

STATE OF MICHIGAN
COURT OF APPEALS

LESTER D. PERNELL,

Plaintiff-Appellant,

v

CITY OF EAST LANSING, TRAVIS BOVE, and
RYAN KUHN,

Defendants-Appellees.

UNPUBLISHED
March 18, 2014

No. 313707
Ingham Circuit Court

LC No. 11-1363-CZ

Before: SHAPIRO, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the trial court granting defendants' motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). We affirm.

I. FACTS

The individual defendants are police officers that worked for defendant city while investigating a complaint that plaintiff kidnapped his child from the mother and had been violent. Defendant officers requested the state police to issue an Amber alert by submitting a form on which they checked a box that read that the child was "[i]n the company of another with intent to harm the child, or who has a confirmed criminal history of harming children, sexual assault, domestic violence, or is suicidal." Plaintiff stated that he was defamed when the media widely reported that he had a history of violence and sexual assault against children, which he vigorously asserts is false.

II. ANALYSIS

Plaintiff argues that his claims for defamation, false light invasion of privacy, and injurious falsehood should not have been summarily dismissed. A communication is defamatory when the defamed individual's reputation is injured to the extent that "it lowers the individual's reputation in the community or it deters others from associating or dealing with the individual." *Mino v Clio Sch Dist*, 255 Mich App 60, 72; 661 NW2d 586 (2003), quoting *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000).

To establish a claim for defamation, the plaintiff must show (1) that “a false and defamatory statement concerning the plaintiff” was made, (2) that the defendant made “an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statements irrespective of special harm, or the existence of special harm caused by the publication.” [*Wilson v Sparrow Health Sys*, 290 Mich App 149, 154-155; 799 NW2d 224 (2010) (citations omitted).]

“In order for a statement to be actionable, the statement must be provable as false.” *Mino*, 255 Mich App at 77 (citation omitted). “Truth is an absolute defense to a defamation claim.” *Wilson*, 290 Mich App at 154-155 (citation omitted).

The elements of an injurious falsehood claim are publishing a false statement harmful to the interests of another where the actor “intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and . . . knows that the statement is false or acts in reckless disregard of its truth or falsity.” *Kollenberg v Ramirez*, 127 Mich App 345, 352; 339 NW2d 176 (1983).

In order to maintain an action for false-light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position. [*Derderian v Genesys Health Care Sys*, 263 Mich App 364, 385; 689 NW2d 145 (2004) (internal quotation marks and citations omitted).]

A trial court’s determination of a motion for summary disposition is reviewed de novo. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). The applicability of governmental immunity is a question of law that is also reviewed de novo. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004).

A. MCR 2.116(C)(7)

In reviewing a motion for summary disposition based on immunity, MCR 2.116(C)(7), a court considers the affidavits, depositions, admissions, and other documentary evidence to determine whether movant is entitled to immunity as a matter of law. *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). The evidence is viewed in a light most favorable to the nonmoving party, and all legitimate inferences in favor of the nonmoving party are drawn. *Jackson v Saginaw Co*, 458 Mich 141, 142; 580 NW2d 870 (1998).

Governmental immunity is a characteristic of government. *Mack v Detroit*, 467 Mich 186, 197-198; 649 NW2d 47 (2002). Governmental immunity from tort liability is governed by MCL 691.1407. Under MCL 691.1407, immunity is broadly interpreted and exceptions to it are narrowly construed. *Frohriep v Flanagan*, 275 Mich App 456, 468; 739 NW2d 645 (2007). Immunity for individual lower-ranking public officials, such as police officers, accused of

negligent torts is addressed in MCL 691.1407(2).¹ *Odom v Wayne Co*, 482 Mich 459, 479-480; 760 NW2d 217 (2008). Here, however, defendants were alleged to have committed intentional torts. “Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.” MCL 691.1407(3). In 1986, in response to *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984), which describes the common-law test for individual governmental immunity from all tort liability, *id.* at 633-635, the Legislature amended MCL 691.1407 to include absolute immunity to high-ranking governmental officials and individual governmental immunity to governmental employees from liability for negligent torts; the common-law qualified individual governmental immunity from intentional torts by governmental actors remained, *Odom*, 482 Mich at 468-470.

In *Odom*, the Court reaffirmed application of the common-law test set forth in *Ross* to determine individual immunity for governmental actors from liability for intentional torts. *Id.* at 459-461. For an intentional tort, the individual defendants must establish that they are entitled to individual governmental immunity by demonstrating the following:

- (a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,
- (b) the acts were undertaken in good faith, or were not undertaken with malice, and
- (c) the acts were discretionary, as opposed to ministerial. [*Id.* at 480; see also *Ross*, 420 Mich at 633-634.]

¹ MCL 691.1407(2) provides as follows:

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, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force 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.

Plaintiff acknowledges that the individual defendants were acting in the course of their employment while attempting to locate a child thought to be missing by issuing the Amber alert. However, plaintiff argues, the individual defendants were not acting in their scope of authority because the Amber alert they issued for public dissemination contained false and defamatory material.

The Michigan Amber Alert Act, MCL 28.751 *et seq.*, was designed to rapidly disseminate useful information to media in accordance with policies established by the state police. MCL 28.752; MCL 28.753. The facts indicate that the individual defendants' actions were limited to investigating the complainant's allegation that defendant was violent in her home and took their child without proper clothing. The police investigation, which involved consideration of the complainant's statement, her injuries, and observable property disarray, as well as a LIEN check that revealed that plaintiff was charged, but not prosecuted, for domestic violence approximately three months prior to the incident in question, supported the concern about domestic violence.

The individual defendants' actions were authorized and properly responsive to and consistent with the investigative context for which they were contacted. There was no evidence presented that the individual defendants were acting in a capacity or for individual reasons or pursuits or in a manner that was not directly authorized and congruent with the scope of their official police duties. The Amber alert form listed a limited number of reasons that could form a basis for a finding of child endangerment. The box checked by the defendants unfortunately lumped suicide, sexual assault, and a history of harming children with domestic violence. The form did not offer the defendants the opportunity to indicate which of the enumerated circumstances applied to the application. Additionally the form used the phrase "confirmed criminal history", a phrase that is, at best ambiguous but one that is presumptively different than a confirmed history of criminal conviction. This panel urges the revision of this form and acknowledges the depth of harm that may occur as a consequence of the aggregation of vastly different circumstances and the lack of definition of the phrase "confirmed criminal history". However, the defendants' actions cannot be implicated because the drafting of the Amber alert form prevented them from separating one category of endangerment from another.

Plaintiff argues that the individual defendants acted with malice and recklessly disregarded the truth as they knew that plaintiff did not have a criminal history or history of violence toward children. Whether a defendant acted in good-faith is examined from a subjective perspective where an "honest belief and good-faith conduct" are protected by immunity while those who act with malicious intent are not protected. *Latits v Phillips*, 298 Mich App 109, 115; 826 NW2d 190 (2012). "A plaintiff can establish bad faith by showing malicious or intentionally unlawful conduct." *Fiones v Dalman*, 199 Mich App 396, 401; 502 NW2d 725 (1993) (citation omitted). Individual immunity is not warranted where the government employee "acts maliciously or with a wanton or reckless disregard of the rights of another." *Odom*, 482 Mich at 474 (citation omitted). Willful and wanton misconduct is where the conduct demonstrated "an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does." *Id.*

Here, the individual defendants knew plaintiff was recently charged with domestic violence and viewed evidence of the complainant's claim that defendant was violent on the

evening in question. That the previous charge of domestic violence was not prosecuted does not mean the charges were not justified. The individual plaintiffs unsuccessfully attempted to contact plaintiff to further the investigation. There was no evidence that the individual defendants strayed beyond the bounds of the information they gathered and confirmed in requesting the Amber alert or acted in any way that was not grounded in the facts as they experienced them.

Plaintiff argues that the act of filling out the Amber alert form was ministerial in nature, thus not protected by immunity. Immunity is granted to a governmental employee engaged in discretionary acts because it permits “the employee to resolve problems without constant fear of legal repercussions.” *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 578-579; 808 NW2d 578 (2011) (quotation omitted). Discretionary acts involve significant decision-making involving personal deliberation, decision, and judgment; whereas, ministerial-operational acts “involve the execution or implementation of a decision and entail only minor decision-making.” *Oliver v Smith*, 290 Mich App 678, 689-690; 810 NW2d 57 (2010). Ministerial acts require “obedience to orders or the performance of a duty in which the individual has little or no choice,” and the execution of an act after a decision is ministerial in nature. *Odom*, 482 Mich at 475-476 (internal quotation marks and citations omitted).

