STATE OF MICHIGAN

COURT OF APPEALS

NORMA MACKERSIE,

Plaintiff-Appellant,

v

PETER DIMMER and MARY KUULA,

Defendants-Appellees.

UNPUBLISHED
November 22, 1996

No. 164599
LC No. 91-17071-CL

Before: Marilyn Kelly, P.J., and O'Connell and D.A. Teeple,* JJ.

PER CURIAM.

Plaintiff appeals as of right the order of the circuit court granting summary disposition in favor of defendants. We affirm in part and reverse in part.

I

Plaintiff worked as a nurse at Oakdale Regional Mental Health Center, which is operated by the Department of Mental Health. In 1988, she represented to members of the Oakdale staff, among them defendant Mary Kuula, a nursing services supervisor, that certain employees were inappropriately administering behavior management drugs to patients. It appears that defendant Peter Dimmer, a clinical services supervisor, became aware of plaintiff's concerns, as well. At approximately the same time, however, plaintiff was implicated by other staff members in the same type of behavior.

Plaintiff's nursing services were provided to Oakdale pursuant to such a "clinical services contract." One of defendant Dimmer's job responsibilities was to make "preliminary decisions to enter into or terminate clinical services contracts." In September 1988, defendant received the approval of the director of Oakdale to terminate plaintiff's contract. On September 26, 1988, defendant Dimmer directed defendant Kuula to prepare a letter of termination with respect to plaintiff. The letter stated that

* Circuit judge, sitting on the Court of Appeals by assignment.

> [t]his action is being taken due to grave concerns expressed by several staff relating to the four recent instances of mishandling of the procedures on the use of behavior management drugs. It is believed that your influence and behavior . . . result[ed] in failures to follow procedures.

Defendant Dimmer signed the letter, which was then delivered to plaintiff.

Plaintiff brought suit.[1] She contended, first, that defendants had tortiously interfered with her economic relationship with Oakdale; second, that they had tortiously interfered with her contractual relations with Oakdale; third, that defendants had spread injurious falsehoods concerning plaintiff's actions with respect to behavior management drugs; and, fourth, that they had terminated her contract in reprisal for her exercise of her first amendment right to free speech, which reprisal, it was asserted, was in violation of 42 USC 1983. Upon defendants' motion, the circuit court granted summary disposition in favor of defendants with respect to all four counts.

II

Plaintiff first argues that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(7) with respect to her state law claims, i.e., the tortious interference claims and the injurious falsehood claim. Summary disposition pursuant to MCR 2.116(C)(7) is appropriate where, among other reasons, the claim is barred by immunity granted by law. Our review of a grant of summary disposition under MCR 2.116(C)(7) is de novo. *Nalepa v Plymouth-Canton Community School District*, 207 Mich App 580, 584; 525 NW2d 897 (1994). Examining the pleadings, depositions, affidavits, and other record evidence, this Court independently determines whether the nonmoving party possesses immunity from the claim asserted. *Id*.

At issue in the present case is whether defendants enjoyed governmental immunity. As set forth in MCL 691.1407(5); MSA 3.996(107)(5), "[j]udges, legislators, and the elective or highest appointive executive officials of all levels of government are immune from tort liability for injuries to persons . . . whenever they are acting within the scope of their judicial, legislative, or executive authority." This immunity, while "absolute," encompasses only those occupying the highest offices of their respective level and branch of government. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 592; 363 NW2d 641 (1984). For example, the Attorney General enjoys this absolute immunity, *American Transmissions, Inc v Attorney General*, 216 Mich App 119, 120-121; 548 NW2d 665 (1996), as do county clerks, *Gracey v Wayne Co Clerk*, 213 Mich App 412, 416-417; 540 NW2d 710 (1995), and county prosecutors. *Bischoff v Calhoun Co Prosecutor*, 173 Mich App 802, 806; 434 NW2d 249 (1988).

The Legislature, however, reflecting the distinction drawn by the *Ross* Court, distinguished between high level governmental officials and lower level government officers and employees. See *Bischoff*, *supra*, pp 804-805. In contrast to that immunity accorded those occupying the highest offices of each level of government, the Legislature provided the following grant of immunity for lower level officers and employees:

> each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer 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 officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. [MCL 691.1407(2); MSA 3.996(107)(2).]

School principals, teachers and counselors have been held to be lower level governmental employees, see *Nalepa*, *supra*, 593, as have police officers. See *Flones v Dalman*, 199 Mich App 396, 401; 502 NW2d 725 (1993).

In the present case, there exists no serious dispute that the defendants are lower level governmental employees as relevant to governmental immunity. Both defendant Kuula and defendant Dimmer were employees of the Department of Mental Health, which is to say, they were governmental employees. Because defendant Kuula answered directly to defendant Dimmer, it is clear that she did not occupy the highest office of the level of government in which she was employed. See *Ross*, *supra*. Similarly, because defendant Dimmer had to receive the approval of the director of Oakdale before taking actions such as terminating plaintiff's employment, it clear that defendant Dimmer did not occupy the highest office, either. *Id*. Therefore, the present analysis must focus on whether the qualified immunity accorded lower level governmental employees such as defendants bars the claims presently in issue.

