2013 IL App (2d) 120878-U
No. 2-12-0878
Order filed May 14, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

TAMARA L. TROMBETTA, CARMEN V. TROMBETTA, ANTHONY L. TROMBETTA, and STEPHANIE A. TROMBETTA, minors, by and through their parents, Tamara and Carmen Trombetta,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellants,	)	
v.	)	No. 07-L-0421
CITY OF WHEATON; ANDREW UHLIR, individually and as a sworn police officer of the City of Wheaton; BRADLY A. BEELER, individually and as an agent for the City of Wheaton; NANCY A., individually and as the parent of the minor; and UNNAMED MINOR,	)	
Defendants,	)	
(City of Wheaton and Andrew Uhlir, Defendants-Appellees).	)	Honorable Kenneth L. Popejoy, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* Plaintiffs did not challenge the trial court's ruling excluding evidence from the summary judgment record, and therefore, plaintiffs waived that issue on appeal. Further, the proper record contained no genuine issue of material fact that the police officer had a duty to investigate the child abuse allegations against plaintiffs; and further, that the police officer was acting within his official capacity when he committed misconduct that plaintiffs allege gave rise to liability. Therefore, defendants were cloaked in absolute immunity and were entitled to summary judgment.

¶ 2 In April 2007, plaintiffs, Tamara Trombetta, Carmen Trombetta, and minors Anthony Trombetta and Stephanie Trombetta (collectively plaintiffs) filed a 14-count complaint against defendants, the City of Wheaton (the City); Andrew Uhlir, a police officer for the City; Joseph Eversole, a police officer for the City, Bradley Beeler, as an agent for the City; Nancy A., individually and as the parent of Brandon A., and Brandon A., individually (collectively, defendants). With respect to the City and Uhlir, the only two defendants who are parties to this appeal, plaintiffs alleged claims of defamation, intentional infliction of emotional distress, malicious prosecution, violation of the Illinois Constitution, violation of the United States Constitution, and loss of consortium. The trial court granted summary judgment in favor of the City and Uhlir. Subsequently, the trial court entered judgment in favor of plaintiffs against defendant Nancy A., and plaintiffs voluntarily dismissed their claims against the remaining defendants. Plaintiffs appeal the trial court's determination to grant the City and Uhlir's motion for summary judgment, contending that the trial court erred in granting that motion. We affirm.

¶ 3 I. Background

¶ 4 The pleadings, depositions, affidavits, and judicial admissions reflect that, in 2006, plaintiff Tamara Trombetta was employed as a substitute teacher with Wheaton School District #200. In March of that year, Tamara's daughter, Stephanie, began spending time with defendant, Brandon A. Both Stephanie and Brandon were in the eighth grade. Brandon was in the company of Tamara and

Stephanie several times throughout March and April of 2006, including one evening when Brandon stayed at the Trombetta's house as a guest of Tamara's son, Anthony Trombetta.

¶ 5 On April 27, 2006, defendant Nancy A., Brandon's mother, reported her concerns to the Edison Middle School that Tamara was spending a lot of time with Brandon. Nancy A. reported that Tamara and Brandon had spoken during a late night phone call during which Tamara's voice sounded slurred. On April 29, 2006, Nancy A. reported her concerns to the Wheaton police department and stated her belief that Tamara had possibly sexually abused Brandon. Later that same day, police officers interviewed Brandon, but Brandon denied any inappropriate contact or behavior. Later that same evening, Nancy A. brought Brandon back to speak with the officers, stating that Brandon had been embarrassed earlier and wanted to provide more information. Brandon told the officers that Tamara frequently played with his hair and had asked if he was sexually active. Brandon also said that Tamara tackled him on one occasion for about 20 seconds and began rubbing her body on his buttocks area. Brandon told the police officers that he believed that Samantha M. had recorded the incident. The next day, Nancy A. brought Brandon back to the police department, informing the officers that Brandon had additional information. Brandon stated that Tamara was aware that he had consumed part of a beer the night he stayed at the Trombetta household. Brandon also stated that Tamara allowed him to drive her vehicle around the subdivision on a separate occasion. Finally, Brandon stated that Tamara had placed her hand on his penis and testicles on three occasions.

