

STATE OF MICHIGAN
COURT OF APPEALS

JOHN SCOTT HALL and MOBILE VIDEO
SALES & SERVICE, INC.,

UNPUBLISHED
June 17, 2008

Plaintiffs-Appellants,

v

SERGEANT TIMOTHY GREENE,
NORTHFIELD TOWNSHIP POLICE
DEPARTMENT, CHIEF CARL WATKINS, and
CAPTAIN MIKE ZSENYUK,

No. 276667
Washtenaw Circuit Court
LC No. 05-001063-CZ

Defendants-Appellees.

Before: Bandstra, PJ, and Talbot and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) and (10). We affirm.

This case involves a dispute concerning an in-car video recording unit that plaintiff John Scott Hall installed in a Northfield Township police vehicle. When the unit malfunctioned in the same manner as the unit it replaced, defendant Sergeant Timothy Greene of the Northfield Township Police Department (“the department”) investigated the matter. Interviews with Hall led Greene to conclude that Hall represented the replacement unit to be a new unit. Hall did nothing to clarify Greene’s apparent misunderstanding, and Hall was charged with attempting to obtain money by false pretenses, contrary to MCL 750.218(3)(a) and MCL 750.92. At the direction of defendant Captain Mike Zsenyuk, Greene sent an e-mail regarding the department’s investigation of Hall to the Michigan Association of Chiefs of Police listserv.¹ Plaintiffs thereafter filed suit against defendants alleging several intentional torts, which the trial court dismissed on the basis of governmental immunity under MCR 2.116(C)(7), and breach of contract, which the court dismissed under MCR 2.116(C)(10).

¹ A “listserv” automatically sends e-mails to multiple e-mail addresses on a mailing list. A person must subscribe to the mailing list in order to send and receive messages. See <<http://www.techterms.com/definition/listserv>>.

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court granted summary disposition for defendants on plaintiffs' tort claims under MCR 2.116(C)(7). In reviewing a motion for summary disposition under subrule (C)(7), we accept the contents of the complaint as true unless the moving party contradicts the plaintiffs' allegations and offers supporting documentation. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). We consider any affidavits, depositions, admissions, and other documentary evidence if the supporting materials are admissible into evidence. *Id.* In addition, we also review the applicability of governmental immunity de novo on appeal. *Bennett v Detroit Police Chief*, 274 Mich App 307, 310-311; 732 NW2d 164 (2006).

A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion under subrule (C)(10), we consider all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id.* at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for trial. *Id.* at 31.

The governmental immunity statute, MCL 691.1407(2), states, 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 . . . 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 . . . if all of the following are met:

(a) The officer . . . 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 . . . 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.

In *Sudul v City of Hamtramck*, 221 Mich App 455, 458; 562 NW2d 478 (1997), this Court held that "an individual employee's intentional torts are not shielded by our governmental immunity statute" The majority agreed with dissenting Judge Murphy's discussion of the governmental immunity statute, which stated as follows:

Subsection 2 of § 7 of the governmental immunity statute [MCL 691.1407], added by 1986 PA 175, effective July 7, 1986, sets forth governmental immunity "except as otherwise provided in this section [§ 7]" for individual employees of a governmental agency who are acting within the scope of authority, where the agency is engaged in the exercise or discharge of a

governmental function, and the individual's conduct does not amount to gross negligence. Thus, subsection 2 is not controlling in determining whether individuals are entitled to immunity if another subsection of § 7 applies. Subsection 3 of § 7 specifically provides that “[s]ubsection (2) shall not be construed as altering the law of intentional torts as it existed prior to the effective date of subsection (2).” Analysis under subsection 2 of § 7 is therefore unnecessary, and one need not go through the “hoops” of that subsection, including establishing gross negligence, to maintain intentional tort claims of assault and battery if before July 7, 1986, the intentional torts of assault and battery by individual governmental employees were not barred by governmental immunity. Governmental immunity simply would not be implicated. [*Id.* at 480-481 (Murphy, J.) (first set of brackets added).]

Thus, if a governmental employee is alleged to have committed an intentional tort not barred by governmental immunity before July 7, 1986, then governmental immunity does not protect the employee from the claim.

Recently, in *Frohriep v Flanagan*, 275 Mich App 456, 457, 473; 739 NW2d 645 (2007), rev'd in part 480 Mich 962 (2007), this Court determined that two individual government employees of the Michigan Department of Education (MDE), Jeremy Hughes and Frank Ciloski, were immune from liability for libel per se, interference with a business expectancy, intentional infliction of emotional distress, and invasion of privacy. This Court reasoned that “the MDE is a governmental agency that was engaged in the exercise or discharge of a governmental function” and that the plaintiffs alleged no facts tending to show that Hughes or Ciloski acted outside the scope of their authority or in a grossly negligent manner. *Id.* at 473.

On appeal, our Supreme Court reversed this Court's decision with respect to Hughes and Ciloski, stating in relevant part:

MCL 691.1407(2) does not apply to these defendants because they are individual government employees who are not provided immunity under MCL 691.1407(5),² and because the plaintiffs alleged intentional torts for which liability was imposed before July 7, 1986. MCL 691.1407(3) and *Sudul v Hamtramck*, 221 Mich App 455, 458 (Corrigan, J.); 480-481 (Murphy, J.) (1997). [*Frohriep v Flanagan*, 480 Mich 962; 741 NW2d 516 (2007).]

² MCL 691.1407(5) provides:

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.

Thus, our Supreme Court reaffirmed the directive that governmental immunity does not apply to government employees alleged to have committed intentional torts not barred by governmental immunity before July 7, 1986.

In this case, the trial court determined that the individual defendants, Sergeant Greene, Chief Watkins, and Captain Zsenyuk, were governmentally immune from liability for plaintiffs' tort claims because no reasonable trier of fact could conclude that these defendants acted with gross negligence. Governmental immunity does not bar plaintiffs' claims, however, because plaintiffs alleged intentional torts for which liability was imposed before July 7, 1986. See *Frohriep, supra*, 480 Mich at 962; *Frohriep, supra*, 275 Mich App at 457 (involving libel per se and interference with business expectancy); *Randall v Delta Twp*, 121 Mich App 26, 33-34; 328 NW2d 562 (1982) (intentional interference with economic relations and defamation); and *Belt v Ritter*, 385 Mich 402, 405-408; 189 NW2d 221 (1971) (malicious prosecution). Therefore, the trial court erred by granting summary disposition for Greene, Watkins, and Zsenyuk pursuant to MCR 2.116(C)(7) on this basis.³

Defendants argue that notwithstanding the inapplicability of governmental immunity, they were entitled to summary disposition because their communications enjoyed a "shared interest" qualified privilege. "Michigan law recognizes a qualified privilege as applying to communications on matters of 'shared interest' between parties." *Rosenboom v Vanek*, 182 Mich App 113, 117; 451 NW2d 520 (1989). The "shared interest" privilege "extends to all bona fide communications concerning any subject matter in which a party has an interest or a duty owed to a person sharing a corresponding interest or duty." *Id.* The elements of a "shared interest" qualified privilege are:

(1) good faith, (2) an interest to be upheld, (3) a statement limited in its scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner and to proper parties only. [*Prysak v R L Polk Co*, 193 Mich App 1, 15; 483 NW2d 629 (1992).]

A qualified privilege may be overcome by showing that the communication "was made with actual malice, i.e., with knowledge of its falsity or reckless disregard of the truth." *Id.* Whether a privilege exists is a question of law to be determined by the court. *Id.* at 14-15.

The e-mail that Greene sent to the Michigan Chiefs of Police listserv was protected by the "shared interest" privilege. It was sent in good faith to alert other police agencies of the results of the department's investigation of Hall and the impending charge against him. Hall had informed Greene that he serviced approximately 15 other police departments in the area. In

³ Plaintiffs do not argue that the trial court erred by granting summary disposition for the department based on governmental immunity. Plaintiffs conceded in the trial court that the department is immune because it is a government agency. Further, we express no opinion regarding whether Chief Watkins is entitled to absolute immunity under MCL 691.1407(5) (see note 2, *supra*) because the parties have not raised that issue on appeal. See also *Bennett, supra* at 319.

addition, Captain Zsenyuk testified that the e-mail was sent for the investigatory purpose of determining if other police agencies had experienced similar situations or wrongdoing. Although plaintiffs argue that Hall never told Greene that the replacement unit was new and that Greene lied in this regard, Hall admitted during his deposition that he did not attempt to clarify Greene's apparent misunderstanding that the unit was new. Hall testified that when Greene informed him that the unit was obviously used rather than new, he simply said "okay." Thus, there is no indication that the e-mail was sent in bad faith or with actual malice.

Moreover, the interests involved concerned the prosecution of Hall and informing other police agencies of the conduct to be charged against him. The e-mail was limited in its scope to these purposes, constituted a proper forum to address such an issue, and was limited in its publication to members of the Michigan Chiefs of Police listserv, persons with an obvious interest in the matter. Thus, the e-mail communication enjoyed a "shared interest" qualified privilege.

To the extent that plaintiffs' claims are premised on Greene's communications with the prosecutor via police reports, such reports also enjoyed a "shared interest" qualified privilege. In the reports, Greene indicated that Hall had told him during two interviews that the VCR was new. Hall denied making such a statement. Even if Hall did not specifically state that the unit was new, however, as previously discussed, he did nothing to correct Greene's apparent misapprehension that Hall was claiming to have installed a new unit in the police vehicle. When confronted with the allegation that the unit was used rather than new, Hall simply stated, "okay." Thus, the communications with the prosecutor were made in good faith and without actual malice.

Further, Greene's statements in the police reports were communicated to the prosecutor for the specific purpose of allowing the prosecutor to determine whether to charge Hall with a crime. The communications were limited to this proper purpose and the publication was limited to the prosecutor. Thus, Greene's communications with the prosecutor, similar to the e-mail, enjoyed a "shared interest" qualified privilege.

The "shared interest" qualified privilege was a defense to plaintiffs' claims of libel per se, *Prysak, supra* at 14-15, defamation, *Kefgen v Davidson*, 241 Mich App 611, 623 n 7; 617 NW2d 351 (2000), and tortious interference with a contract or advantageous business relationship or expectancy, *Joba Constr Co, Inc v Burns & Roe, Inc*, 121 Mich App 615, 639-640; 329 NW2d 760 (1982).

Although we have found no authority applying this qualified privilege as a defense to a malicious prosecution claim, the trial court properly granted summary disposition for defendants on this claim as well. To establish a malicious prosecution claim, a plaintiff is required to show that the defendant initiated a criminal prosecution against him "with malice or a purpose in instituting the criminal claim other than bringing the offender to justice." *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 378; 572 NW2d 603 (1998). As previously discussed, no evidence indicates that Greene acted with malice. Hall admitted that he did not attempt to explain that the replacement unit was not new as Greene obviously believed. Further, plaintiffs presented no evidence showing that Greene or any other defendant initiated the criminal charge against Hall for a reason other than to seek justice. Accordingly, summary disposition for defendants was proper under MCR 2.116(C)(10). Although the trial court granted

summary disposition under MCR 2.116(C)(7) based on governmental immunity, this Court will not reverse if the trial court reached the correct result for the wrong reason. *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 21; 684 NW2d 391 (2004).

The trial court also properly granted summary disposition for defendants on plaintiffs' breach of contract claim. Plaintiffs argue that an implied contract existed between the parties, which defendants breached. When an explicit contract does not exist, an implied contract may arise from the parties' conduct, language, or other circumstances evidencing their intent to contract. *Featherston v Steinhoff*, 226 Mich App 584, 589; 575 NW2d 6 (1997). The elements of an implied contract are identical to those of an explicit contract, namely (1) "parties competent to contract," (2) "a proper subject matter," (3) "legal consideration," (4) "mutuality of agreement," and (5) "mutuality of obligation." *Borg-Warner Acceptance Corp v Dep't of State*, 169 Mich App 587, 590; 426 NW2d 717 (1988), rev'd on other grounds 433 Mich 16 (1989). "Mutuality of agreement" or "mutual assent" is otherwise known as a "meeting of the minds." *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992). "In order to form a valid contract, there must be a meeting of the minds on all the material facts." *Id.* (citations omitted).

Here, the evidence failed to show a meeting of the minds regarding the price of plaintiffs' service, which comprised a material fact. In addition, the parties did not discuss the specifics of the transaction, including that the VCR needed to be replaced rather than repaired. Thus, there was no mutuality of agreement, as the trial court determined. At most, plaintiffs showed only that they had performed services for defendants during the previous three or four years. Such evidence was not sufficient to establish the existence of an implied contract. Accordingly, the trial court properly granted summary disposition for defendants on plaintiffs' breach of contract claim.

Affirmed.

/s/ Richard A. Bandstra

/s/ Michael J. Talbot

/s/ Bill Schuette