

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL MCCARTHY,

Plaintiff-Appellant,

v

BROWNSTOWN TOWNSHIP, DIANE L.
PHILPOT, and EDWIN C. NEAL,

Defendants-Appellees.

UNPUBLISHED

April 20, 2010

No. 289651

Wayne Circuit Court

LC No. 07-731430-NZ

Before: MARKEY, P.J., AND ZAHRA AND GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition to defendants regarding his claims of defamation, intentional infliction of emotional distress, interference with advantageous economic expectations, and civil conspiracy. The trial court ruled that the individual defendants as trustees of Brownstown Township and the defendant township itself were immune from tort liability under MCL 691.1407(1) and (5). Defendants were therefore entitled to summary disposition under MCR 2.116(C)(7). Alternatively, the trial court ruled that even if defendants were not immune, plaintiff had failed to create material questions of fact regarding the necessary elements to establish his tort claims; therefore, defendants were entitled to judgment as a matter of law under MCR 2.116(C)(10). We agree with the trial court that defendants were engaged in a governmental function—oversight of the township's police department—and that plaintiff has neither pleaded nor produced evidence in avoidance of immunity. We affirm.

I. SUMMARY OF FACTS

This case arises from a series of incidents that plaintiff infers defendants orchestrated to intimidate and harass him.¹ Plaintiff is a longtime police officer employed by the Brownstown

¹ Community disputes regarding police union activity, unsuccessful recall campaigns, plaintiff publicly criticizing the defendant trustees, internal police department investigations leading to the resignation of some officers, as well as FBI investigations leading to indictments, regarding police leaks, provide additional backdrop for plaintiff's conspiracy theories.

Township police department who held the rank and position of detective. In June 2006, plaintiff was working with the Federal Bureau of Investigation (FBI) investigating alleged criminal activity of a motorcycle gang. Another Brownstown police officer observed plaintiff and an FBI agent meeting with a “scruffy biker type” who, unknown to the officer, was an informant in the motorcycle gang investigation. From talk among police officers, this meeting apparently became widely known in the police department. Many of the Brownstown police officers belonged to their own motorcycle club and frequented places that members or associates of the outlaw gang also frequented. In July 2006, the informant allegedly observed Dennis Abraham telling the leaders of the outlaw gang that plaintiff was meeting with a “snitch.” On learning this, plaintiff and his FBI partner picked up Abraham, took him to a federal building, and interviewed him.

At the time of these events, defendant Philpot was a trustee and the treasurer of defendant Brownstown Township; defendant Neal was also a trustee, and a former Brownstown Township police officer. In November 2006, Brownstown Township police Lt. Steve Nemeth informed Philpot that Abraham wished to complain about police misconduct but was afraid to bring his complaint directly to the police department. Lt. Nemeth indicated Abraham wished to bring his allegations to Philpot and Neal, who agreed to meet with Abraham. The substance of Abraham’s claims were that during the July 2006 interview, plaintiff appeared to have been drinking, that plaintiff and his FBI partner took Abraham to a basement “dungeon” of the federal building, that plaintiff and his FBI associate asked Abraham about “dirty cops,” and that at one point, plaintiff displayed his weapon by pulling up his shirt and lifting it from his waistband. Philpot and Neal recorded Abraham’s allegations regarding the July interview on a DVD, which they forwarded to the Michigan State Police (MSP). The state police informed defendants that because the interview occurred on federal property, it was within the FBI’s jurisdiction to investigate Abraham’s allegations.