¶ 6 On May 1, 2006, a Wheaton Police Commander Joseph Eversole directed defendant Uhlir, a police officer with the Wheaton police department, to lead the investigation. Uhlir spoke with Nancy A. and Brandon after reviewing the case report, and Brandon told Uhlir that he and Tamara would have private lunches together at school. Uhlir contacted DCFS investigator Earl Modesto and

asked if he could have first access to the witnesses. Modesto agreed and asked Uhlir to provide him with any information he obtained.

¶ 7 Uhlir contacted Samantha M. regarding a recording she made of Tamara allegedly tackling Brandon. Samantha M. told Uhlir that she saw Tamara and Brandon wrestling on the floor, but did not see Tamara touch Brandon inappropriately. Samantha M. also told Uhlir that the wrestling ended before she began recording, and that she recorded only Anthony using bad language and throwing things at Tamara. Samantha gave Uhlir the memory chip from her camera.

¶ 8 Uhlir met with Addison E., a middle school student, who testified during his deposition that he believed that the police had preconceptions about Tamara's conduct, but he did not remember anything specific that led him to this conclusion. Addison testified that he could not remember any questions that Uhlir asked him or what Uhlir said was on Samantha's video. In addition, Uhlir met with Dana Z., Katherine H., Spencer R., and Isha I., who were also middle school students.

¶ 9 On May 11, 2006, Uhlir met with Tamara at her attorney's office. Uhlir asked Tamara several questions regarding Brandon's allegations and asked whether she was aware that Nancy A.'s family had received death threats. Tamara denied any inappropriate contact with Brandon and having any knowledge pertaining to the death threats. Tamara agreed to submit to a polygraph test. Defendants Brad Beeler and Preston Tackett administered the polygraph test. Following the test, Beeler told Tamara that she did not pass the polygraph test. Although Uhlir was not present during the test, he was in a room with Tamara and Beeler following the test and discussed Tamara's performance. Uhlir was told in Tamara's presence that Tamara admitted touching Brandon's groin during the polygraph test. Tamara denied making these statements, instead claiming that the questions were confusing. Uhlir did nothing further to investigate the case, but provided his reports

to Modesto and reviewed the case with the State's Attorney's office. No criminal charges were brought against Tamara, and the case was closed on August 29, 2006.

¶ 10 In September 2006, Uhlir called Estelle P. regarding alleged death threats that had been made toward Brandon. Uhlir explained that he was investigating the possibility that the alleged threats toward Brandon had been made from Estelle's daughter's phone and asked Estelle for permission to question her daughter. Uhlir told Estelle that he had obtained a video recording as part of his investigation of Tamara's alleged molestation. Uhlir did not tell Estelle what was on the recording, but allegedly stated that he would not allow his daughter to go to the Trombetta home.

¶ 11 On August 16, 2006, apart from the police investigation, DCFS entered a notification of indicated decision against Tamara for sexual molestation. An administrative hearing in that proceeding commenced on January 18, 2007. Modesto testified that his only source of information regarding the indication was provided by Uhlir, and Uhlir told him that Tamara admitted to certain allegations of inappropriate behavior during her polygraph test. Modesto testified that normal protocol would have included "victim sensitive interviewing" techniques. Modesto testified that he believed that Uhlir used victim sensitive interviewing and that Uhlir asked him to stay away while he completed his investigation. Uhlir admitted that he was unfamiliar with victim sensitive interviewing and had not employed such a technique during his investigation. Nancy A. testified that Uhlir admitted mishandling the case and said it had an impact on the State's Attorney's decision not to file charges. On February 23, 2007, DCFS vacated its indication and cleared Tamara of the accusations.

¶ 12 On April 27, 2007, plaintiffs filed their complaint. As amended, plaintiffs' complaint against the City and Uhlir alleged causes of action for defamation, intentional infliction of emotional

distress, malicious prosecution, a violation of the Illinois Constitution, a violation of the United States Constitution, and loss of consortium.

¶ 13 During her deposition, Tamara testified that Wheaton police officers stalked her between 2006 and 2007. She testified that the officers waited for her as she picked her children up from school and followed her through town. Tamara's therapist testified during a deposition that he observed a police car behind Tamara's car on one occasion as she turned into his office parking lot. Dana Z. testified that she observed a police car following Tamara's car on at least two occasions while she was riding with Tamara, opining "I just remember it seeming like we got followed a lot in police cars when we were in the Trombetta's car."

¶ 14 On October 12, 2010, the trial court struck allegations from plaintiffs' first-amended complaint, concluding that the statute of limitations had expired on the new allegations and that those allegations did not relate back to the original complaint. The stricken allegations related to Estelle's statements regarding her conversation with Uhlir, where Uhlir allegedly cautioned that he would not let his child go to the Trombetta home.