Unfortunately, plaintiff's brief on appeal is little aid in conducting such an analysis. The bulk of authority advanced by plaintiff concerns only governmental immunity in the context of high level governmental officials, see, e.g., *Marrocco v Randlett*, 431 Mich 700; 433 NW2d 68 (1988); *Smith v Dep't of Public Health*, 428 Mich 540; 410 NW2d 749 (1987), aff'd on other grounds sub nom *Will v Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989), authority that is of little use when considering the immunity of lower level governmental employees. The balance of authority cited by plaintiff concerns older cases discussing the markedly different precursor of the present governmental immunity statute, see, e.g., *Flones, supra* (discussing cause of action arising before the 1986 amendment of the governmental immunity provision in issue), or are unpublished decisions of no precedential value. See MCR 7.215(c)(1). In short, plaintiff has directed this Court's

attention to no relevant authority. This Court will not search for authority to support a party's position. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). By failing to present an argument supported with pertinent legal authority, plaintiff has abandoned this issue on appeal.

However, were we to address the substance of plaintiff's argument on appeal, we would still affirm. Upon defendants' assertion of the defense of governmental immunity and motion for summary disposition, plaintiff had the burden of presenting evidence either that defendants were not acting and could not reasonably have believed that they were acting within the scope of their authority; that the governmental agency was not engaged in the exercise or discharge of a governmental function; or that defendants' conduct amounted to "gross negligence." MCL 691.1407(2); MSA 3.996(107)(2). Were plaintiff to succeed in making any of these showings, she would defeat defendants' motion for summary disposition on the basis of governmental immunity.

Plaintiff has challenged only the subsection addressing the scope of the governmental employee's authority.[2] Plaintiff contends that there exists a "bad faith exception" to governmental immunity, and that where a governmental employee is actuated by bad faith, that employee may not contend that he is acting within the scope of his employment or that he reasonably believes that he is. Here, it is submitted, defendants terminated plaintiff's employment because she "blew the whistle" on the improprieties of other employees. Hence, because defendants were motivated by bad faith, plaintiff argues that defendants were not acting within the scope of their employment and, accordingly, that they are not shielded by governmental immunity.

Plaintiff's argument fails for several reasons. First, there is no "bad faith exception" to governmental immunity. While a bad faith exception was recognized in the past, this was only in the context of the precursor to present MCL 691.1407; MSA 3.996(107). Since the statute underwent substantial amendment in 1986, no decision of which this Court is aware has recognized any type of bad faith exception.

Second, the evidence advanced by plaintiff would be insufficient to demonstrate bad faith for purposes of a motion for summary disposition. In support of her position that bad faith existed, plaintiff advances little more than a *post hoc ergo propter hoc* argument: because plaintiff's employment was terminated after she reported alleged violations, she was terminated because of this. Something more than this naked allegation must exist to remove plaintiff's contention from the realm of speculation. See *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). We refuse to recognize a basic logical fallacy as grounds for defeating a motion for summary disposition. As the record before us stands, we have evidence that it was reported to defendant Dimmer that plaintiff was engaged in improprieties, and was terminated because of this. Plaintiff has presented no contrary evidence, only conjecture that defendants were not motivated by this valid reason for terminating her, but instead were motivated by an illegitimate reason. Without some evidence to support this position, however, plaintiff's position necessarily fails.

In summary, because plaintiff has failed to refer this Court to binding authority supporting her position on appeal, defendant has effectively abandoned that position. Further, were we to address the merits of plaintiff's position, our disposition of this case would not change because, first, the main thrust

of her argument on appeal relies on outdated case law, and, second, she fails to support her position with more than speculation. While the dissent would focus on some sort of "intentional tort" exception to governmental immunity, we would note that plaintiff does not make such an argument, using the phrase "intentional tort" only once in her brief on appeal, and then only in passing. Therefore, we affirm the circuit court's grant of summary disposition pursuant to MCR 2.116(C)(7) with respect to plaintiff's state law claims.

III

Plaintiff's remaining claim is premised on 42 USC 1983: she claims defendants' actions in terminating her employment impinged on her constitutional right to freedom of speech. The circuit court quickly dispensed with this claim based on the somewhat similar case of *Kell v Johnson*, 186 Mich App 562; 465 NW2d 26 (1990), where it was held that a governmental employee could not be sued in his individual capacity for official acts. The court was, however, apparently unaware that *Kell* is no longer good law. See *Hafer v Melo*, 502 US 21; 112 S Ct 358; 116 L Ed 2d 301 (1991) (state officers may be sued in their individual capacities pursuant to 42 USC 1983 for actions taken in their official capacities). Therefore, the circuit court erred. Because the record on this issue is not developed, we are unable to conduct a meaningful review with respect to the alternative theories to affirm advanced on appeal by defendants, which may or may not have merit. Accordingly, we reverse on this issue.

IV

Finally, plaintiff argues that the circuit court erred with respect to one of its factual conclusions in deciding defendants' motion for summary disposition, specifically, the court's finding that plaintiff had not reported the alleged improprieties of other employees. The court reached this conclusion on the basis of testimony given by plaintiff in connection with a parallel suit. See n 1, *supra*. Because resolution of the issues on appeal does not require us to address this particular allegation of error, we decline to do so.

Affirmed in part, reversed in part.

/s/ Peter D. O'Connell
/s/ Donald A. Teeple

[1] It appears that plaintiff also filed a separate action against Oakdale and the Department of Mental Health, alleging breach of contract, violation of the Whistleblowers' Protection Act, MCL 15.361 *et seq.*; MSA 17.428(1) *et seq*., and a 42 USC 1983 action predicated on the alleged violation of her first amendment right to free speech. According to defendants, all counts were dismissed.

[2] While plaintiff, in her brief on appeal, also purports to address the subsection concerning the exercise of a governmental function, when reviewing her brief we fail to discern any substantive argument on this issue, and decline to address it further.