STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY DINOTO,

Plaintiff-Appellant,

v

CITY OF WARREN, RONALD L. BONKOWSKI, A. PHILLIP EASTER and WILLIAM J. KARPINSKI,

Defendants-Appellees.

UNPUBLISHED
December 15, 1998

No. 203417
Macomb Circuit Court
LC No. 96-000111 CZ

Before: Murphy, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants summary disposition regarding plaintiff's claims of defamation, defamation per se and tortious interference with a business relationship. We affirm.

Plaintiff first contends that the trial court erred in granting defendant summary disposition when an issue of fact existed regarding whether defendant Easter's defamatory letter was written with actual malice. A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Marx v Dep't of Commerce*, 220 Mich App 66, 70; 558 NW2d 460 (1996). The court must consider the pleadings, affidavits, depositions, and other documentary evidence available to it and grant summary disposition if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*. This Court reviews summary disposition decisions de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Id*. In our review, we must draw all reasonable inferences in the nonmoving party's favor. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

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 to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App

432, 443-444; 566 NW2d 661 (1997). A communication is defamatory if it tends to harm the reputation of another so as to lower that person in the estimation of the community or deter third persons from associating or dealing with that person. *Glazer v Lamkin*, 201 Mich App 432, 438; 506 NW2d 570 (1993). To show actual malice, the plaintiff must prove that the defendant made the statement with knowledge that it was false or with reckless disregard of the truth. *Id*. A general allegation of malice is insufficient to establish a genuine issue of material fact. *Id*.

At the time defendant Easter wrote the allegedly defamatory letter, plaintiff was employed by defendant City of Warren's fire department. An employer has the qualified privilege to defame an employee by making statements to other employees whose duties interest them in the subject matter. *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 78-79; 480 NW2d 297 (1991). The elements of a qualified privilege are (1) good faith, (2) an interest to be upheld, (3) a statement limited in scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner and to proper parties only. *Id*. at 79 (citing *Bufalino v Maxon Bros, Inc*, 368 Mich 140, 153; 117 NW2d 150 (1962).) Plaintiff may overcome this privilege only by showing that the statement was made with actual malice, that is, knowledge of its falsity or reckless disregard of the truth. *Id*. Qualifiedly privileged communications made in good faith do not lose their status if the content of the communication is indeed proved false. *Merritt v Detroit Memorial Hosp*, 81 Mich App 279, 287; 265 NW2d 124 (1978).

Viewing the evidence in the light most favorable to plaintiff, we may assume that Easter's allegations that plaintiff tape recorded the January 5, 1995 meeting and that he was deceitful and not trustworthy for having done so, which allegations plaintiff denies, are untrue and defamatory, contrary to the trial court's determination. However, Easter represented the City of Warren, plaintiff's employer. Therefore, he was permitted to defame plaintiff, an employee, by making statements to other employees whose duties interested them in the subject matter.

Plaintiff has failed to demonstrate a genuine issue of material fact regarding whether Easter's letter was protected by a qualified privilege. Easter sent the letter in his capacity as the director of the City of Warren's department of labor relations. Easter represented the city in collective bargaining negotiations with the unions of city employees. The January 9, 1995 letter addressed Easter's concerns regarding plaintiff's negotiation tactics and how they might affect the parties' attempts to work out a new contract between the city and Warren Professional Fire Fighters Union Local 1383. Easter limited his mailing of the letter to local 1383 union members and city officials and fire department employees who either attended the January 5, 1995 meeting or who had some responsibility or interest in these negotiations. Furthermore, there is no evidence that Easter acted in bad faith or knowingly made a false statement when he accused plaintiff of taping the contract negotiations meeting. Easter did not incorporate into his letter baseless accusations regarding plaintiff's conduct. An unnamed union official in attendance at the meeting informed Easter that plaintiff had taped the meeting, and the record indicates that there was a tape recorder at the meeting in the possession of union officials. Even though Easter was mistaken in his accusation, there is no evidence that he knowingly made a false statement about plaintiff. The mere fact that Easter chose to believe the person who informed him that plaintiff taped the meeting instead of accepting plaintiff's denial does not establish that Easter acted with malice.