A second incident that is part of plaintiff’s tort claims occurred in late November 2006. A fellow Brownstown Township police officer stopped plaintiff on suspicion of drunk driving. But plaintiff was not offered or administered a portable breath test; no sobriety tests were performed, and on instructions of the supervising sergeant who was called to the scene, plaintiff was driven home. Brownstown Township police department incident report 2006-00022832 simply states: OLDER RED F-150 POSSIBLE OWI WB SIBLEY FROM TELEGRAPH. The trial court in its December 10, 2008, opinion and order summarizes this incident and what followed (capitalization and some spelling modified):

On November 22, 2006, plaintiff, who was off-duty, was pulled over by Brownstown Township police officer Jason Mitteer for driving erratically on Telegraph Road. Plaintiff admitted drinking five to ten beers prior to being pulled over. The officers at the scene, Mitteer and Wheeler, did not conduct a field sobriety test or a portable Breathalyzer test. The officers called a supervisor, Sergeant Watson, who drove plaintiff home without issuing him a citation. Plaintiff subsequently had a disciplinary meeting regarding the incident and was referred to an alcohol counselor, with whom he failed to follow up.

On December 27, 2006, former chief Daniel Grant was informed that officers Mitteer and Wheeler still wanted to file reports and seek possible

charges against plaintiff. Chief Grant responded that the officers should take whatever action they thought appropriate. Officer Mitteer called Ms. Philpot and told her that he had pulled plaintiff over on suspicion of drunk driving, that plaintiff had “almost killed” officer Wheeler, that plaintiff had not received a citation and that Mitteer and Wheeler were told to leave the scene by their commanding officer. Mitteer also told Philpot he was advised not to write a report but did not disclose who so advised. Ms. Philpot asked Chief Grant about the incident and specifically why there was no written report. Chief Grant said that the four officers at the scene agreed they would take plaintiff home and do nothing further. After Ms. Philpot informed Chief Grant that she had been contacted by one of the officers who wished to write a report, Chief Grant promised to look into the matter. Ms. Philpot also contacted the township attorney. Ms. Philpot forwarded to officer Wheeler an email from Chief Grant to [township attorney Stephen] Hitchcock, allowing the officer to write a report and take any appropriate action regarding the incident.

On March 19, 2007, a local business owner, whose son had been prosecuted for a DUI in Brownstown, came to a board [of trustees] meeting to discuss an anonymous letter alleging a township officer received preferential treatment relating to a DUI stop. Ms. Philpot subsequently moved to investigate the alleged misconduct and to allow the township attorney access to the evidence. Attorney Hitchcock found no potential criminal violations by officer Wheeler or officer Mitteer because they did not make the decision on how to proceed.

Based on the recommendation of the township attorney, the board passed a resolution referring the alleged DUI incident to the MSP. The board also directed attorney Hitchcock to request the MSP forward the results of their investigation to the board to review for potential criminal violations. Captain Clark of the MSP informed the township he could not investigate as the request did not come from an appropriate source, but he also concluded that the incident did not warrant criminal investigation because it had occurred almost a year ago, there was no physical evidence and “administrative action was taken with other personnel.” In light of this lawsuit, the board removed the matter from its January 2008 agenda.

Other grounds for plaintiff’s tort claims include his suspicion that some township police officers were conducting surveillance of him at the direction of defendants, but plaintiff admitted he had no evidence to support this claim other than his belief that he was being watched and that officer Mitteer provided information to Philpot. Likewise, plaintiff admitted that no direct evidence supported his claim that Philpot orchestrated the local businessperson’s complaint. Plaintiff only suspected this based on Philpot’s earlier contact with chief Grant and officer Mitteer, and because Philpot knew the complainant as a businessperson in the community. Plaintiff also touts as evidence of a conspiracy the opinion of one trustee that investigating alleged police misconduct was a “witch hunt.” Plaintiff additionally cites Philpot’s subsequent

letters of recommendation for some former officers who resigned as a result of the internal investigation of the leak regarding plaintiff's informant, and the businessperson's political support for Neal and Philpot.

After extensive discovery, defendants moved for summary disposition on the basis of governmental immunity, MCR 2.116(C)(7), and on the basis that plaintiff had failed to produce evidence that he could support his tort claims at trial, MCR 2.116(C)(10). The trial court heard arguments of counsel on the motions on November 14, 2008. The court issued its ruling in favor of defendants on both grounds they asserted in an opinion and order dated December 10, 2008. Plaintiff brings this appeal by right.

