department of State. Each defendant filed preliminary objections raising, *inter alia*, the defense of sovereign immunity. Common pleas sustained each party's preliminary objection raising immunity and dismissed Glunk's third amended complaint with prejudice. Glunk did not appeal the dismissal of his complaint as to the Department. *See also* Appellant's brief at 8 (noting that he did not oppose the Department's preliminary objections and has "dropped his case against the Department of State . . . .").

According to the averments of Dr. Glunk's *pro se* third amended complaint, Dr. Glunk, a plastic surgeon, performed a procedure on a young woman who subsequently died from a complication of that procedure. As a result of her death, Greenwald, an attorney employed by the Department of State (Department), along with other Department attorneys and employees, investigated the young woman's death and prosecuted Dr. Glunk in connection therewith. The Department's investigation was not the only legal process stemming from the fatality. The family of the young woman (the family) also commenced a civil medical malpractice action against Dr. Glunk.[2]

Dr. Glunk broadly asserts in his complaint that Greenwald used his position with the Department as well as "state resources" to assist the family in pursuing its malpractice case against him, to aid the family in opposing his subsequent bankruptcy petition and to aid the family in its continuing vendetta against him. *See* Amended Complaint-Civil Action, ¶ B at 4. Dr. Glunk further avers that Greenwald continued to personally investigate the young woman's death despite his investigator's conclusion that Dr. Glunk properly treated/cared for the deceased young woman and that the Department's Charging Unit had concluded that there was no factual or legal basis to continue the investigation or institute a formal action against Glunk. He avers, *inter alia*, that in conducting his investigation, Greenwald had numerous conversations with private attorneys working with the family and assisted the family and its attorneys in pursuing its

[2] While the complaint alludes to the malpractice action, we can take judicial notice of the court opinions generated in that matter. Those opinions reveal that following trial, a verdict in excess of $15 million was awarded, with a finding that Dr. Glunk was 75% negligent. *See Fledderman v. Glunk* (C.C.P. Phila. No. 3619, No. 1942), aff'd in part, reversed and remanded in part on issue of delay damages by Pa. Super. Nos. 3360, 3378, 3379 EDA 2008 (filed November 12, 2010).

civil case and in opposing his bankruptcy action. In addition, he asserts that Greenwald persisted in filing unwarranted orders to show cause and improperly released an order suspending Glunk's medical license to various individuals and entities before Glunk or his counsel were given notice of the order.[3] Glunk further contends that Greenwald timed the filing of the various orders to show cause to harass Glunk and distract him from defending against the family's malpractice action. Glunk generally and repeatedly characterizes all of the complained of conduct as beyond Greenwald's scope of employment.

Finally and importantly, Dr. Glunk avers that Greenwald provided the attorneys involved in the medical malpractice action and in opposing his bankruptcy action with confidential peer-review material that they could not otherwise have obtained in order to assist them in their legal actions. Amended Complaint, ¶¶ 61, 65. Glunk avers generally that Greenwald's actions constituted an abuse of process and/or a malicious prosecution.

Based upon the above averments, Glunk asserts causes of action for malfeasance, intentional infliction of emotional distress and conspiracy (between Greenwald and the family/its attorneys) to assist the malpractice action, the family's vendetta and the opposition to his bankruptcy action. As noted, Greenwald responded with various preliminary objections, including immunity from suit and demurrers to the causes of action for malfeasance (construed by

[3] Although the complaint is not altogether clear, it appears that Glunk's license was suspended by the Board of Medicine for attempting to influence a Board member regarding a disciplinary matter before the Board. *See* Amended Complaint, ¶¶ 38, 44 at 6 and 7. *See also Glunk v. State Bd. of Med.*, Pa. Cmwlth. No. 2730 C.D. 2010 (filed June 15, 2011). According to Glunk, Greenwald improperly disseminated the order suspending his license to the Philadelphia media, the family's malpractice attorneys, Glunk's medical practice and the American Board of Plastic Surgery, among others.