Merritt, supra. We also note that plaintiff's suggestion that we may infer malice on Easter's part in light of the city's "intentional campaign of harassment toward plaintiff" is without merit. These letters, sent to plaintiff by defendant city fire commissioner Karpinski and which catalogue various alleged employment problems of plaintiff during 1993 and 1994, are irrelevant to plaintiff's instant claim based on Easter's January 9, 1995 letter. Finally, although plaintiff argues that no privilege exists because the letters were improperly distributed without envelopes, plaintiff acknowledges that the letters were placed in individual mailboxes at city offices. In the absence of any allegation by plaintiff that anyone other than the intended recipients viewed the contents of Easter's letter from inside the individual mailboxes, we find that this method of distribution effectively limited dissemination of the letter to only proper parties. To the extent that plaintiff alleges that Easter distributed the letter to other individuals whose names do not appear on the letter, he has completely failed to provide any names or titles of such individuals in support of this allegation. Thus, because Easter circulated the letter in good faith and only to other city employees and union officials having an interest in the communication, the trial court properly granted defendants summary disposition pursuant to MCR 2.116(C)(10) regarding plaintiff's defamation claim.

Plaintiff also argues that the court erred in granting summary disposition in favor of defendants on his claim of tortious interference with a business relationship. The basic elements of tortious interference with a business relationship are the existence of a valid business relation or expectancy, knowledge of the relationship or expectancy on the part of the interferer, an intentional interference inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the party whose relationship has been disrupted. *Lakeshore Comm Hosp, Inc v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995). Tortious interference with business relationships may be caused by defamatory statements. *Id*. However, as with defamation actions, where the conduct allegedly causing business interference is a defendant's utterance of negative statements concerning a plaintiff, privileged speech is a defense. *Id*.

Viewing the facts in plaintiff's favor, plaintiff apparently had business relationships or expectancies and defendants, including Easter, were aware of them. However, in light of our conclusion that Easter's allegations were privileged and that plaintiff failed to raise a genuine issue of fact overcoming this qualified privilege, the privilege defeats plaintiff's tortious interference action based on the January 9, 1995 letter. *Id*. Furthermore, plaintiff has failed to demonstrate with any evidence other than his mere allegations that the January 9, 1995 letter somehow resulted in his failure to be appointed as fire commissioner or reelected as union local president. City of Warren Mayor Mark Steenbergh stated in his affidavit that the allegations were not a factor when he appointed someone else for the position of fire commissioner. Plaintiff has not provided any evidence to the contrary. We also note that the reason plaintiff was not reelected president of his union was because he chose not to run for reelection. Plaintiff has provided no affidavits or other evidence from union members, or even the names of other members who stated that they would not vote for him because of Easter's allegations. Accordingly, the trial court properly granted defendants summary disposition regarding plaintiff's tortious interference claim.

Finally, we believe that plaintiff's defamation and tortious interference claims are also barred by governmental immunity. Defendants raised this defense in their motion for summary disposition.

Although the trial court recognized but failed to analyze this issue, we will briefly address it now. MCL 691.1407(5); MSA 3.996(107)(5) provides governmental immunity as follows:

> Judges, legislators, and the elective or highest appointive executive officials of all levels of government are immune from tort liability for injuries to persons or damages to property whenever they are acting within the scope of their judicial, legislative, or executive authority.

Lower level officials, employees, and agents are immune from tort liability only when they are (1) acting during the course of their employment and acting, or reasonably believe they are acting, within the scope of their authority, (2) acting in good faith, and (3) performing discretionary, as opposed to ministerial acts. *Ross v Consumers Power Co* (*On Rehearing*), 420 Mich 567, 633-634; 363 NW2d 641 (1984). Under this test, no individual immunity exists for ultra vires activities. *Id*. at 634. By definition, ultra vires activities are those which are unauthorized and outside the scope of employment. *Id*. at 631.

Easter, as director of labor relations for the City of Warren, was clearly acting within the scope of his authority as a high-level appointed department head when he wrote the January 9, 1995 letter to plaintiff accusing him of tape recording a contract negotiations meeting without defendants' knowledge. In his reply to defendants' motion for summary disposition, plaintiff conceded that Easter wrote the letter within his authority as the city's labor relations director. It was Easter's job to negotiate labor issues for the City of Warren, and the letter to plaintiff, who was negotiating on behalf of his firefighters' union, involved those negotiations. Even if defendants had intended, as plaintiff alleges, to defame plaintiff or interfere with his business relationships by distributing the letter, that is not a factor in the determination. *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143-144; 560 NW2d 50 (1997). Therefore, because our review of the pleadings and documentary evidence reveals no facts justifying an exception to governmental immunity, we conclude that summary disposition would also have been properly granted pursuant to MCR 2.116(C)(7). *Wallace v Recorder's Court of Detroit*, 207 Mich App 443, 447; 525 NW2d 481 (1994).

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage