

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD A. SULLIVAN and JOANNE M.
SULLIVAN,

UNPUBLISHED
June 4, 1999

Plaintiffs-Appellants, Cross-Appellees,

v

No. 204195
Berrien Circuit Court
LC No. 96-001652 NO

TIMOTHY ALLAN ONKKA,

Defendant-Appellee, Cross-Appellant.

Before: Sawyer, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal by right from the trial court's grant of summary disposition in defendant's favor, and in connection, the trial court's denial of their motion for reconsideration. Defendant cross appeals from the trial court's denial of his motion to amend his answer.

Plaintiff Richard Sullivan was a long-time teacher in the River Valley School District. An outspoken critic of various district and union policies and practices, plaintiff repeatedly came into conflict with Charles Williams, superintendent of schools for the River Valley District. These conflicts came to a head in 1995, resulting in school board action regarding plaintiff's further employment in the district. In March 1995, Williams contacted defendant, a South Bend psychologist, requesting that he review various documents, including a number of letters written by plaintiff, and return an analysis.

Defendant returned to Williams a letter which, clearly stating his position that the observations included were merely impressions based exclusively on the materials provided, recommended that a more formal assessment of plaintiff's personality should be made to determine his fitness. In May 1995, Williams presented the school board a recommendation that plaintiff undergo a complete physical and mental evaluation to determine his fitness for continued employment. Defendant's letter was amongst the documentation provided in support of this recommendation. The school board approved the recommendation, and despite subsequently being declared fit to continue teaching after an evaluation by his chosen psychiatrist, plaintiff's refusal to meet with a board-approved doctor resulted in his suspension. Plaintiff has not worked for the district since being suspended in 1995.

In the trial court, plaintiffs brought suit jointly against defendant and Williams, alleging defamation under the torts of libel and false light. The central issue concerned potential liability arising from the communication contained in defendant's letter to Williams. Concluding matters below, the trial court first granted summary disposition in favor of codefendant Williams. Finding that his actions related to this communication fell under the scope of his authority as superintendent of schools, the court held that Williams qualified for absolute immunity. Subsequently, defendant was granted summary disposition on a finding that the "shared interest" doctrine was implicated by the circumstances of this communication, and that therefore, defendant was entitled to a qualified privilege. Plaintiffs appeal only the court's grant of summary disposition with respect to defendant.

The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and (10), and subsequently denied plaintiffs' motion for reconsideration. We review de novo grants of summary disposition under MCR 2.116(C)(7) and (10). *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We must consider all pleadings, affidavits, depositions, admissions and other documentary evidence available to the trial court. *Horace, supra*; *Spiek, supra*. The record must be reviewed in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). We review the denial of a motion for reconsideration to determine whether the lower court abused its discretion. *Cason v Auto Owners Ins Co*, 181 Mich App 600, 605; 450 NW2d 6 (1989).

Although plaintiffs have not appealed the trial court's grant of summary disposition in favor of Williams, they base this appeal on the contention that Williams' actions were not cloaked with privilege, and therefore, defendant had no interest to share. Plaintiffs' argument below was premised on *Gracey v Wayne Co Clerk*, 213 Mich App 412; 540 NW2d 710 (1995), wherein it was reluctantly accepted that there existed an "intentional tort exception to governmental immunity for the intentional use or misuse of a badge of governmental authority for a purpose unauthorized by law." *Id.*, at 418. The court in the present case held that Williams' position as superintendent, the highest appointed executive official of a level of government, afforded him immunity from tort liability for actions within the scope of his executive authority. The court determined that pursuant to MCL 380.248; MSA 15.4248, under which he had a statutorily mandated duty to supervise, direct and even suspend the district's teachers, Williams' actions concerned professional matters that were cloaked with absolute immunity. Contrary to plaintiffs' argument, however, the court held that their proofs failed to show the type of unconscionable personal agenda that *Gracey* noted would void the privilege.

The day after the trial court issued its ruling, the Michigan Supreme Court overruled *Gracey* and ended application of the intentional tort exception. The Court stated:

We agree . . . that *Gracey* was incorrectly decided. The Legislature's grant of immunity in MCL 691.1407(5); MSA 3.996(107)(5) is written with utter clarity. We need not reach the concern that a malevolent-heart exception might not be workable, since the Legislature has provided no such test. [*American Transmissions, Inc v Attorney General*, 454 Mich 135, 143; 560 NW2d 50 (1997).]

Under this authority there is no question that the trial court's decision was correct. We agree that Williams was immune from tort liability for his actions, which unquestionably fell within the scope of executive authority provided in MCL 380.248; MSA 15.4248.

As regards defendant's entitlement to the qualified privilege applying to communications on matters of "shared interest" between the parties, the trial court rested its decision on *Rosenboom v Vanek*, 182 Mich App 113; 454 NW2d 520 (1989), in which this Court held that a university student and a department chairman shared an interest concerning criminal charges against another student within the department. *Id.*, at 118. We agree with the trial court's conclusion that while not on all fours with that situation, defendant and Williams shared a mutual interest or concern: Both acted in the interest of the school system in communicating with regard to plaintiff's fitness.

Although defendant was arguably a consulting employee of the school district, the presence or lack of a relationship within a single organization is not a dispositive characteristic of this privilege. The "shared interest" privilege

"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. The privilege embraces not only legal duties but also moral and social obligations." *Id.*, 117 (referencing *Harrison v Arrow Metal Products Corp*, 20 Mich App 590, 611-612; 174 NW2d 875 [1969]).

Williams acted not only within the scope of his authority, but also under a legal duty. We agree with the trial court that once consulted on behalf of the school board, and requested to provide even a cursory evaluation of a teacher's fitness, a corresponding duty was thereby imposed on defendant to ensure that the district's personnel and students were safe.

Because the "shared interest" doctrine applies, our analysis must now shift to the question whether the court correctly determined that plaintiffs failed to establish "actual malice" in defendant's letter, the showing required to defeat this qualified privilege. See *Harrison, supra*, 613. Plaintiffs argue that malice was evidenced by defendant's "reckless indifference to the truth or falsity of the allegedly defamatory statements." They allege that defendant had reason to doubt the veracity of statements provided by Williams, and also that defendant should have recognized signs evidencing a conflict between Williams and plaintiff, and indicating Williams' malicious intent. Plaintiffs essentially contend that before drafting the letter defendant should have conducted his own investigation to gather information independent from that provided by Williams.

In *Ireland v Edwards*, 230 Mich App 607, 622; 584 NW2d 632 (1998), we quoted a prior panel of this Court which addressed the definition for actual malice as follows:

"Actual malice is defined as knowledge that the published statement was false or as reckless disregard as to whether the statement was false or not. Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation. Furthermore, ill will,

spite or even hatred, standing alone, do not amount to actual malice. ‘Reckless disregard’ is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published.”

Whether the evidence in a defamation case is sufficient to support a finding of actual malice is a question of law. *Id.* In considering a motion for summary disposition, a court must consider whether the evidence is sufficient to allow a rational finder of fact to find actual malice by clear and convincing evidence. *Id.*

Plaintiffs presented little more than speculative assertions as to what defendant should have known. Although asserting that defendant failed to satisfy the standard of care of his profession, plaintiffs introduced no documentation supporting this claim of recklessness. Given that defendant included numerous qualifying statements within his letter to Williams, all noting that he based his analysis on limited source material, in agreement with the trial court we conclude that plaintiffs failed to establish by clear and convincing evidence that defendant in fact entertained serious doubts concerning the truth of the statements he published. *Id.*

We affirm the trial court’s grant of summary disposition and adopt its well-reasoned conclusions that any potentially defamatory statements in defendant’s letter to Williams were privileged under the shared interest doctrine and that plaintiffs failed to establish the actual malice required to overcome that privilege. *Rosenboom, supra.* We hold that defendant was entitled to judgment as a matter of law. *Morales, supra.*

Having determined that summary disposition was properly granted to defendant, we must now review whether the denial of plaintiffs’ motion for reconsideration was an abuse of discretion. *Cason, supra.* Plaintiffs contend that the trial court abused its discretion by not taking account of additional evidence they provided in support of their motion for reconsideration. Plaintiffs assert that without this additional documentation the court may have been misled into believing that no evidence of defendant’s gross negligence or gross indifference existed. “Generally, a motion for reconsideration must demonstrate a “palpable error” by which the court and the parties have been misled. A motion which merely presents the same issue as ruled on by the court, either expressly or by reasonable implication, will not be granted. MCR 2.119(F)(3).” *Id.* Plaintiffs assert that the court’s misunderstanding of the situation, in the absence of these new documents, would be “palpable error” requiring reversal of the decision denying reconsideration.

Plaintiffs contend that the additional documentation shows that defendant failed to satisfy the standard of care requisite in his profession and thus evidences defendant’s gross indifference. In its order denying the motion for reconsideration, the court stated:

In this Motion, the Plaintiff claims that the Defendant, Dr. Onkka, was grossly negligent and therefore should not be protected by a qualified privilege. This issue was expressly ruled on by the Court in its Opinion issued March 24, 1997. In that Opinion, the Court found that Plaintiff had presented no evidence that Dr. Onkka acted

recklessly or with gross negligence. Although the Plaintiff has attached additional evidence to his Motion, this evidence does not establish that Dr. Onkka's conduct constituted gross negligence. At best, the proffered [sic] evidence would support a claim of ordinary negligence, which is insufficient to defeat the qualified privilege.

The trial court correctly determined that this claim falls squarely under the purview of MCR 2.119(F)(3), which deems issues ruled on, "either expressly or by reasonable implication," to be invalid bases for granting reconsideration. Though the order notes that the court reviewed the proffered support, we believe that especially given plaintiffs' concession that they possessed all this newly submitted documentation when they filed their brief opposing summary disposition,¹ pursuant to MCR 2.119(F)(3) that diligence was unnecessary.

The "new" evidence merely provides support for an argument plaintiffs made during the original motion. In *Charbeneau v Wayne Co General Hosp*, 158 Mich App 730; 405 NW2d 151 (1987), we found no abuse of discretion in the denial of reconsideration requested on the basis of "a legal theory and facts which could have been pled or argued prior to the trial court's original order." *Id.* at 733. Plaintiffs made the argument that defendant exhibited recklessness below. A conscious choice not to focus on this theory, despite possessing the documentation later submitted, will not support a finding of "palpable error."

This Court agreeing with the trial court's grant of summary disposition, the alternative theories and issues presented by the parties need not be addressed.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Michael J. Talbot

¹ The key items amongst the "new" documentation submitted were the complete depositions of defendant and two other psychologists. Plaintiffs excerpted these depositions for the original motion, purposely electing not to include the portions of these depositions relating to defendant's methods and the psychology profession's standard of care. They unconvincingly claim that "excusable neglect," due to the volume of their brief and a focus on other issues, explains the failure to include these materials at the earlier stage of the proceedings.