II. STANDARD OF REVIEW

We review de novo a trial court's determination to grant or deny summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(7) may assert that a claim is barred by immunity granted by law and may be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The allegations of the complaint are accepted as true unless contradicted by documentary evidence. *Maiden, supra* at 119. The motion is properly granted when the undisputed facts establish the moving party is entitled to immunity granted by law. *Id.* at 118; MCR 2.116(I)(1).

When considering a motion brought under MCR 2.116(C)(10), the court must view the proffered evidence in the light most favorable to the party opposing the motion. *Maiden, supra* at 120. But MCR 2.116(G)(4) requires that "[w]hen a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise . . . , set forth specific facts showing that there is a genuine issue for trial." A litigant's mere promise to produce evidence at trial to support its claims is insufficient to survive a properly support (C)(10) motion. *Maiden, supra* at 120-121. Thus a trial court must grant the motion when the proffered evidence fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

III. ANALYSIS

Except for certain limited statutory exceptions, MCL 691.1407(1) grants tort immunity to governmental agencies "engaged in the exercise or discharge of a governmental function." We must broadly construe governmental immunity and narrowly construe its exceptions. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 544; 688 NW2d 550 (2004). None of the six statutory exceptions applies to the facts of this case.

A "governmental function" is an activity expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. MCL 691.1401(f); *Maskery v University of Michigan Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003). In this case, the Charter Township Act, MCL 42.1 *et seq.*, provides for the establishment of a 7-member

governing board “composed of the supervisor, the township clerk, the township treasurer, and 4 trustees.” MCL 42.5. The act also authorizes the township board to “provide for and establish a police force” MCL 42.12. And, further, “[t]he township board shall make all necessary rules for the government of the township police force and its members and shall prescribe the powers and duties of policemen” *Id.* We are required to liberally construe the authority granted by these statutory provisions in favor of the township to “include [powers] fairly implied and not prohibited by [our] constitution.” Const 1963, art VII, § 34. Moreover, Brownstown Township local ordinance provides for the establishment of a police department and that the township board appoint its chief and other personnel and promulgate rules and regulations for its governance.

Furthermore, it is settled that the hiring, supervision, discipline and discharge of a government employee is the exercise of a governmental function. See *Galli v Kirkeby*, 398 Mich 527, 537 (WILLIAMS, J, concurring); 542 (COLEMAN, J, dissenting); 248 NW2d 149 (1976); *Bozarth v Harper Creek Bd of Ed*, 94 Mich App 351, 353; 288 NW2d 424 (1979). More specifically, “the management, operation, and control of a police department is a governmental function.” *Odom*, 482 Mich at 464 n 6, quoting *Mack v Detroit*, 467 Mich 186, 204; 649 NW2d 47 (2002). Finally, in determining whether an activity is a governmental function, we must focus on the general activity and not the specific conduct involved at the time of the alleged tort. *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003). Here, plaintiff presents no credible argument that defendants’ general activity of overseeing its police department and having proper authorities investigate alleged misconduct by township police officers were not governmental functions. Indeed, plaintiff alleges in his complaint that the board of trustees, including Philpot and Neal, held supervisory authority over all employees of the police department and acted in their capacities as trustees and treasurer.

There is no intentional tort exception to governmental immunity applicable to government agencies. See *Smith v Dep’t of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987). Also, MCL 691.1407(5) extends absolute immunity from tort liability to a “judge, a legislator, and the elective or highest appointive executive official of all levels of government . . . if he or she is acting within the scope of his or her judicial, legislative, or executive authority.” See *American Transmissions, Inc v Attorney General*, 454 Mich 135; 560 NW2d 50 (1997). With respect to the township, it may be found vicariously liable “only when its officer, employee, or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity which is nongovernmental or proprietary, or which falls within a statutory exception.” *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 625; 363 NW2d 641 (1984). Here, plaintiff has not pleaded an exception to governmental immunity, nor does he allege a proprietary activity. Rather, plaintiff argues governmental immunity does not apply because the conduct of Philpot and Neal was improper and not within the scope of their legislative authority. This argument lacks merit.

Plaintiff relies on *Marrocco v Randlett*, 431 Mich 700; 433 NW2d 68 (1988). In that case, the Court recognized that no exception to governmental immunity existed for intentional torts of the highest-ranking officials acting within the scope of their authority performing a governmental function. *Id.* at 707. But the Court also noted that “the intentional use or misuse of a badge of governmental authority for a purpose unauthorized by law is not the exercise of a governmental function.” *Marrocco*, 431 Mich at 708-709, quoting *Smith*, 428 Mich at 611. In a

later case, the Court clarified that the subjective intent of a government official protected by MCL 691.1407(5) is not a factor in determining whether the official acted within the scope of his or her authority. *American Transmissions*, 454 Mich at 143-144. Rather, whether an official's actions are within his or her authority is determined by examining the "reasonably 'objective' aspect[s] of the overall factual context," *id.* at 144 n 10, including but not limited to, "the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of government." *Marrocco*, 431 Mich at 711.

Plaintiff argues that Philpot and Neal's actions were not within the scope of their legislative authority because their actions regarding alleged police misconduct were "contrived investigations." But plaintiff offers no evidence to support the premise of this argument. Speculation and conjecture are insufficient to raise an issue of genuine material fact requiring a trial. *West*, 469 Mich at 188; *Detroit v GMC*, 233 Mich App 132, 139; 592 NW2d 732 (1998).

Moreover, it is undisputed that plaintiff was involved in the two incidents that were the subject of investigation: plaintiff in fact interviewed Abraham at the federal building, and he was stopped by a fellow police officer while driving after having consumed a significant quantity of beer. And, plaintiff, in his complaint, concedes both that the township board has supervisory power over the police department and its personnel, and also that Philpot and Neal were acting in their capacities as trustees and treasurer of Brownstown Township board of trustees. While plaintiff argues that the Charter Township Act, MCL 42.1 *et seq.*, did not authorize the specific actions of Philpot and Neal, we must examine whether the general activity and not the specific conduct involved at the time of the alleged torts is within the authority of the government officials. *Tate*, 256 Mich App at 661. Moreover, the authority granted by these statutory provisions includes that which is "fairly implied and not prohibited by [our] constitution." Const 1963, art VII, § 34. In light of statutes and local ordinance that authorize the township board to exercise appointive and regulatory authority over the township's police department, defendants had explicit and implicit authority to direct that appropriate authorities investigate alleged police misconduct. Further, Philpot and Neal in their capacity as trustee/legislators could examine alleged police misconduct to propose disciplinary or rule making action by the board. Thus, we reject plaintiff's argument that Philpot and Neal were not acting within their legislative authority.

With respect to plaintiff's claims against the township, as noted above, "the management, operation, and control of a police department is a governmental function." *Odom*, 482 Mich at 464 n 6, quoting *Mack*, 467 Mich at 204. Because plaintiff has produced no evidence to substantiate his claim that the township's actions were not a governmental function, it follows that MCL 691.1407(1) grants to defendant Brownstown Township immunity from the intentional torts plaintiff alleges. See *Smith*, 428 Mich at 544: "There is no 'intentional tort' exception to governmental immunity." Further, because Philpot and Neal were acting within the scope of their authority performing a nonproprietary, governmental function for which no statutory exception to immunity applies—and were also protected by statutory immunity as discussed above—there can be no vicarious liability imposed on Brownstown Township. *Ross*, 420 Mich at 625. Also, as the trial court observed, plaintiff has not alleged the township violated a constitutional provision or imposed an unconstitutional policy or custom. Accordingly, the trial court correctly ruled that the township was immune from plaintiff's tort claims.

We conclude the trial court correctly ruled that defendants were immune from plaintiff's tort claims and properly granted summary disposition to defendants under MCR 2.116(C)(7). We decline to address the trial court's alternative basis for granting defendants summary disposition under MCR 2.116(C)(10).

We affirm. As the prevailing parties, defendants may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey

/s/ Brian K. Zahra

/s/ Elizabeth L. Gleicher