

STATE OF MICHIGAN
COURT OF APPEALS

LACONDA HICKS, ED. D.,

Plaintiff-Appellee,

v

SHERI WASHINGTON and WILLOW RUN
COMMUNITY SCHOOLS,

Defendants-Appellants.

UNPUBLISHED
February 5, 2013

No. 309148
Washtenaw Circuit Court
LC No. 10-679-CD

Before: WHITBECK, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Defendants appeal from the trial court's decision denying their motion for summary disposition based on governmental immunity. Though the underlying case involves several claims, only plaintiff's defamation claim is at issue on this appeal. We reverse in part because Willow Run Community Schools (WRCS) is protected by governmental immunity. In addition, Washington is entitled to immunity for actions taken in her official capacity as president of WRCS school board, but the trial court was correct to deny her claim of immunity for actions allegedly taken in her capacity as a private citizen.

I. FACTS

Plaintiff began working for defendant WRCS in September 2007, as its Director of Special Education. She claims that she adequately performed her job duties. Plaintiff alleges that on September 15, 2009, she was assaulted, "verbally and otherwise," by defendant Washington, who was the president of the school board for WRCS. Plaintiff reported this incident to the Washtenaw County Sheriff's Department, and claims that Washington in turn insisted that WRCS hire an investigator to scrutinize plaintiff. Plaintiff alleges that the investigation revealed nothing, but that she was suspended and later terminated on May 25, 2010.

Plaintiff further claims that after her employment was terminated, defendants posted on the internet and provided future employers with false information about plaintiff and her employment history with WRCS. In particular, plaintiff alleges that a memo written by Washington detailing reasons that Washington was recommending the board terminate plaintiff's employment was released to local news media. This memo alleged that plaintiff had committed fraud, theft, and ethical and professional misconduct. Plaintiff also claims that after she applied

for a job with Detroit Public Schools (DPS), but before WRCS terminated her employment, WRCS responded to an inquiry from DPS by stating that “[t]here are currently concerns pending, but there has not been a hearing substantiating charges of misconduct.”

Plaintiff also provided evidence that Washington was personally involved in running a website called Willow Run Watchdog, which posted a number of comments and articles critical of plaintiff and other employees of WRCS. This website was not sanctioned by or affiliated with WRCS. While plaintiff has produced documents showing that Washington administrated the website and posted comments and articles, Washington did not make any reference on the website to her official position in the district or even use her name in any postings.

Defendants filed a motion under MCR 2.116(C)(10) seeking summary disposition, among other reasons, on the basis that Washington was absolutely immune from plaintiff’s defamation claim under MCL 691.1407(5) and that WRCS was immune under MCL 691.1407(1). The trial court denied the motion, without stating specific reasons regarding defendants’ claims of immunity. Defendants appeal only that portion of the order rejecting their claims of immunity.

II. STANDARD OF REVIEW

Although the motion below was couched in terms of MCR 2.116(C)(10), it is more properly considered under MCR 2.116(C)(7) because both parties are claiming only immunity. However, the standards for both rules are “essentially the same.” *Hanley v Mazda Motor Corp*, 239 Mich App 596, 599 n 3; 609 NW2d 203 (2000). The Court accepts all well pled allegations as true and construes them, along with any documentary evidence, in favor of the non-moving party. *Id.* at 600. Summary disposition is appropriate if there is no genuine issue of material fact. *Id.*

III. WRCS’S GOVERNMENTAL IMMUNITY CLAIM

Under MCL 691.1407(1), “a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.” Our Supreme Court considered this provision in *Ross v Consumers Power Co*, 420 Mich 567; 363 NW2d 641 (1984), and determined that “a governmental function is an activity which is expressly or impliedly mandated or authorized by constitution, statute, or other law.” *Id.* at 620. Thus, “[w]hen a governmental agency engages in mandated or authorized activities, it is immune from tort liability, unless the activity is proprietary in nature (as defined in [MCL 691.1413¹]) or falls within one of the other statutory exceptions to the governmental immunity act.” *Id.* The legislature later codified the *Ross* Court’s definition as follows: “‘Governmental function’ is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local

¹ “Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees.” MCL 691.1413.

charter or ordinance, or other law.” MCL 691.1401(b). The parties agree that WRCS’s activities were not proprietary in nature and that none of the statutory exceptions to immunity apply.

Therefore, the only question is whether WRCS’s alleged defamation of plaintiff occurred while WRCS was engaged in activities expressly or impliedly mandated or authorized by law. “The term ‘governmental function’ is to be broadly construed.” *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003). “The operation of a public school is a governmental function.” *Stringwell v Ann Arbor Public School Dist*, 262 Mich App 709, 712; 686 NW2d 825 (2004).

Plaintiff alleges that WRCS released a memo containing the charges against her to the media, posted false information about her online, and provided prospective employers with false information about her employment history. Releasing information to the media and responding to inquiries from other school districts are activities that are impliedly authorized by law as necessary to the functioning of a public school system. The public cannot make informed decisions about whom to elect to the school board, and cannot weigh in on school-related issues, unless the board keeps the public apprised of its activities. Therefore, communicating with the public must be impliedly authorized by law.

Washington may not have been authorized by law to anonymously post defamatory material on a private website, but WRCS would not be liable for those actions. “*Respondeat superior* liability generally can be imposed only where the individual tortfeasor acted during the course of his or her employment and within the scope of his or her authority. If either of these conditions is not met, a governmental agency cannot be held vicariously liable.” *Ross*, 420 Mich at 624. Washington did not post on the Willow Run Watchdog website in her capacity as school board president, and indeed appears to have tried to conceal her involvement with the website. Because those actions were outside the scope of her official duties, WRCS is not liable for them.

Plaintiff cites *Pardon v Finkel*, 213 Mich App 643; 540 NW2d 774 (1995), in which this Court held that a county and its off-duty police officers were not entitled to immunity for acts committed while the officers were engaged in crowd control under a contract with a private entity. However, the facts in the present case are entirely different. Plaintiff does not allege that any of the acts were committed under a contract with a private entity—there is no claim, for example, that WRCS was paid to have Washington post her views online.

Plaintiff also argues that immunity does not apply because defendants deliberately defamed her for the sole purpose of injuring her. Plaintiff cites *Gracey v Wayne Co Clerk*, 213 Mich App 412; 540 NW2d 710 (1995), which held that the actions of a county clerk that might normally fall within the scope of the clerk’s authority became acts outside that scope when deliberately performed to achieve an illegal purpose, relying on language in *Marrocco v Randlett*, 431 Mich 700, 713; 433 NW2d 68 (1988) that the intentional use or misuse of a badge of governmental authority for a purpose unauthorized by law is not the exercise of a governmental function. However, plaintiff fails to note that *Gracey* was explicitly abrogated by our Supreme Court in *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143; 560 NW2d 50 (1997). *American Transmissions* explicitly rejected any consideration of an actor’s subjective motives. The Court held that there is no malevolent-heart or intent exception in MCL 691.1407, and made clear that *Marrocco* should not be read to create one. 454 Mich at 143-144.

Because all of the actions that may be imputed to WRCS constituted the discharge of governmental functions, and none of the statutory exceptions apply, WRCS is immune from liability for plaintiff's defamation claim.

IV. WASHINGTON'S CLAIM OF ABSOLUTE IMMUNITY

Under MCL 691.1407(5):

A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

Plaintiff does not dispute that WRCS is a "level of government," and this Court has previously held that school districts constitute levels of government. *Nalepa v Plymouth-Canton Community School Dist*, 207 Mich App 580, 587; 525 NW2d 897 (1994). That case also held that board members are the elective executive officials of their level of government, which plaintiff also does not dispute. *Id.* at 587-588.

Plaintiff disputes only whether Washington was acting within the scope of her executive authority when she allegedly defamed plaintiff. Plaintiff argues that deliberate misconduct does not fall within the scope of an official's authority. As discussed above, *Gracey*, supports plaintiff's position but was overruled by *American Transmissions*. In *American Transmissions*, the Supreme Court held that the attorney general was acting within the scope of his executive authority when he responded to questions about an investigation, regardless of his intentions. 454 Mich at 144. Similarly, it must be within a school board member's authority to speak to the public about issues affecting the school she is tasked with overseeing. Because there is no malevolent-heart exception to immunity, it does not matter whether Washington deliberately lied about plaintiff, only the context in which she did so.

To the extent that Washington was involved in official WRCS actions, such as responding to the inquiries from Detroit Public Schools, she is immune. However, some of plaintiff's claims involve Washington's involvement with the Willow Run Watchdog website. This website was not affiliated with or in any way sanctioned by WRCS. It does not appear that Washington used her name or title on the website, or in any way indicated that she was an officer for the district. Indeed, Washington went so far as to deny in her deposition that she knew who the website's administrator was, though plaintiff has since produced documents showing that Washington herself administered the website.

In this context, it does not appear that Washington's activities on the website can be considered to be within the scope of her authority as school board president, at least not based on the evidence to date. Her position as president must authorize her to speak officially with public about school issues, but her alleged secret involvement with a private website, not sponsored or endorsed by the school district, could hardly have been less official. "No officer, of course, is absolved from liability for his private and personal torts merely because he is an officer, and the question arises only where he performs, or purports to perform, his official functions." *Ross*, 420 Mich at 679.

Because, viewing the evidence in the light most favorable to plaintiff, defendant made allegedly defamatory statements about plaintiff while speaking as a private citizen and not as a government official, MCL 691.1407(5) does not fully bar plaintiff's defamation claim against defendant. Any statements Washington made in her official capacity as school board president are protected, including the memo containing the charges that led to plaintiff's firing and the response to the Detroit Public Schools inquiry. The publication of this official memo on the website does not alter its protected status. However, any statements made in plaintiff's private capacity on the Willow Run Watchdog Website are not protected.

V. CONCLUSION

The trial court should have granted summary disposition to WRCS on plaintiff's defamation claim, and should also have granted Washington summary disposition with regard to any alleged statements made in her official capacity as school board president, but correctly denied summary disposition with regard to any statements made in her private capacity including those posted on the Willow Run Watchdog website.

Reversed in part, affirmed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Henry Willaim Saad
/s/ Douglas B. Shapiro