¶ 15 On March 5, 2012, Uhlir and the City filed their motion for summary judgment. In response, plaintiffs attached the DCFS administrative hearing transcripts, which defendants moved to strike because the declarants were not unavailable and defendants did not have an opportunity to conduct a cross-examination. The trial court granted defendants' motion to strike the DCFS transcripts from the summary judgment record.

¶ 16 On May 1, 2012, the trial court granted Uhlir's and the City's motion. The trial court found that no genuine issues of material fact existed to support plaintiffs' allegations of defamation or intentional infliction of emotional distress. The trial court further noted that various types of tort immunity applied, stating that Uhlir's "entire investigative activities were all done during the scope

of his employment, during the time frame of his employment and under the color of his employment in regard to same." Accordingly, the trial court found that Uhlir's actions were within his discretionary authority and were therefore subject to immunity.

¶ 17 On July 18, 2012, the trial court entered a judgment in favor of plaintiffs against Nancy A. for approximately $258,000. Plaintiffs timely appealed.

¶ 18 II. Discussion

¶ 19 The only issue in this appeal is whether the trial court erred in granting summary judgment in Uhlir's and the City's favor. In support of their contention, plaintiffs argue that Uhlir and the City were not entitled to absolute immunity, immunity pursuant to the Local Government and Governmental Employees Tort Immunity Act (the Tort Immunity Act) (745 ILCS 10/2-201 *et seq.* (West 2006)), or the Abused and Neglected Child Reporting Act (the Reporting Act) (325 ILCS 5/9 (West 2006)). Plaintiffs further argue that the record contains several genuine issues of material fact that precluded summary judgment.

¶ 20 The sole function of a trial court in acting upon a motion for summary judgment is to determine whether a material question of fact exists. *Fritzsche v. LaPlante*, 399 Ill. App. 3d 507, 516 (2010). Summary judgment is proper when the pleadings, depositions, and affidavits on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Nelson v. Aurora Equipment Co.*, 391 Ill. App. 3d 1036, 1038 (2009). In reviewing a grant of summary judgment, we must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Mills v. McDuffa*, 393 Ill. App. 3d 940, 948 (2009). Summary judgment is a drastic means of disposing of a case and should not be granted unless the movant's right to judgment is clear and free from

doubt. *Id.* at 948. We review *de novo* an order granting summary judgment. *Nelson*, 391 Ill. App. 3d at 1038.

¶ 21 At the outset, we note that the trial court excluded from the record plaintiffs' allegation in their first amended complaint that Uhlir cautioned Estelle against letting his child visit the Trombetta household. The trial court also struck the transcripts from the DCFS hearing attached to plaintiffs' response to defendants' summary judgment motion, which included Modesto's testimony regarding Uhlir's alleged statement to Modesto regarding Tamara's purported admissions during the polygraph test. Plaintiffs do not contend that the trial court erred in excluding those items from the record or otherwise challenge those rulings on appeal. Accordingly, those claims are not properly before the court and we will not consider them. See *Kulchawik v. Durable Manufacturing Co.*, 371 Ill. App. 3d 964, 971 (2007) (holding that points not argued in an appellant's opening brief are waived). As a result, the trial court's rulings excluding those items from the record stand and those allegations and purported facts will not be part of the record before us when determining whether the record contains a genuine issue of material fact precluding summary judgment.

¶ 22 Turning to the remaining alleged questions of fact, we conclude that summary judgment in defendants' favor is proper. In granting summary judgment, the trial court repeatedly noted that plaintiffs' remaining assertions were merely "conclusory in nature" and created no genuine issues of material fact. In this appeal, plaintiffs attempted to create issues of material fact by presenting a distorted interpretation of the record facts. Plaintiffs assert that Uhlir told student witnesses that Tamara was guilty, but the record reflects only that certain students felt like Uhlir had preconceived notions regarding Tamara's guilt. Plaintiffs assert that Uhlir berated student witnesses for not telling the truth, but the record reflects only that Uhlir allegedly told a student's father that he thought the student was lying after the interview. Plaintiffs claim that Uhlir told Estelle he had videotape

evidence of Tamara's guilt, but the record reflects that Uhlir told Estelle he had obtained a video recording during the course of his investigation and that he made no representations regarding what was on the video recording. Plaintiffs assert that Uhlir stalked the Trombetta family because they felt like they were always being followed by the police, but there is nothing in the record to support the accusation that Uhlir was a part of any orchestrated effort to harass the Trombetta family. Plaintiffs assert that Uhlir failed to cooperate with the DCFS investigation, but the record reflects that Uhlir merely asked DCFS to let him conduct his investigation prior to the DCFS investigation and that Uhlir subsequently gave Modesto all of the notes from his investigation.

