

STATE OF MICHIGAN
COURT OF APPEALS

STEPHEN W. WARDA,

Plaintiff-Appellee/Cross-Appellant,

v

CITY COUNCIL OF THE CITY OF FLUSHING
and CITY OF FLUSHING,

Defendants-Appellants/Cross-
Appellees.

UNPUBLISHED
December 23, 2003

No. 241188
Genesee Circuit Court
LC No. 98-062796-CZ

Before: O’Connell, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendants appeal as of right a declaratory judgment that awarded plaintiff the attorney fees he incurred in a separate criminal action. Plaintiff cross-appeals the trial court’s determination of those fees. We affirm in all respects.

This case arose when plaintiff signed a salvage vehicle inspection report for a damaged car while he was working as a police officer for defendant city. The report indicated the source of the car’s replacement parts and also verified that the numbers on the car and parts were correct. The report also contained plaintiff’s verification that he personally inspected the vehicle, the parts were on the vehicle, and all the safety features properly functioned. In fact, later inspections indicated that the car’s owner never put the parts on the car and attempted to defraud his insurance company by claiming that the repaired car was stolen and stripped of the new parts. Plaintiff later admitted that the parts were not on the car at the time of inspection. Following an investigation, criminal charges of filing a false report were levied against plaintiff and he retained several attorneys, including his brother, to defend against the action. Plaintiff did not ask the city to pay for his defense.

Plaintiff defended against the criminal charges by asserting that he was adhering to training provided by the Secretary of State’s Office, and he called an agent from that office to testify on his behalf. Plaintiff also presented evidence that the car may have been repaired and then damaged again in a second collision. The prosecutor then abandoned the theory that plaintiff had not properly verified the repairs, and concentrated on verification of the car’s safety features. But inspectors are police officers, not mechanics, so plaintiff demonstrated that the verification of safety features was not really anticipated by the Secretary of State’s Office and had no real meaning to the inspectors. Plaintiff explained that the Secretary of State’s Office

changed the report form shortly afterward and eliminated the language regarding safety equipment. A jury acquitted plaintiff. He then asked the city to pay his legal fees, and the city refused. This declaratory judgment action ensued. The trial court found that plaintiff worked as the city's employee during the inspection, the inspection was within the scope of plaintiff's employment and authority, and he acted in good faith. The trial court also found that defendant abused its discretion by refusing to reimburse plaintiff for his defense expenses.

The principal statute at issue is MCL 691.1408(2), which states in relevant part,

When a criminal action is commenced against an officer or employee of a governmental agency based upon the conduct of the officer or employee in the course of employment, if the employee or officer had a reasonable basis for believing that he or she was acting within the scope of his or her authority at the time of the alleged conduct, the governmental agency may pay for, engage, or furnish the services of an attorney to advise the officer or employee as to the action, and to appear for and represent the officer or employee in the action. An officer or employee who has incurred legal expenses after December 31, 1975 for conduct prescribed in this subsection may obtain reimbursement for those expenses under this subsection.

Defendant first challenges the applicability of the statute by arguing that the trial court erroneously found that plaintiff acted within the scope of his employment and authority when he inspected the damaged vehicle and filled out his inspection report. We disagree. A trial court's findings of fact are only reversed on appeal if they are clearly erroneous. MCR 2.613(c). "Generally speaking, factual findings are clearly erroneous if there is no evidence to support them or there is evidence to support them but this Court is left with a definite and firm conviction that a mistake has been made." *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999).

The salvage vehicle inspection system represented a mutually beneficial program involving incentives and obligations for plaintiff, the city, and its police department, and the Secretary of State's Office. The department encouraged plaintiff to participate in the plan, and he turned inspection fees he collected over to the department, which then removed taxes and paid him the remainder. During the inspections, plaintiff would occasionally wear a jump suit with his department insignia on it, and plaintiff regularly used the department's equipment to run LEIN checks. The department helped plaintiff maintain his certification, paid for his training, and permitted his use of equipment, stationary, and other resources. In return for plaintiff's participation, the city retained fees for its citizens' inspections. Under the circumstances of this case, the trial court did not clearly err when it found that plaintiff was employed by the city when he conducted his inspections. *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 688-689; 594 NW2d 447 (1999).

Having found an employment relationship existed during the inspections, it naturally follows that plaintiff had a reasonable basis for believing he acted within the scope of his employment and authority when he inspected the damaged vehicle and filled out the inspection report at issue. Therefore, the trial court did not clearly err when it held that the statute applied.

Defendants next argue that the trial court erred in determining that the city abused its discretion when it denied plaintiff reimbursement of his attorney fees. We disagree. A trial court's findings of fact are reviewed for clear error. *Bowens v City of Pontiac*, 165 Mich App 416, 420; 419 NW2d 24 (1988).

The statute states that the city "may" reimburse plaintiff for his criminal defense expenses. MCL 691.1408(2). Therefore, the statute gives the city discretion whether to pay plaintiff's fees. *Exeter Twp Clerk v Exeter Twp Bd*, 108 Mich App 262, 268-269; 310 NW2d 357 (1981). However, "it may constitute an abuse of discretion . . . to refuse to provide legal representation or to indemnify the official for legal expenses incurred where pressing necessity or emergency conditions require legal representation." *Id.* at 269-270. In *Exeter*, we held that "where it is factually demonstrated that pressing necessity or emergency conditions warrant a municipal official in employing legal counsel in a matter of official, public concern and legal services are provided without consent of the governing body, the courts may hold a municipal corporation liable for such legal services." *Id.* at 270.

We later held that the same analysis applies to legal expenses incurred in defending criminal charges. *Bowens, supra*. In *Bowens*, a city councilman incurred legal expenses defending false accusations of illegal gambling within his district. *Id.* at 417, 421. We held that the city abused its discretion in denying reimbursement for attorney fees incurred in securing his acquittal. *Id.* at 420. The plaintiff in *Bowens* acted reasonably, in good faith, and for a public purpose when he engaged in the activities that led to his prosecution. *Id.* at 419-420. Applying *Exeter, supra*, we held that the successful defense of a public officer from criminal charges represented a sufficient emergency and public concern to require reimbursement of the innocent official's attorney fees.

Finding no error in the trial court's conclusion that plaintiff exercised his official duties in good faith and was later acquitted of any wrongdoing, we apply *Bowen's* reasoning and hold that the city abused its discretion when it refused to reimburse plaintiff. We do not find any error in the trial court's calculation of reasonable attorney fees.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder