

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UNPUBLISHED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.

JANSEN, P.J. (*concurring in part and dissenting in part*).

I fully concur in the majority's conclusion that the circuit court properly granted summary disposition in favor of defendant Harrison Charter Township. I respectfully dissent, however, from the majority's conclusion that the circuit properly denied defendant Parakh's motion for summary disposition.

As the majority recognizes, the circuit court applied the wrong test to determine whether defendant Parakh was entitled to governmental immunity. Therefore, it cannot actually be said that the court found a jury-submissible question of fact concerning whether Parakh acted in good faith and without malice under the test of *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 633-634; 363 NW2d 641 (1984). At any rate, however, even if there did remain a genuine issue of material fact on this issue, I conclude that Parakh was entitled to summary disposition in this case.

As our Supreme Court explained in *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005), the elements of a defamation claim are:

(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication.

Thus, to be actionable, the defendant's allegedly defamatory communication must have been unprivileged. Whether a communication is privileged is a question of law for the court. *Stablein v Schuster*, 183 Mich App 477, 480; 455 NW2d 315 (1990).

In my opinion, Parakh's report to the Harrison Charter Township Board of Trustees was absolutely privileged as a matter of law. The report was made by a governmental official in the course of his employment and in furtherance of his official duties, and was prepared for submission to the local legislative body. *Domestic Linen Supply & Laundry Co v Stone*, 111 Mich App 827, 836; 314 NW2d 773 (1981); *Gidday v Wakefield*, 90 Mich App 752, 757-758; 282 NW2d 466 (1979); *Stewart v Troutt*, 73 Mich App 378, 384; 251 NW2d 594 (1977); see also *Powers v Vaughan*, 312 Mich 297, 304-305; 20 NW2d 196 (1945); *Kefgen v Davidson*, 241 Mich App 611, 620-621; 617 NW2d 351 (2000); *Chonich v Ford*, 115 Mich App 461, 466-469; 321 NW2d 693 (1982). Because Parakh's report was absolutely privileged, it is irrelevant that certain statements contained therein might have been made recklessly or even with malice. *Chonich*, 115 Mich App at 469; *Domestic Linen*, 111 Mich App at 835.

"Absolute privilege applies to matters of public concern in regard to which, as a matter of policy and the general welfare of society, persons should be allowed to express their views boldly and without fear of legal repercussions." *Chonich*, 115 Mich App at 469. If official communications such as Parakh's report were not cloaked with absolute immunity, the floodgates would open and all varieties of governmental inspectors would be required to defend against meritless defamation claims.

In addition, I conclude that Parakh's letter to plaintiff and alleged oral statements to plaintiffs' customers were not actionable in defamation. Parakh's letter to plaintiff was not a communication to a third party. *Mitan*, 474 Mich at 24. Moreover, the only potentially actionable oral statements identified in plaintiffs' complaint are those made on the evening of February 6, 2009, when Parakh allegedly told plaintiffs' customers "that they had to leave, that the business was being shut down, and other such pejorative statements, designed to destroy plaintiffs' business." Even viewing the facts alleged in the complaint as true, Parakh's statements "that [the customers] had to leave" and that "the business was being shut down" were not false and defamatory, as it is undisputed that Gino's Surf was operating without a valid certificate of occupancy at the time. Further, the claim that Parakh made "other such pejorative statements, designed to destroy plaintiffs' business" was insufficient to justify recovery because it did not identify the specific substance of the alleged statements. *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 77-78; 480 NW2d 297 (1991). For these reasons, I would remand for entry of judgment in favor of Parakh on plaintiffs' defamation claims.

/s/ Kathleen Jansen