¶ 23 Despite the liberties plaintiffs have taken with the record facts, defendants would be protected by absolute immunity. Our supreme court has adopted the absolute immunity doctrine for government officials enunciated by the United States Supreme Court in *Barr v. Matteo*, 360 U.S. 564, 571 (1959). *Blair v. Walker*, 64 Ill. 2d 1, 10 (1976) (holding that the governor was protected from allegedly defamatory statements that were legitimately related "to matters committed to his responsibility"). Pursuant to the doctrine, an official of the executive branch of the federal, state, or local government cannot be held liable for statements made within the scope of his or her official duties. *Dolatowski v. Life Printing & Publishing Co., Inc.*, 197 Ill. App. 3d 23, 28 (1990). The doctrine originated as a defense against civil damages and "kindred torts." *Harris v. New-Sun*, 269 Ill. App. 3d 648, 651 (1995). The justification for the doctrine is to ensure that government officials are:

> " 'free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might

> appreciably inhibit the fearless, vigorous, and effective administration of policies of government.' " *Id.* at 651-62 (quoting *Barr*, 360 U.S. at 571).

The absolute immunity doctrine also shelters lower level officials because the "complexities and magnitude of governmental activity" require the delegation of authority regarding functions which are not made less important "simply because they are exercised by officers of lower rank in the executive hierarchy." *Morton v. Hartigan*, 145 Ill. App. 3d 417, 425 (1986) (quoting *Barr*, 360 U.S. at 573). The doctrine applies only to those discretionary acts which are unique to the particular public office. *Currie v. Lao*, 148 Ill. 2d 151, 167 (1992). Further, while absolute immunity should be narrowly applied, the doctrine provides a complete defense from civil actions, including allegedly defamatory statements that were made with malice. *Anderson v. Beach*, 386 Ill. App. 3d 246, 250 (2008).

¶ 24 In this case, the absolute immunity doctrine applies to the City and Uhlir, and therefore, those defendants are entitled to judgment as a matter of law. The proper record on appeal is devoid of any indication that Uhlir was ever acting outside the scope of his official duties as a Wheaton police officer when he engaged in the remaining acts of alleged police misconduct. On the contrary, that Eversole directed Uhlir to investigate the allegations that Tamara had an improper relationship with Brandon is undisputed.

¶ 25 Plaintiffs rely on our holding in *Stratman v. Brent*, 291 Ill. App. 3d 123 (1997), to support their argument that Uhlir recklessly spread false statements and that his conduct did not constitute discretionary actions unique to his position. In *Stratman*, the defendant, a police chief, allegedly told a former officer's prospective employer that the officer was mentally unstable and that he would not rehire the officer. *Id.* at 127. Initially, the reviewing court concluded that the doctrine of absolute immunity was not applicable because the record did not indicate that the defendant had a duty, as

police chief, to provide prospective employers with statements regarding former employees. *Id.* at 133. The reviewing court held that the plaintiff's injuries were not caused by the defendant's decision to provide information, but rather by the specific statements he allegedly chose to provide. *Id.* at 131. The reviewing court further held that the defendant's decision to provide information was not unique to his position as police chief because "decisions regarding what to tell prospective employers are made by all past employers." *Id.* Thus, the reviewing court concluded that the defendant "was not exercising his official discretion while making the alleged defamatory statements because his act was not unique to the office of police chief." *Id.*

¶ 26 Plaintiff's reliance on *Stratman* is misplaced. Unlike statements to a prospective employer regarding a former employee, the record in this case reflects that Uhlir had a duty to investigate both the allegations of sexual abuse against Tamara and the death threats Brandon allegedly received. Thus, because Uhlir had a duty to investigate and had absolute immunity as a result, *Stratman*'s holding that a police chief's statements to a prospective employer were not unique to his official capacity provides us with little guidance or persuasion.

