

STATE OF MICHIGAN
COURT OF APPEALS

FJN, L.L.C., FRANK'S HOLDINGS, L.L.C.,
GINO'S SURF, FRANK NAZAR, SR., and
FRANK NAZAR, JR.,

UNPUBLISHED
March 25, 2014

Plaintiffs-Appellees/Cross-
Appellants,

v

No. 313294
Macomb Circuit Court
LC No. 2012-002006-CZ

VIJAY PARAKH,

Defendant-Appellant/Cross-
Appellee,

and

CHARTER TOWNSHIP OF HARRISON,

Defendant-Cross-Appellee,

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Defendant Vijah Parakh, a building official for defendant Harrison Township, appeals as of right the trial court's order denying his motion for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity). Plaintiffs FJN, L.L.C., Frank's Holdings, L.L.C., Gino's Surf, Frank Nazar, Sr., and Frank Nazar, Jr., cross-appeal, challenging the trial court's decision granting summary disposition for Harrison Township on the basis of governmental immunity and also asserting that the trial court erroneously granted partial summary disposition for defendant Parakh. We affirm.

Plaintiffs own and operate a restaurant and banquet hall known as Gino's Surf or Gino's Surf Lounge in Harrison Township. In 2006, plaintiffs sought to renovate their property in two phases. In the spring of 2007, plaintiffs received site plan approval for Phase II, which they described as an antique car museum and restaurant. Plaintiffs planned a grand opening party at the newly renovated facility for February 6, 2009, and placed advertisements for the planned event in a local newspaper. On the date of the event, defendant Parakh hand-delivered a letter to plaintiffs advising them that a valid certificate of occupancy had not been issued for the new

area, and that the new area could not be opened to the public. Nevertheless, plaintiffs proceeded with the planned event.

Plaintiffs allege that on the evening of the event, defendant Parakh and other township officers arrived and told patrons that they were required to leave and that the business was being shut down. Plaintiffs allege that defendant Parakh subsequently prepared a report for the Harrison Township Board of Trustees and made other verbal statements that contained false and defamatory statements regarding plaintiffs and the events of February 6, 2009, and that defendant Parakh knowingly and intentionally caused plaintiffs to suffer a loss of business income by falsely reporting that plaintiffs' business was dangerous and unfit for human use.

In May 2012, plaintiffs filed this action against defendant Parakh and Harrison Township. Count I sought an order compelling defendants to issue a certificate of occupancy for plaintiffs' business. Counts II, III, and IV alleged claims for libel and slander based on defendant Parakh's allegedly defamatory statements against plaintiffs' business, and plaintiffs Nazar, Jr., and Nazar, Sr., respectively. Both defendants moved for summary disposition of the libel and slander claims on the basis of governmental immunity. The trial court granted the township's motion, but held that defendant Parakh was not entitled to immunity because there was a genuine issue of fact whether his conduct amounted to gross negligence that proximately caused plaintiffs' damages. Defendant Parakh now appeals the trial court's order denying him summary disposition, and plaintiffs cross-appeal the trial court's order granting summary disposition to the township.

We review de novo a trial court's decision to grant or deny summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Defendant Parakh moved for summary disposition under MCR 2.116(C)(7), which permits a court to grant summary disposition when a claim is barred by governmental immunity. *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). Whether a defendant is entitled to governmental immunity is a question of law, which we review de novo. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). When reviewing a motion under subrule (C)(7), the court must accept the allegations in the pleadings as true unless contradicted by evidence submitted by the parties. *Maiden*, 461 Mich at 119; *Tenneco, Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 443; 761 NW2d 846 (2008). Summary disposition under MCR 2.116(C)(7) is not appropriate where there is a material factual dispute. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008).

A government employee's entitlement to immunity from tort liability is governed by MCL 691.1407, which provides, in pertinent part:

(2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, 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 is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by

the volunteer 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.

(3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.^[1]

The trial court analyzed defendant Parakh's claim in accordance with the criteria in MCL 691.1407(2). The court ruled that "Parakh acted within the scope of his authority in writing the Report" and that this general activity related to "his inspection/investigation of possible violations of the Zoning Ordinance" and therefore, he "was involved in a governmental function." But the court ruled that defendant Parakh was not entitled to summary disposition because "the allegedly damaging statements in defendant Parakh's Report and his other alleged verbal statements are not limited to those connected to the lack of a certificate of occupancy" and "these other statements can be the proximate cause of plaintiffs' damages." Therefore, the court implicitly concluded that there was a genuine issue of material fact with respect to whether defendant Parakh was grossly negligent and whether his gross negligence was a proximate cause of plaintiffs' damages.

