

STATE OF MICHIGAN
COURT OF APPEALS

BRUCE MAY,

Plaintiff-Appellee,

v

MIKE GREINER,

Defendant-Appellant,

and

MARK STEENBERGH,

Defendant.

UNPUBLISHED

October 19, 2006

No. 269516

Macomb Circuit Court

LC No. 05-001512-NO

Before: Murray, P.J., and O’Connell and Fort Hood, JJ.

PER CURIAM.

Defendant, Mike Greiner, appeals as of right the order denying his motion for summary disposition on the ground that he was not entitled to governmental immunity for the allegedly defamatory statements made about plaintiff, Bruce May. We reverse and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

The material facts of this case are not in dispute. Plaintiff is a member of the Warren Professional Fire Fighters Association, Local 1383 of the IAFF, AFL-CIO, and has been a firefighter with the city of Warren since 1992. In addition, plaintiff is an enlisted member of the United States National Guard and has over 20 years’ military service. In October 2003, plaintiff was called to active duty and deployed to the Middle East for ten months. Plaintiff did not apply for military leave, but instead, employed a collective bargaining agreement provision termed “trading of days,” or “buddy relief,” that provided for other firefighters in plaintiff’s department to work his schedule for him, apparently for supplemental pay of approximately \$200 a day from plaintiff. The provision generally permits employees to collect full pay and benefits during

leave, sick time or vacation time. Utilizing the provision enabled plaintiff to receive full and overtime pay and to retain benefits from the city, as well as to collect full military pay during his deployment.¹

In April 2004, the new Fire Commissioner for the city, Robert Vought, learned of this use of the “trading of days” provision and, believing it to be improper, immediately placed plaintiff on military leave. The city began an investigation into the matter. Defendant Greiner, Deputy Mayor of the city, with the approval of the city’s Mayor, defendant Steenbergh, issued a press release. From that release, two articles were published, one in the *Detroit Free Press* and the other in the *Macomb Daily*, referencing the program and plaintiff’s participation in it and citing comments by both defendants.

When defendants refused to retract their statements, plaintiff filed a complaint, alleging 1) defamation per se, 2) interference with a prospective business advantage, and 3) injurious falsehood. Plaintiff contended that defendants’ comments contained allegations of fraud and effectively accused him of criminal actions. Plaintiff also contended that defendants either knew that their statements about him were untrue or that they acted with reckless disregard of the truth.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). Defendant Steenbergh claimed that he had absolute immunity under MCL 691.1407(5) because he was the highest executive official of the city and his remarks were made in his official capacity as mayor and as representative of the city. Defendants also claimed that they were immune from liability under MCL 691.1407(2) because they were acting within the scope of their authority and were engaged in a governmental function. Defendants further asserted that plaintiff failed to plead gross negligence and that their actions did not constitute gross negligence. Defendants finally asserted that plaintiff’s suit was barred because their comments were protected by a qualified privilege as statements regarding matters of public concern, and because the comments did not specifically mention plaintiff.

Following a hearing on the motion, the trial court entered an opinion and order, granting in part and denying in part defendants’ motion for summary disposition. With regard to defendant Steenbergh, the trial court granted summary disposition pursuant to MCR 2.116(C)(7), concluding that he was acting within the scope of his executive authority and was absolutely immune from the lawsuit. With regard to defendant Greiner, the trial court denied summary disposition pursuant to MCR 2.116(C)(8) and (10), concluding that plaintiff adequately alleged gross negligence in his complaint and that there was a question of fact whether defendant Greiner’s statements constituted gross negligence.

Thereafter, the trial court rejected defendant Greiner’s motion for reconsideration, but stayed further proceedings pending the outcome of this appeal.

¹ It was reported that another employee was utilizing the same program to receive full pay from the city’s fire department while being employed full-time with a fire department in Knoxville, Tennessee.

II. Standard of Review

We review de novo both a trial court's decision on a motion for summary disposition and the trial court's statutory interpretation concerning the application of governmental immunity. *Carr v City of Lansing*, 259 Mich App 376, 379; 674 NW2d 168 (2003).² Summary disposition is properly granted under MCR 2.116(C)(7) when a claim is barred by immunity granted by law. *Downs v Saperstein Assoc Corp*, 265 Mich App 696, 698; 697 NW2d 190 (2005). The reviewing court must consider all submitted documentary evidence as well as accept as true the plaintiff's pleadings and construe them in the plaintiff's favor unless contradicted by the evidence. *Id.*

Furthermore, the primary goal of statutory interpretation is to identify and give effect to the Legislature's intent as expressed in the language of the statute. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). "If the language is unambiguous, 'we presume that the Legislature intended the meaning clearly expressed-no further judicial construction is required or permitted, and the statute must be enforced as written.'" *Id.*, quoting *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

III. Analysis

On appeal, defendant Greiner argues that he is entitled to governmental immunity pursuant to MCL 691.1407(2). We agree.

MCL 691.1407(2) governs immunity from tort liability for individual government officers and employees:

[E]ach officer and employee 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.

² The trial court determined defendant Greiner's motion pursuant to MCR 2.116(C)(8) and (10); however, because the motion was based on the applicability of governmental immunity, we analyze the issue under MCR 2.116(C)(7).

The trial court held that defendant Greiner satisfied the initial two prongs of the test, but that there was a question of fact regarding whether he acted with gross negligence. Defendant contends that he satisfies this third prong because plaintiff's complaint failed to allege gross negligence and his statements did not amount to gross negligence.³

The gross negligence exception to governmental immunity applies to individual employees, not to governmental agencies. MCL 691.1407(2). "The plain language of the governmental immunity statute indicates that the Legislature limited employee liability to situations where the contested conduct was substantially more than negligent." *Maiden v Rozwood*, 461 Mich 109, 122; 597 NW2d 817 (1999). The term "gross negligence" is defined by statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a); *Maiden, supra* at 122. This standard of care has also been described as "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004).

