

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DENNIS BISHOP,

Plaintiff-Appellant/Cross Appellee,

v

CITY OF FLINT, CLYDELL DUNCAN, and JOHN  
HUNTER,

Defendants-Appellees/Cross Appellants.

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UNPUBLISHED  
September 9, 1997

No. 169062  
Genesee Circuit Court  
LC No. 92-015349-NO

Before: Neff, P.J., and Wahls and Taylor JJ.

PER CURIAM.

Plaintiff Dennis Bishop (Bishop), a police officer employed by the Flint Police Department, appeals the trial court's judgment in his action against the City of Flint (Flint), Police Chief Clydell Duncan (Duncan), and John Hunter (Hunter), a member of the Genesee County Road Commission, for various torts and alleged violations of the Whistleblowers Protection Act (WPA), MCL 15.361 *et seq.*; MSA 17.428(1) *et seq.*, and the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* Defendants cross-appeal. We affirm in part, reverse in part, and remand.

I

This case arose out of a traffic accident that occurred in December 1991 between Craig Tromp, a white man driving a semi tractor-trailer, and Hunter, a black man driving a pickup truck. Tromp was attempting to make a left turn at an intersection when he realized that he couldn't complete his turn because Hunter appeared to be approaching the intersection at a high rate of speed. Tromp stopped the semi-truck, partially blocking southbound traffic. Hunter was unable to stop the pickup and it slid into the semi. There were no witnesses to the accident.

Bishop, a white officer assigned to the Traffic Bureau, was dispatched to the scene. Although Bishop issued no tickets in connection with the matter, when he prepared the accident report later that day he assigned both drivers a hazardous action code of "9" because he believed both drivers had contributed to the accident: Tromp by underestimating the speed of the oncoming pickup truck and

turning in front of it and Hunter by exceeding the speed limit and forfeiting the right-of-way as he entered the intersection.

Two days later, Hunter obtained a copy of the accident report and was unhappy with being assigned a hazardous code of "9". Hunter immediately contacted Darryl Buchanan, Director of Investigation for the City of Flint Ombudsman's Office. Subsequently, Hunter called Duncan and told him that he had been treated unfairly in the accident report. Duncan told Hunter that he would have Lieutenant Richard Lewis, the officer in charge of the Traffic Bureau, look into the matter.

At Duncan's request, Lewis contacted Hunter and advised Hunter that his investigation revealed that Hunter was speeding at the time of the accident, and therefore the hazardous action number "9" was properly assigned to both drivers. Hunter asked Lewis if his race was a factor in the preparation of the accident report.

Hunter then contacted Duncan a second time and said that he was "still dissatisfied" with the accident report. Duncan told Hunter that if the report warranted changing, he would change it. Duncan subsequently sent a memo to Lewis and Deputy Chief Dickenson ordering that the accident report be changed to reflect that Tromp be cited for failure to yield the right-of-way, and that Hunter not be cited. Bishop then prepared an amended accident report, assigning Tromp hazardous action number 3 and Hunter hazardous action number 0, indicating that Hunter was not at fault in causing the collision.

Meanwhile, word of the incident began spreading though the Flint Police Department. Bishop testified that he became known as the investigating officer in the "VIP" affair, and that there was speculation within the department that he would be transferred out of the Traffic Bureau.

An article regarding this incident appeared in the Flint Journal. Written by Timothy Doran, a staff writer for the paper, the article indicated that the accident report prepared by Bishop had been ordered changed by Duncan. The article stated that Hunter, a former member of the County Board of Commissioners, said that the original report was "totally unfair," and that he had a spotless driving record and did not want his insurance rates to increase as a result of the accident. The article then indicated that "Duncan and Hunter said they think racism played a part in this incident and the aftermath" and that "Hunter said police often treat blacks unfairly in accident investigations." Doran testified that although Duncan never directly said that he thought that Bishop was a racist, the issue of racism was raised by both Duncan and Hunter.

In May 1992, Bishop, along with two other officers, was transferred out of the Traffic Bureau into the Patrol Operations Bureau. Dickenson issued the transfer order, and testified that the reason for the transfer was the "cyclic exchange of officers for the goal of having the officers become more traffic oriented." Bishop did not lose any wages, sick time or fringe benefits as a result of the transfer.

Bishop subsequently filed a complaint against Duncan, Flint, and Hunter. The complaint alleged claims of libel/slander, conspiracy to commit libel/slander, false light invasion of privacy, conspiracy to commit false light invasion of privacy, intentional infliction of emotional distress and conspiracy to commit intentional infliction of emotional distress against Duncan and Hunter. The complaint also

alleged that Duncan and, vicariously, Flint, had violated the WPA and the ELCRA. Prior to trial, the court granted Duncan's motion for summary disposition as to the libel/slander, invasion of privacy and intentional infliction of emotional distress claims brought against him individually. Hunter's motion for summary disposition as to the claims against him were denied, as were Duncan's and Flint's motions for summary disposition of Bishop's claims under the WPA and the ELCRA. Duncan's motion for summary disposition regarding the conspiracy charges was also denied.

During the jury trial, the court granted the directed verdict motion brought by Hunter on plaintiff's claim of intentional infliction of emotional distress, and also granted Duncan's directed verdict motion on plaintiff's claim of conspiracy to commit intentional infliction of emotional distress.

At the conclusion of the trial, the jury made the following findings: (1) Duncan and Hunter had not conspired to illegally change a traffic accident report; (2) Duncan had violated the WPA and that, as a result of that violation, Bishop had sustained damages in the amount of \$5,000; (3) Duncan had not discriminated against Bishop on the basis of his race in violation of the ELCRA and (4) as to the libel/slander and invasion of privacy claims against Hunter, although Hunter had made certain false statements to a reporter for The Flint Journal, those statements did not have a tendency to harm Bishop's reputation. In sum, the jury returned a verdict of no cause of action in favor of Hunter, and returned a verdict against Duncan and Flint in the amount of \$5,000 for violation of the WPA.

Subsequently, the trial court awarded plaintiff \$70,107.07 in attorney fees under the WPA. Duncan and Flint were awarded offer of judgment sanctions pursuant to MCR 2.405 in the amount of \$59,494.50. The trial court denied Hunter's request for mediation sanctions pursuant to MCR 2.403.

Bishop filed a claim of appeal, and defendants filed cross-appeals. This Court remanded the case to the trial court for consideration of the issue of whether Hunter was entitled to offer of judgment sanctions pursuant to MCR 2.405(D). On remand, the court concluded that any request by Hunter for sanctions under MCR 2.405(D) was untimely and thus denied Hunter's motion on that basis. Bishop now appeals, and defendants cross-appeal.

## II

The trial court granted Duncan's motion for summary disposition of the libel/slander, false-light invasion of privacy, and intentional infliction of emotional distress claims, finding that Duncan, as the highest executive official of the Flint Police Department, was absolutely immune from liability. The court further determined that although Duncan could not be liable for his own alleged statements and actions because he was protected by executive immunity, Duncan could be liable as a co-conspirator for the alleged statements made by Hunter. These rulings are challenged by plaintiff and defendants, respectively.

## A

Plaintiff argues that the trial court erred in granting Duncan's motion for summary disposition of the libel/slander, false-light invasion of privacy, and intentional infliction of emotional distress claims. We disagree.

Governmental immunity bars tort claims against the highest executive officials of all levels of government whenever they are acting within their executive authority. MCL 691.1407(5); MSA 3.996(107)(5). As chief of police, Duncan was the highest executive official of the police department and thus absolutely immune from tort liability with respect to acts involving the exercise of his executive authority. See *Washington v Starke*, 173 Mich App 230, 240-241; 433 NW2d 834 (1988). There was no issue of material fact that Duncan was acting within his executive authority when he ordered that the accident report be changed or when he spoke to the reporter for the Flint Journal.<sup>1</sup> *American Transmissions, Inc v Attorney General*, 454 Mich 135, 144; 560 NW2d 50 (1997). Accordingly, Duncan is absolutely immune from tort liability for the conduct at issue here because he was acting "within the scope of his executive authority." *Id.*; MCL 691.1407(5); MSA 3.996(107)(5).

## B

In their cross-appeals, Duncan and Flint claim that although the trial court properly ruled that Duncan could not be liable for his own alleged statements and actions because he was protected by governmental immunity, it erred in finding that Duncan could be liable as a co-conspirator for the alleged statements made by Hunter. Specifically, Duncan and Flint argue that the court erred in denying their motions for summary disposition and directed verdict on the conspiracy charges.

The jury determined that Duncan and Hunter had not conspired to fix the accident report, and rendered a verdict of no cause of action on Bishop's claims of conspiracy to commit libel/slander and false-light invasion of privacy claims. The trial court then granted Duncan's and Flint's motion for a directed verdict on the conspiracy to commit intentional infliction of emotional distress claim. On appeal, Bishop does not challenge the jury's verdict or the court's grant of a directed verdict. Consequently, we find that any error in the trial court's denial of Duncan's and Flint's motions for summary disposition on the conspiracy counts is harmless.

## C

In his cross appeal, Hunter challenges the trial court's denial of his motion for a directed verdict on the charges of libel/slander, conspiracy to commit libel/slander, false light invasion of privacy, conspiracy to commit false light invasion of privacy, and conspiracy to commit intentional infliction of emotional distress.<sup>2</sup> Insofar as the jury returned a verdict of no cause of action in favor of Hunter, any error in the trial court's ruling on Hunter's directed verdict motion is harmless.

### III

In their cross appeals, Duncan and Flint argue that the trial court erred in refusing to grant their motions for summary disposition and, later, for a directed verdict, regarding Bishop's claims pursuant to the WPA and the ELCRA. Because the jury returned a verdict of no cause of action on Bishop's civil rights claim, any error in this regard is harmless. However, we agree with Duncan and Flint that their motion for summary disposition on Bishop's action pursuant to the WPA should have been granted.

#### A

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. When deciding such a motion, the court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). Summary disposition is proper when, except with regard to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). This Court liberally finds a genuine issue of material fact. However, where the opposing party fails to adduce evidence to establish a material factual dispute, the motion is properly granted. *Duran v Detroit News*, 200 Mich App 622, 628-629; 504 NW2d 715 (1993).

#### B

At the heart of the WPA is the following provision:

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [MCL 15.362; MSA 17.428(2).]

In the present case, Bishop alleged that Duncan had violated the WPA by transferring him from the Traffic Bureau to the Patrol Bureau in retaliation for reporting Duncan's allegedly illegal order to change the traffic accident report. Bishop's claim against Flint was based solely on the theory that Flint was vicariously liable for the actions of Duncan. Indeed, Bishop did not allege in his complaint that any other city employee was responsible for his transfer, and testified in his deposition that Duncan was the only city employee that he believed did anything wrong with regard to his transfer.

Duncan and Flint do not deny that Bishop, reported an alleged violation of law and was subsequently transferred out of the Traffic Bureau and into the Patrol Bureau. However, Duncan and

Flint assert that Bishop failed to present evidence that Duncan played any role in the decision to transfer him. After a careful review of the record, we agree.

The uncontroverted testimony submitted to the trial court reveals that it was Dickenson, not Duncan, who transferred Bishop out of the Traffic Bureau. Duncan testified that he had nothing to do with Dickenson's decision. Bishop admitted in his deposition that he had no information that would support his assertion that Duncan participated in the decision to reassign him.

In denying Duncan's and Flint's motion for summary disposition, the trial court opined that circumstantial evidence existed that supported Bishop's claim that Duncan was the person actually responsible for the transfer. We have carefully reviewed the deposition testimony relied on by the trial court and find that it does not support this conclusion. Although Duncan is the highest official in the Flint Police Department, no evidence was presented regarding how personnel transfers were made, or that Duncan had any prior knowledge of Dickenson's order to transfer Bishop. No evidentiary support exists for the conclusion that, under a "chain of command" theory, Duncan was responsible for Bishop's transfer. Further, we find no evidentiary support for the trial court's determination that Duncan threatened to transfer Bishop because of Bishop's investigation of the traffic accident involving Hunter. In sum, no evidence was presented that Duncan took any part in Dickenson's decision to transfer Bishop from the Traffic Bureau. Although plaintiff might have had a viable complaint against Dickenson, and Flint, as Dickenson's employer, may potentially have been liable for Dickenson's actions, this is a theory under which Bishop chose not to proceed. Accordingly, we reverse the trial court's denial of Duncan and Flint's motion for summary disposition and remand for the entry of an order granting summary disposition for defendant on Bishop's claim pursuant to the WPA.

#### IV

Bishop argues that the trial court erred in refusing to admit evidence of an anonymous death threat he received. Bishop posits that the exclusion of this evidence prejudiced his ability to demonstrate the totality of damages he suffered as a result of the false statements made by Hunter to the reporter for The Flint Journal. We find no abuse of discretion in the court's ruling.

#### A

In his offer of proof, plaintiff testified that he received a death threat after the article in The Flint Journal was published. Plaintiff testified that he received a telephone call at home from someone he believed was a black male, who said, "You're a dead m----f----," and then hung up. Bishop testified that because his telephone number is unlisted but available to his fellow officers, he believed that "it was either a police officer making the threat or somebody within the police department gave out my phone number to this person who did." Bishop admitted that he had no direct knowledge that the death threat was connected to the instant situation.

Evidence is relevant if it has any tendency to make the existence of a fact at issue more probable or less probable than it would be without the evidence. MRE 401; *Koester v Novi*, 213 Mich App 653, 664; 540 NW2d 765 (1995). Here, evidence of the anonymous death threat was not relevant to

show that Bishop had sustained damage to his reputation. Although the death threat may have shown that someone was angry with defendant, it did not necessarily show that his reputation had been harmed. Indeed, our review of the evidence reveals that no evidence was presented at trial that Bishop's reputation was harmed by Hunter's statements. Although the events in question became well known throughout the police department and plaintiff was teased by his fellow officers, there was overwhelming evidence that Bishop's reputation for being an honest and trustworthy police officer had not been tarnished. The trial court properly excluded Bishop's proposed testimony regarding the anonymous telephone call.

## B

Hunter asserts that because the admissibility of this evidence is the only issue raised by Bishop on appeal against Hunter, and because the claim is frivolous, he is entitled to appellate sanctions pursuant to MCR 7.216(C)(1)(a). We disagree. Our review of the record convinces us that although Bishop's appeal against Hunter was without merit, it was not so lacking in merit to be vexatious.

## V

The remaining issues raised by the parties involve the trial court's various awards of costs and attorney fees.

A mediation panel recommended awards in favor of plaintiff in the amount of \$20,000 against Duncan, \$20,000 against Flint, and \$7,500 against Hunter. Bishop's acceptance of the mediation award was conditioned on the award being accepted by all defendants. Hunter accepted the award but Duncan and Flint rejected it. Subsequently, Bishop made an offer of judgment in the amount of \$47,500 to each defendant. Duncan and Flint each made a counteroffer in the amount of \$5,000. Hunter made a counteroffer in the amount of \$1,500. Plaintiff rejected the counteroffers and the matter went to trial, resulting in a verdict of no cause of action in favor of Hunter and a verdict against Duncan and Flint in the amount of \$5,000 on Bishop's claim under the WPA.

The trial court awarded Bishop \$70,107.07 in attorney fees pursuant to the WPA.<sup>3</sup> Duncan and Flint were awarded offer of judgment sanctions in the amount of \$59,494.50 pursuant to MCR 2.405.<sup>4</sup> Hunter sought and was denied mediation sanctions pursuant to MCR 2.403; on remand from this Court, the trial court determined that any request by Hunter for costs under MCR 2.405 was untimely. We now turn to each of the trial court's rulings.

## A

Because we have determined that summary disposition should have been granted to Duncan and Flint on Bishop's claim under the WPA, the trial court's award of attorney fees pursuant to the WPA must necessarily be reversed.