The problem with the trial court's analysis is that plaintiffs did not plead a negligent tort, but rather pleaded claims for libel and slander, which are intentional torts. See *Frohriep v Flanagan*, 278 Mich App 665, 667; 754 NW2d 912 (2008), rev'd in part on other grounds 483 Mich 920 (2009). As indicated, MCL 691.1407(3) expressly provides that "[s]ubsection (2) does not alter the law of intentional torts as it existed before July 7, 1986." In *Odom v Wayne Co*, 482 Mich 459, 479; 760 NW2d 217 (2008), our Supreme Court set forth the steps to be followed when a lower-ranking governmental employee or official claims entitlement to governmental immunity. The first step is to determine whether the plaintiff pleaded an intentional or negligent tort against the lower-ranking governmental employee or official. *Id.* The Court stated that the analysis prescribed in MCL 691.1407(2) applies only to negligent torts. *Id.* If the plaintiff pleads an intentional tort, the trial court must determine whether the defendant is entitled to individual governmental immunity under the test set forth in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 633-634; 363 NW2d 641 (1984). *Odom*, 482 Mich at 480; see also

¹ The trial court rejected Parakh's claim that he was entitled to immunity under MCL 691.1407(5), which provides immunity to an "elective or appointive executive official of all levels of government." Parakh does not challenge that decision on appeal.

Petripren v Jaskowski, 494 Mich 190, 224; 833 NW2d 247 (2013), and *Radu v Herndon & Herndon Investigations, Inc.*, 302 Mich App 363, 385-386; 838 NW2d 720 (2013). Immunity for intentional torts exists when (1) the employee acted during the course of employment and was acting, or reasonably believed he was acting, within the scope of his authority, (2) the acts were undertaken in good faith or without malice, and (3) the acts were discretionary rather than ministerial. *Odom*, 482 Mich at 480, citing *Ross*, 420 Mich 567.

The trial court erred by analyzing defendant Parakh's request for immunity under the test for a negligent tort set forth in MCL 691.1407(2), rather than the test set forth in *Ross*, 420 Mich 633-634, which governs entitlement to immunity for an intentional tort. But this Court will not reverse a trial court's decision when it reaches the right result for the wrong reason. See *Tipton v William Beaumont Hosp.*, 266 Mich App 27, 37-38; 697 NW2d 552 (2005). The principal difference between the two tests is that for negligent torts immunity applies if the defendant's conduct does not amount to gross negligence that proximately caused the plaintiff's damages, whereas for intentional torts, immunity applies if the defendant committed discretionary acts in good faith and without malice. See MCL 691.1407(2); *Odom*, 482 Mich at 480. However, the lack of good faith and gross negligence are similar in many respects. Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). The "good faith" test is a subjective standard. *Latits v Phillips*, 298 Mich App 109, 116; 826 NW2d 190 (2012). "[A] governmental employee does not act in 'good faith' if the employee acts 'maliciously or with a wanton or reckless disregard of the rights of another.'" *Radu*, 302 Mich App at 386, quoting *Odom*, 482 Mich at 474. Wilful and wanton misconduct requires an intent to harm or "such indifference to whether harm will result as to be the equivalent of a willingness that it does." *Odom*, 482 Mich at 475 (quotation marks and citation omitted).

The trial court's implicit gross negligence determination was based on the fact that defendant Parakh's statements went beyond the certificate of occupancy issue and defendant Parakh failed to contradict plaintiffs' falsity claims. The same reasoning shows that there is also a question of fact regarding whether defendant Parakh acted in good faith. When analyzing a summary disposition motion under MCR 2.116(C)(7), the court must accept the plaintiffs' allegations as true unless contradicted by the evidence submitted by the parties. *Maiden*, 461 Mich at 119. Plaintiffs alleged in their complaint that defendant Parakh made statements he knew were false with the intent to destroy plaintiffs' business, and defendant Parakh did not offer any evidence to support the truth of any of the statements except the lack of occupancy certificate and the advertised grand opening party. As the trial court recognized, defendant Parakh's report included numerous allegations of dangerous conditions that went well beyond opening without an occupancy certificate. Accordingly, we agree that there is an issue of fact whether defendant Parakh acted in good faith and without malice. Therefore, the trial court reached the correct result in denying defendant Parakh's motion for summary disposition.