Daily ministerial acts of a police officer may include “completing activity logs and police reports or following the procedures for booking an arrested person.” *Id.* at 476. Police decisions such as whether to “make an immediate arrest, pursue a suspect, issue a warning, [and] await back up assistance” are discretionary acts that must be performed in a proper manner. *Watson v Quarles*, 146 Mich App 759, 764-765; 381 NW2d 811 (1985).

Here, the individual defendants performed a discretionary act entitled to immunity in completing the request for an Amber alert form. In completing the form, the individual defendants were required to interpret and apply the information they had gathered in their investigation. Filing out the Amber alert request form required decision-making to best characterize the situation and the actors.

Plaintiff also argues that defendant city was not entitled to a grant of governmental immunity. The governmental tort liability act, MCL 691.1401 *et seq.*, grants immunity from tort liability to the state, as well its agencies when they are engaged in the exercise of a governmental function, except where the Legislature has expressly granted an exception. MCL 691.1407(1). “[T]here is no exception in the governmental immunity statute for intentional torts.” *Payton v Detroit*, 211 Mich App 375, 392; 536 NW2d 233 (1995) (citation omitted). Thus, defendant city was entitled to immunity if the issuance of an Amber alert was a government function. “[A] governmental function is an activity which is expressly or impliedly mandated or authorized by constitution, statute, or other law.” *Ross*, 420 Mich at 620. Because tortious acts are not a governmental function, the Court must examine the general activity, and not the specific conduct involved at the time of the tort to determine whether a governmental agency is engaged in a governmental function. *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003); *Payton*, 211 Mich App at 391-393.

Here, as stated, the police are authorized to issue Amber alerts according to MCL 28.751. And where the general nature of the activity is related to the operation of the police force, the

city is immune from liability. *Payton*, 211 Mich App at 392-393. A city cannot be held liable for the intentional torts of its employees. *Id.* at 393.

B. MCR 2.116(C)(10)

When reviewing a motion brought under MCR 2.116(C)(10), a court considers the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the non-moving party. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002).

The extent of defendants' "statement" was checking a box on the Amber alert request form that identified the "Type of Endangerment" as being, "In the company of another with intent to harm the child or who has a confirmed criminal history of harming children, sexual assault, domestic assault, or is suicidal." The individual defendants marked the box based on learning plaintiff was arrested three months prior to the incident in question for domestic violence and based on complainant's statement, corroborated by injury, of domestic violence during the incident in question. Defendants' "statement" was not false.

Further, plaintiff is not able to overcome defendants' entitlement to a qualified privilege in electronically communicating the Amber alert form to the state police.² A qualified privilege for communications on matters of "shared interest" between parties "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." *Rosenboom v Vanek*, 182 Mich App 113, 117; 451 NW2d 520 (1989). "The elements of a 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) (citations omitted).

Here, defendants acted in good faith in issuing the Amber alert form after reasonable investigation of the complainants' allegations. The individual defendants corroborated the complainant's report by viewing physical evidence including an injury, attempting unsuccessfully to contact plaintiff, and performing a LIEN check. The individual defendants checked with a supervisor according to their procedures and checked the box they had determined to be accurate to describe plaintiff. Additionally, the individual defendants were acting in the context of a report of a child kidnapping and had an interest in quickly locating the child through requesting the state police to issue an Amber alert. And there was no evidence that they exceeded the scope of their investigation in providing only the information requested on the Amber alert form prior to submitting it to the state police. They were entitled to the shared interest qualified privilege.

A plaintiff may overcome a qualified privilege by demonstrating that the statement was made with actual malice, that is, "with knowledge of its falsity or reckless disregard of the truth."

² The purpose for the defense of privilege is that some communications are so necessary that, even if defamatory, they should be made. *Postill v Booth Newspapers, Inc*, 118 Mich App 608, 619; 325 NW2d 511 (1982).

Id. Here, the individual defendants possessed information that plaintiff was recently arrested, and not prosecuted, for domestic violence and that evidence indicated that plaintiff was violent with the mother of his child on the night in question. In light of the information gathered during the investigation, checking the box indicating plaintiff's confirmed criminal history of domestic assault was not made with actual malice.

Affirmed.

/s/ Douglas B. Shapiro

/s/ Jane E. Markey

/s/ Cynthia Diane Stephens