## B

Regarding the trial court's award of offer of judgment sanctions to Duncan and Flint, we note that where an offer is rejected, "[i]f the adjusted verdict is more favorable to the offeree than the average offer, the offeror must pay to the offeree the offeree's actual costs incurred in the prosecution or defense of the action." MCR 2.405(D)(2). An "adjusted verdict" is "the verdict plus interest and costs from the filing of the complaint through the date of the offer." MCR 2.405(A)(5). "Average offer" is defined in pertinent part as "the sum of an offer and a counteroffer, divided by two." MCR 2.405(A)(3).

Here, the jury's verdict of no cause of action in favor of Duncan and Flint on the ELCRA count and our determination that summary disposition be granted in favor of Duncan and Flint on the WPA count is clearly more favorable to Duncan and Flint than the "average offer" of \$26,250. Accordingly, we find no abuse of discretion in awarding offer of judgment sanctions to Duncan and Flint pursuant to MCR 2.405.

## C

Hunter claims that the trial court erred in denying his request for attorney fees and costs under MCR 2.405. We disagree.

After the jury returned a verdict of no cause of action in favor of Hunter, Hunter sought mediation sanctions pursuant to MCR 2.403. In a responsive pleading to plaintiff's request for costs under MCR 2.405, Hunter alleged that he was also entitled to costs under MCR 2.405(D)(2). However, at the hearing on the motion for costs held before the trial court, Hunter asserted that he was seeking costs and attorney's fees under MCR 2.403, rather than MCR 2.405.

The trial court denied Hunter's motion for attorney's fees under MCR 2.403 and Hunter does not challenge that ruling on appeal. However, in his claim of cross appeal, Hunter argued that the trial court should have awarded him costs under MCR 2.405. This Court remanded the matter to the trial court for consideration of the issue of whether Hunter was entitled to sanctions pursuant to MCR 2.405(D). A hearing was held, after which the trial court denied Hunter's request for attorney fees and costs under MCR 2.405(D) as being untimely.

We find no abuse of discretion in the trial court's ruling. Without question, the adjusted verdict of zero (representing no cause of action) is more favorable to Hunter than the average offer of \$24,500. However, MCR 2.405(D) provides in pertinent part:

A request for costs under this subrule must be filed and served within 28 days after the entry of judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment. [MCR 2.405(D).]

As demonstrated above, Hunter did not make a timely request for sanctions pursuant to MCR 2.405. Consequently, we find that the trial court's denial of offer of judgment sanctions was a proper exercise of discretion.



## VI

We affirm the trial court's grant of summary disposition for Duncan on Bishop's claims of libel/slander, false-light invasion of privacy, and intentional infliction of emotional distress, and the trial court's exclusion of evidence regarding the anonymous death threat. We also affirm the trial court's award of offer of judgment sanctions to Duncan and Flint and the trial court's denial of such sanctions to Hunter. We reverse the trial court's denial of Duncan's and Flint's motion for summary disposition of Bishop's action under the WPA. We further reverse the trial court's award of statutory costs to Bishop under the WPA.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Myron H. Wahls

/s/ Clifford W. Taylor

<sup>1</sup> Bishop also alleged that Duncan's order to transfer Bishop out of the Traffic Bureau was not within his executive authority. As we determine elsewhere in this opinion, plaintiff presented no evidence to support his claim that Duncan had a role in Bishop's transfer. Notwithstanding this, however, we find that if Duncan were to have ordered Bishop's transfer, it would have been within his executive authority to do so.

<sup>2</sup> The court granted Hunter's motion for a directed verdict on the intentional infliction of emotional distress claim, indicating that there was no evidence that Bishop had suffered from "severe" emotional distress.

<sup>3</sup> In an action under the WPA, a court may award the complainant all or a portion of the costs of litigation, including reasonable attorney fees, if the court determines that the award is appropriate. MCL 15.363; MSA 17.430.

<sup>4</sup> The trial court correctly awarded sanctions pursuant to MCR 2.405 (offer of judgment rule) rather than MCR 2.403 (mediation rule) because plaintiff rejected defendant's counter-offer of judgment after the rejection of the mediation evaluation. MCR 2.405(E).