In their cross-appeal, plaintiffs argue that the trial court erred by granting summary disposition to the township. We disagree. A governmental entity is immune from tort liability when exercising a governmental function, absent a statutory exception. MCL 691.1407(1); *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). There is no intentional tort exception for government entities. *Smith v Dep't of Pub Health*, 428 Mich 540; 410 NW2d 749 (1987), *aff'd sub nom Will v Mich Dep't of State Police*, 491 US 58 (1989);

Payton v Detroit, 211 Mich App 375, 392; 536 NW2d 233 (1995). Additionally, a governmental entity is entitled to immunity for an employee's conduct while engaged in a governmental function, within the scope of his employment. *Payton*, 211 Mich App at 393. But even if an employee was not engaged in a governmental function within the scope of his employment, a governmental entity cannot be liable for the intentional torts of employees. *Id.* As this Court explained in *Alexander v Riccinto*, 192 Mich App 65, 71-72; 481 NW2d 6 (1991), if the employee acted in good faith in the course of his employment, governmental immunity shields the entity, absent a statutory exception, and if the employee did not act in good faith or in the course of his employment, the entity is not vicariously liable for the intentional tort.

In the present case, although the trial court did not provide a clear analysis of the applicable law, possibly because it did not distinguish between negligent and intentional torts, the court held correctly that, as a matter of law, the township was not liable for defendant Parakh's alleged libel and slander. The facts indicate that defendant Parakh was either acting in bad faith outside the scope of his authority, in which case the township is not vicariously liable, or he was acting within the scope of his authority and carrying out a governmental function, in which case immunity applies to the township. See *Alexander*, 192 Mich App at 71-72. Therefore, the trial court did not err in granting summary disposition to the township.

Plaintiffs also argue that the trial court erred by granting partial summary disposition for defendant Parakh. In its opinion and order ruling on defendant Parakh's motion for reconsideration of the trial court's order denying him summary disposition, trial court stated that "plaintiffs' claims for libel and slander will be limited to defendant Parakh's statements unrelated to the use of the facility without a certificate of occupancy for the Phase II improvements."² The trial court did not err by imposing this limitation. It is the trial court's responsibility to exercise "reasonable control" over the presentation of evidence to effectively ascertain the truth and to "avoid needless consumption of time." MRE 611(a). The facts indicate that it was one of defendant Parakh's job responsibilities to ensure that plaintiffs were not using Phase II without a certificate of occupancy. However, as the trial court correctly noted, defendant Parakh's report contained statements that went beyond the issue of whether a violation occurred, and it is these statements that create a question of fact whether defendant Parakh acted in good faith and without malice. Although we affirm this limitation on plaintiffs' claims for libel and slander, we note that at some point, the trial court will need to determine which alleged statements fall outside that limitation.

² Plaintiffs actually argue that the trial court limited the liability of defendant Parakh in its September 20, 2012 Opinion and Order. However, that is not the case. Rather, in analyzing defendant Parakh's claim of immunity, the court stated that he was not entitled to immunity because "the allegedly damaging statements in defendant Parakh's Report and his other alleged verbal statements are not limited to those connected to the lack of a certificate of occupancy" and "these other statements can be the proximate cause of plaintiffs' damages." Therefore, it appears that the trial court did not decide to limit plaintiffs' claims until it issued its opinion and order regarding defendant Parakh's motion for reconsideration.

Finally, we respectfully disagree with the dissent's conclusion that defendant Parakh's report was absolutely privileged as a matter of law. The complaint contains a question of fact concerning whether defendant Parakh prepared the report solely for submission to the Harrison Charter Township Board of Trustees or whether he wrote the report with the intent to release it to the media. Given the lack of discovery, we are unable to conclude that the report was entitled to an absolute privilege. However, because the issue was raised below and the trial court did not decide it, defendant Parakh is not precluded from raising it again.

Affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Donald S. Owens
/s/ Douglas B. Shapiro