¶ 27 Rather, we find *Harris,* 269 Ill. App. 3d 648*,* instructive. In that case, the plaintiff sued a newspaper, the Zion police department, and a detective for libel and intentional infliction of emotional distress over comments the detective told a reporter from the newspaper regarding crimes the plaintiff and her husband had allegedly committed, including a comment that a search of the plaintiff's home revealed pornographic materials. *Id.* at 649. The defendants moved to dismiss the complaint pursuant to the doctrine of absolute immunity. *Id.* at 649-50. The reviewing court affirmed the trial court's dismissal of the plaintiff's complaint. *Id.* at 652. In doing so, the reviewing court held that the police detective was acting within his duties when speaking to the reporter because his official job duties included speaking to the media regarding investigations in which he

was involved, and he spoke to the newspaper reporter in his official capacity as a police department spokesperson. *Id.* at 652-53. The reviewing court further noted that the detective was in charge of the investigation involving the plaintiff, and that his statements to the newspaper reporter were related to the investigation. *Id.* at 653.

¶ 28 Similarly, in this case, the record reflects that Uhlir had a duty to investigate the sexual abuse allegations, and the actions Uhlir undertook were done in his official capacity as a Wheaton police officer. Thus, like the defendants in *Harris*, defendants here were cloaked with immunity for their actions. See *id.*

¶ 29 We also find support for our determination in *Anderson v. Beach*, 386 Ill. App. 3d 246 (2008). In *Anderson*, the reviewing court considered whether allegedly defamatory statements and other disclosures made by the defendant, a police officer, about the plaintiff, also a police officer, were privileged. *Id.* at 247. The statements concerned alleged wrongdoing by the plaintiff, and included a letter the defendant had sent to officers outside the chain of her command. *Id.* The defendant maintained that her statements were protected by an absolute privilege. *Id.* at 250. Distinguishing *Blair*, the reviewing court concluded that the defendant's statements were not entitled to an absolute privilege from a defamation suit because the defendant was not acting within her official capacities when she revealed the letter to officers outside the chain of her command. *Id.* The reviewing court noted that the defendant did not argue that police department rules required her to report misconduct of another officer to colleagues. Instead, the defendant merely argued that her actions should be absolutely privileged because it was "sound policy" to immunize a public official's criticism of another public official where the criticism is reasonably related to job duties. *Id.* The reviewing court rejected this argument, concluding that the class of cases of where

defamatory statements were absolutely privileged was narrow and generally limited to certain legislative and judicial proceedings. *Id.*

¶ 30 Applying the absolute immunity doctrine to Uhlir and the City is consistent with the holding in *Anderson*. While we are cognizant that an absolute privilege from allegedly defamatory statements should be narrowly applied, the circumstances in this case warrant that Uhlir's statements should be cloaked in immunity. Unlike the defendant in *Anderson*, who did not argue that her statements and disclosures were made pursuant to police department rules, Uhlir testified that his actions in this case were conducted pursuant to his investigative duties as a detective with the Wheaton police department. Plaintiffs cannot point to anything in the record that the trial court did not strike to rebut this testimony to defeat absolute immunity.

¶ 31 We further emphasize that affording Uhlir and the City absolute immunity is consistent with the spirit and purpose of that doctrine, as described by the United States Supreme Court in *Barr*. The *Barr* Court noted that the doctrine is intended to ensure that government officials can perform their duties without fear of damage suits, which could inhibit the "fearless, vigorous, and effective administration of government policies." See *Barr*, 360 U.S. at 571. Here, Uhlir was investigating allegations of child abuse and acted within his official duties at all times.

¶ 32 In sum, the proper record before us does not contain a genuine issue of material fact as to whether Uhlir had a duty to investigate the child abuse allegations against Tamara; and further, that Uhlir was acting within his official capacity when he committed misconduct that plaintiffs allege gave rise to liability. Because there is no genuine issue of material fact that Uhlir and the City were entitled to immunity under the absolute immunity doctrine, the trial court properly entitled them to judgment as a matter of law. See *Loniello v. Fitzgerald*, 42 Ill. App. 3d 901-02 (1976) (concluding that the defendant was entitled to summary judgment because the record reflected that absolute

immunity applied to his allegedly defamatory statements). Further, because we conclude that absolute immunity applies, it is not necessary for us to consider whether Uhlir's and the City's statements and actions were privileged under the Tort Immunity Act or the Abused Child Reporting Act. See *id.* at 902.

¶ 33 III. Conclusion

¶ 34 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 35 Affirmed.