

STATE OF MICHIGAN
COURT OF APPEALS

STEPHEN LOVELY,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED

June 21, 2007

No. 271404

Gogebic Circuit Court

LC No. 06-000109-CZ

Before: Fitzgerald, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiff, an inmate at the Ojibway Correctional Facility, appeals as of right from the trial court's order dismissing his complaint, with prejudice, against a Department of Corrections (DOC) library employee, and ordering plaintiff to pay costs of \$60. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

From plaintiff's unclear assertion of facts, we gather that he seeks more than \$2 million in damages because his prison's assistant law librarian would not loan his library copy-account money so he could make photocopies of his legal documents. Plaintiff also took umbrage at the librarian's failure to notarize his legal documentation because she neglected to bring her equipment, and that she left the library on a day when he was scheduled to receive copying service. Plaintiff brought claims of both negligence and fraud. The trial court ruled that defendant failed to establish any conduct that would rise to the level of gross negligence or an intentional tort, so plaintiff's claim was irremediably flawed. The trial court also ruled that the lawsuit was frivolous. The court awarded defendant \$60 in costs.

Plaintiff argues that the trial court erred by dismissing his fraud claim, denying him an opportunity to amend the complaint, and awarding costs to defendant. We disagree with plaintiff's arguments. In accordance with the prison litigation reform act (PLRA), MCL 600.5501 *et seq.*, the trial court appropriately reviewed the complaint to determine whether the DOC employee was immune from liability and whether the complaint was frivolous. MCL 600.5509(2)(a) and (b). We review *de novo* a trial court's decision on a motion for summary disposition or a question regarding the applicability of governmental immunity. See *Anderson v Myers*, 268 Mich App 713, 714; 709 NW2d 171 (2005); *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). Although plaintiff's complaint and its supporting materials must be examined in a light most favorable to plaintiff, *Herman, supra* at 143-144, we are not bound by plaintiff's choice of labels for his action. *Johnston v City of Livonia*, 177 Mich App 200, 208;

441 NW2d 41 (1989). “The gravamen of plaintiff’s action is determined by considering his entire claim, and he may not avoid the requirements of the PLRA by artful pleading.” *Anderson, supra* at 715-716.

Viewed in this manner, we reject plaintiff’s argument that the DOC library employee is not entitled to immunity because his complaint purports to allege a claim for fraud. A governmental employee is immune from tort liability while acting in the course of employment if:

(a) The . . . employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The . . . employee’s . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage. [MCL 691.1407(2).]

However, if plaintiff’s complaint alleges an intentional tort against a governmental employee, then immunity does not apply. *Lavey v Mills*, 248 Mich. App. 244, 257; 639 N.W.2d 261 (2001); MCL 691.1407(3). Actual fraud is an intentional tort, *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 368; 532 NW2d 541 (1995), and its elements are:

(1) that defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery. [*Hi-Way Motor Co v Int’l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976), quoting *Candler v Heigho*, 208 Mich 115, 121; 175 NW 141 (1919).]

Therefore, plaintiff’s fraud claim required him to demonstrate that the assistant librarian deceptively made a representation to him with the desire that he would rely on it, and then plaintiff in turn relied on the representation to his detriment. *Id.* It is important to note that “[f]raud will not be presumed but must be proven by clear, satisfactory and convincing evidence.” *Id.*

Plaintiff’s primary claim does not sound in fraud, and the facts he alleged could never support a fraud claim. Although the DOC library employee made representations to him about library rules, and although some of those rules could have been misunderstood or misconstrued, none of the representations about the rules were intended to deceive plaintiff into taking injurious action in compliance with the representations. In fact, the assistant librarian enforced the rules contrary to plaintiff’s desires, and he demonstrated no willingness to rely on the assistant librarian’s interpretation of the rules or conform to them at all. However, his incarceration severely limited his freedom to disregard the assistant librarian’s interpretation. If the

interpretation was flawed in any way, that misinterpretation was mere negligence. Similarly, plaintiff fails to point to any source that would suggest that the assistant librarian owed him a duty to investigate the rules to the fullest and inform him of every available option for meeting his photocopying needs. Instead, plaintiff offered evidence that he filed several grievances citing the internal procedures with abandon and claiming that the DOC library employee refused to process loans for him to obtain photocopies of legal documents.

Considered in its entirety, plaintiff's complaint is that the DOC library employee was responsible for photocopy activities, but failed to follow the operating procedure for processing loans for prisoners when performing her duties. Contrary to plaintiff's argument on appeal, the employee's alleged failure to follow proper procedure does not constitute an ultra vires act, but rather the interpretation and enforcement of that procedure fits well within her range of duties. See generally *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 407-410; 605 NW2d 690 (1999). Thus, accepting the allegations in plaintiff's complaint and the supporting materials, the trial court properly held that the gravamen of plaintiff's claim concerned actions within the scope of the DOC employee's duties that were not grossly negligent and did not, in substance, constitute fraud. Plaintiff fails to demonstrate how, under these facts, amending the complaint would have provided him any benefit. Therefore, we affirm the trial court's dismissal of plaintiff's complaint, with prejudice, pursuant to MCL 691.1407(2) and MCL 600.5509(2)(b).

Plaintiff also fails to establish any basis for disturbing the trial court's award of \$60 in costs under MCR 2.625(A)(1) and (F)(1). Although part of the request was labeled "nominal attorney fees," substantively, the entire request was based on costs authorized by MCL 600.2441. Moreover, we find no support for plaintiff's claim that he was denied due process. Notwithstanding the reference to "session" in the trial court's orders, the record does not indicate that the trial court conducted any hearing regarding the motions. Under MCR 2.119(E)(3), a trial court has discretion to dispense with oral arguments on motions. The opportunity afforded to plaintiff to oppose the requested costs and seek reconsideration of the trial court's decision at his later motion hearing fully afforded plaintiff due process, even though the trial court did not expressly rule on each argument plaintiff proffered. See *Paschke v Retool Industries (On Rehearing)*, 198 Mich App 702, 706; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502 (1994). Unlike *People v Herrera (On Remand)*, 204 Mich App 333, 339; 514 NW2d 543 (1994), because plaintiff's civil complaint was not an attempt to assert constitutionally protected liberty interests, due process did not require that the trial court consider plaintiff's ability to pay. "[O]nce admitted to the courthouse, an indigent person, like any other litigant, can be liable for taxed costs as a nonprevailing party." *Wells v Dep't of Corrections*, 447 Mich 415, 420; 523 NW2d 217 (1994).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ David H. Sawyer

/s/ Peter D. O'Connell