Greenwald as a claim for abuse of process or malicious prosecution), intentional infliction of emotional distress and conspiracy.

Common pleas concluded that Dr. Glunk's factual averments demonstrated that Greenwald's investigation and prosecution of Glunk were performed and animated, at least in part, by his official duties and, therefore, sovereign immunity barred Glunk's claims regardless of the manner in which Greenwald performed his duties or whether he acted with bad motive.[4] Common pleas' opinion at 3 (filed June 15, 2012). Common pleas sustained the objection and dismissed the complaint with prejudice. This appeal followed.

On appeal, Dr. Glunk argues, in pertinent part that, immunity does not bar his claims because Greenwald "supplied [the family and its attorney] with information, including protected information, to assist them in their civil trial, the bankruptcy trial, and advertising for a period of approximately ten years." Appellant's brief at 10.[5] At this early stage of the pleading process, we must agree.[6]

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[4] The trial court also concluded that Glunk's action was barred by the doctrine of prosecutorial immunity.

[5] He also suggests that immunity does not bar his claims because after the initial investigation, Greenwald was assigned to the Department's Charging Unit and any responsibility or involvement in the Glunk matter ended at that time. We conclude that the scope and application of sovereign immunity, discussed *infra*, cannot be parsed or limited so narrowly.

[6] When reviewing a trial court's order sustaining a preliminary objection on the basis of immunity, we must accept as true all well pled facts averred in the complaint as well as all reasonable inferences that may be drawn therefrom. *Smith v. Cortes*, 879 A.2d 382, 384 (Pa. Cmwlth. 2005), *aff'd*, 587 Pa. 506, 901 A.2d 980 (2006). Preliminary objections should be sustained only in cases where there is no doubt that the facts pleaded are insufficient to state a claim for relief. *Id.* While sovereign immunity is an affirmative defense typically raised in new matter, *see* Pennsylvania Rule of Civil Procedure No. 1030, it may be raised by preliminary objection where it is clearly applicable on the face of the complaint. *Sweeney v. Merrymead Farm, Inc.*, 799 A.2d 972, 975 (Pa. Cmwlth. 2002).

It is well settled that the Commonwealth and its agencies, officials and employees are generally immune from suit for damages when acting within the scope of their duties. *Stackhouse v. Pa. State Police*, 892 A.2d 54, 58-59 (Pa. Cmwlth. 2006). *See also* 1 Pa. C.S. § 2310 (providing for immunity for Commonwealth and its officials and employees pursuant to Article I, Section 11 of the Pennsylvania Constitution); Section 8521 of the Judicial Code, 42 Pa. C.S. § 8521. While not relevant here, there are nine legislatively created exceptions to immunity. *See* Section 8521 of the Judicial Code, 42 Pa. C.S. § 8522 (setting forth exceptions to sovereign immunity).

A Commonwealth employee, like Greenwald, is immune from suit regarding intentional conduct provided his actions are within the scope of his employment. *La Frankie v. Miklich*, 618 A.2d 1145, 1149 (Pa. Cmwlth. 1992). The corollary to the foregoing is that the Commonwealth employee is not afforded immunity if the actionable conduct was not committed within the scope of his employment.[7] In deciding whether an employee's actions fall within the scope of employment, this court has considered the following criteria:

> Conduct of an employee is within the scope of employment if it is of a kind and nature that the employee is employed to perform; it occurs substantially

[7] In *La Frankie*, this court opined:

> [T]he proper test to determine if a Commonwealth employee is protected from liability pursuant to 1 Pa. C.S. § 2310 and 42 Pa. C.S. § 8522 is to consider whether the Commonwealth employee was acting within the scope of his or her employment; whether the alleged act which causes injury was negligent and damages would be recoverable but for the availability of the immunity defense; and whether the act fits within one of the nine exceptions to sovereign immunity.

Id. at 1149.

> within the authorized time and space limits; it is actuated, at least in part, by a purpose to serve the employer; and if force is intentionally used by the employee against another, it is not unexpected by the employer.

Sanchez v. Montanez, 645 A.2d 383, 388 (Pa. Cmwlth. 1994) [quoting *Natt v. Labar*, 543 A.2d 223, 225 (Pa. Cmwlth. 1988)].

Here, we agree with common pleas that Dr. Glunk's claims premised on Greenwald's investigation of the young woman's death as well as the legal proceedings undertaken in connection therewith, whether believed to be motivated by political reasons, timed to distract Glunk from other legal matters, or pursued contrary to the views of his investigator and other Department attorneys, essentially allege the type of conduct that falls within the scope of Greenwald's official duties as a Department attorney and, therefore, are barred by sovereign immunity. *See generally* 49 Pa. Code § 16.55 (detailing complaint process before State Board of Medicine and prosecutor's duty to investigate and determine whether formal charges are required).

We reach a different conclusion, however, regarding the averments that Greenwald provided unobtainable, confidential peer-review materials to the attorneys representing the family in its malpractice action and opposing his bankruptcy action for the purpose of aiding their legal efforts. Such conduct, if true, represents action that falls outside Greenwald's scope of employment; providing confidential, privileged information to private attorneys in an unrelated matter does not serve the Department's purposes and is not the type of conduct Greenwald was hired to perform.[8] While Greenwald contends in his brief on appeal

[8] *Cf. Yarris v. County of Delaware*, 465 F.3d 129, 136-37 (3d Cir. 2006) (holding prosecutor not entitled to absolute immunity from suit for constitutional violation for alleged deliberate destruction of exculpatory evidence).

that "to the extent Greenwald turned over any information to the [family], the Department of State was required to do so in response to a subpoena issued in the [malpractice] matter. . . . [and] the [Department's] obligation to turn over this information was addressed by the Philadelphia Court of Common Pleas [in the malpractice action]," Brief at 16, we cannot consider this explanation at this stage of the proceedings; in reviewing common pleas' decision, we are limited to considering only the factual averments of the complaint and any inferences reasonably drawn therefrom, as was the trial court.

Accordingly, because common pleas dismissed the entire complaint on grounds of immunity, although some averments allege action outside its scope, we reverse in part and remand for consideration of the remaining preliminary objections.[9, 10]

BONNIE BRIGANCE LEADBETTER,
Judge

[9] The trial court did conclude, however, that: "Glunk's assertions that Greenwald improperly assisted the [family] in opposing Glunk's bankruptcy or engaged in a continuing vendetta fail for lack of factual support. The allegations . . . are entirely conclusory, averring only that Greenwald assisted the [family] but providing no fact from which that inference can be drawn . . . ." Common pleas' opinion at 4 n.2 (filed June 15, 2012). Not only did Glunk fail to challenge this conclusion in his Concise Statement of Errors Complained of on Appeal but he has not addressed it sufficiently in his appellate brief; accordingly, he has waived the right to challenge common pleas' conclusion in this regard. Pa. R.A.P. 1925(b)(4)(vii); *Lower Paxton Twp., Bd. of Supervisors v. Okonieski*, 620 A.2d 602, 604 (Pa. Cmwlth. 1993).

[10] Glunk's averments regarding the improper provision of confidential material and the harm caused thereby clearly fail to state a claim for the intentional infliction of emotional distress. In order to establish a cause of action for intentional infliction of emotional distress, the plaintiff must demonstrate that: "(1) a person who by extreme and outrageous conduct (2) intentionally or recklessly causes (3) severe emotional distress to another." *Manley v. Fitzgerald*, 997 A.2d 1235, 1241 (Pa. Cmwlth. 2010). Here, the conduct complained of does not rise to the level of "extreme and outrageous" and the harm alleged, that of lost sleep and an impact on the ability to perform daily duties, falls short of "severe emotional distress."

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O R D E R

AND NOW, this 19th day of September, 2013, the order of the Court of Common Pleas of Philadelphia County is hereby REVERSED IN PART and the matter is remanded for further proceedings in accordance with the foregoing opinion.

Jurisdiction relinquished.

BONNIE BRIGANCE LEADBETTER,
Judge