Plaintiff's complaint alleges that defendants "made their comments/prepared statements with either knowledge that same was false or with reckless disregard as to whether same was false" and "acted in bad faith in that said Defendant[s] made said comments either with knowledge of their falsity or in reckless disregard of their truth or falsity." Viewing these allegations in favor of plaintiff, we conclude, as did the trial court, that the complaint adequately informed defendants of the nature of the cause of action against them and sufficiently alleged that defendants engaged in grossly negligent conduct as that term is defined in the statute.

However, we disagree with the trial court's ruling that there was a question of fact regarding whether defendant Greiner's conduct amounted to gross negligence. Plaintiff asserted that defendant Greiner was grossly negligent in his statements to the press:

Deputy Mayor Mike Greiner said city rules require employees to take a military leave when called to duty. When on leave, the city pays the difference between military pay and what the employee would have earned while working for the city.

Greiner said Wednesday that the city suspects other Warren firefighters are abusing the system.

³ Relying, in part, on *Smith v Dep't of Public Health*, 428 Mich 540; 410 NW2d 749 (1987), defendant Greiner also asserts that there is no intentional tort exception to the doctrine of governmental immunity. However, *Smith* was not dealing with immunity for the intentional actions of individuals; instead, it was focusing on the matter of immunity for governmental agencies. *Id.* at 593-594. Thus, the holding of *Smith* does not stand for the proposition that individual governmental employees are immune from liability for all intentional torts and such an interpretation would conflict with the plain language of MCL 691.1407(3). See *Sudul v City of Hamtramck*, 221 Mich App 455, 483-484 (Murphy, J. concurring); 562 NW2d 478 (1997).

Under the so-called “buddy relief” system, the two employees who left the state continued collecting their salaries and benefits, while paying \$200 to any co-worker who filled in for them.

“We want a pound of flesh,” Deputy Mayor Mike Greiner said Wednesday. “The (administration’s) position is they owe us every cent for what they got working. It’s ill-gotten gains.”

Warren firefighter Bruce May, a National Guard reservist called to active duty and now stationed in Egypt, also used buddy relief.

The city placed him on military leave last week, and will pay him on the difference between his military salary and his regular firefighter earnings – instead of his full pay.

“To essentially pay someone to work for you,” Greiner asserted, “is not allowed.”

“This is a huge conspiracy. Thirty firefighters participated in relieving these two guys.”

Each could face discipline, and the city will pursue fraud charges against those involved if the city isn’t reimbursed for the salaries, health care benefits and pension contributions to Patterson and May, he said.

Plaintiff argued that defendant Greiner’s statements improperly accused him of criminal conduct and intentionally or recklessly omitted details of plaintiff’s actions, namely that he followed the requirements of the “buddy relief” system, that the company officer approved his use of the system, that the fire chief and fire commissioner had no objections to its use, and that use of the system actually saved the city money by not having to replace plaintiff with an overtime worker.

Here, there is no evidence that defendant Greiner’s conduct in issuing and making certain statements to the press constituted conduct so reckless that it demonstrated a substantial lack of concern for whether an injury resulted. As deputy mayor, it was proper for defendant Greiner to speak on behalf of the mayor and address issues regarding the city’s fire department in a press release. And, there was evidence that the press release was reviewed and approved by the mayor before it was released. Furthermore, there was evidence that the press release was issued after the city had commenced an investigation into the allegedly unauthorized use of the “buddy relief” system. Evidently, the investigation revealed, in part, that the contract provision allowed for “buddy relief” where firefighters would switch days, not trade hours for cash payments, and that the city required its employees to register for military leave. Given defendant Greiner’s authority and the information available to him at the time, his comments to the press cannot be characterized as grossly negligent.

Moreover, defendant Greiner’s statements must be viewed in context to determine if they can reasonably be understood as stating an actual fact about plaintiff. *Ireland v Edwards*, 230 Mich App 607, 618; 584 NW2d 632 (1998). Statements that are obviously “rhetorical hyperbole” are not actionable. *Id.*, quoting *Greenbelt Cooperative Publishing Ass’n, Inc v Bresler*, 398 US 6, 13-14; 90 S Ct 1537; 26 L Ed 2d 6 (1970). Defendant Greiner’s statement about a “conspiracy” was nothing more than an expression of disapproval at the extent of firefighter participation in the conduct, not an actual accusation against plaintiff. In addition, his statements such as “[w]e want a pound of flesh,” and “[i]t’s ill-gotten gains,” while colorful, do not rise to the level of reckless disregard. Particularly, considering that these statements were made in conjunction with information that was revealed as part of the investigation into the “buddy relief” system. Contrary to the trial court’s finding, no reasonable juror could conclude that defendant Greiner’s actions constituted reckless conduct demonstrating a substantial lack of concern for whether injury would result. See *Stanton v City of Battle Creek*, 466 Mich 611, 620-621; 647 NW2d 508 (2002); *Tarlea, supra* at 88. Therefore, we hold that the trial court erred in denying defendant Greiner’s motion for summary disposition on this ground.

Reversed and remanded for further proceedings consistent with this opinion.⁴ We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Peter D. O’Connell
/s/ Karen M. Fort Hood

⁴ We note that the parties failed to raise the applicability of MCL 691.1407(3) on plaintiff’s common law tort claims against defendant Greiner. See *Sudul, supra*, and *Lavey v Mills*, 248 Mich App 244, 257; 639 NW2d 261 (2001). Because a party may not merely assert error and leave it to this Court to make his argument and search for authority to support his position, *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959), we do not address the implications of this subsection of the governmental immunity statute on plaintiff’s claims.