STATE OF MICHIGAN

COURT OF APPEALS

SHERMAN E. SHERWOOD,

Plaintiff-Appellant,

v

EAST BAY TOWNSHIP, a municipal corporation,

Defendant-Appellee.

UNPUBLISHED
May 16, 2000

No. 214270
Grand Traverse Circuit Court
LC No. 97-016297-NZ

Before: Smolenski, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendant's motion for directed verdict on plaintiff's defamation and self-defamation claims. We affirm.

Plaintiff argues that the trial court improperly granted defendant's motion for directed verdict. Specifically, plaintiff asserts that the court construed the governmental immunity doctrine too broadly and should have allowed his claims of defamation and self-defamation to go to the jury. We disagree.

"The applicability of governmental immunity is a question of law that is reviewed de novo on appeal." *Cain v Lansing Housing Comm*, 235 Mich App 566, 568; 599 NW2d 516 (1999). In deciding a motion for a directed verdict, the trial court "must consider the evidence in the light most favorable to the nonmoving party," making all reasonable inferences in favor of the nonmoving party. *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994); *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997). A directed verdict should be granted only when no question of fact exists upon which reasonable minds could differ. *Brisboy Fibreboard Corp*, 429 Mich 540, 549; 418 NW2d 650 (1988). The trial court's decision in granting or denying the motion for directed verdict will not be disturbed absent "a clear abuse of discretion." *Phinney*, *supra*.

In the present case, plaintiff is suing defendant Township and not any individuals. Plaintiff is claiming that defendant is vicariously liable because of the actions of its employees. Pursuant to MCL 691.1407(1); MSA 3.996(107)(1) of the governmental immunity act, governmental agencies are immune from tort liability when "engaged in the exercise or discharge of a governmental function." *Tryc*

v Michigan Veterans' Facility, 451 Mich 129, 134; 545 NW2d 642 (1996). Defendant Township is considered to be a governmental agency. MCL 691.1401(d); MSA 3.996(101)(d); see, also, *Kuriakuz v West Bloomfield Twp*, 196 Mich App 175; 492 NW2d 757 (1992). 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); MSA 3.996(101(f); *Russell v Dep't of Corrections*, 234 Mich App 135, 137; 592 NW2d 125 (1999). "To determine whether a governmental agency is engaged in a governmental function, the focus must be on the general activity, not the specific conduct involved at the time of the tort." *Pardon v Finkel*, 213 Mich App 643, 649; 540 NW2d 774 (1995). Generally, no intentional tort exception exists to governmental immunity. *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd sub nom *Will v Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989); *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 450; 487 NW2d 799 (1992). Further, a governmental agency can be vicariously liable only when its employee, 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).

For the purpose of determining vicarious liability, the specific issue in this case involves whether the actions of defendant's employees (Clerk Janice Gee and Treasurer Debora Watson) in volunteering the fact and details of plaintiff's termination are "nongovernmental" as stated in *Ross, supra*.[1] Plaintiff does not claim that the actions in question are proprietary or fall within a statutory exception. Further, the focus must be on the general activity involved and not the specific conduct. *Pardon, supra*. We conclude that the trial court's opinion accurately states the law and the testimony in this case, correctly construes the testimony in plaintiff's favor, and correctly concludes that plaintiff's claims of defamation and self-defamation are barred by governmental immunity.

In concluding that the employees' actions constituted governmental activity and in granting defendant's motion for a directed verdict on the defamation and self-defamation claims, the trial court analogized and relied on three cases: *Meadows v Detroit*, 164 Mich App 418; 418 NW2d 100 (1987), *American Transmissions v Attorney Gen'l*, 454 Mich 135; 560 NW2d 50 (1997), and *Washington v Starke*, 173 Mich App 230; 433 NW2d 834 (1988). We agree with the trial court that these cases are most helpful in resolving the current issue presented by plaintiff.

In *Meadows, supra* at 427, 431, the plaintiff argued that the defendant city was vicariously liable for the torts of its employees in the Detroit Police Department, including the police chief's letter, which, according to the plaintiff, was defamatory, that was written in response to a citizen's complaint regarding the plaintiff's discharge. In the letter to the citizen, the police chief stated that the plaintiff had violated departmental regulations by failing to report that his partner had accepted a bribe and that the plaintiff's actions constituted "criminal conduct." *Id*. at 427. The Court concluded that governmental immunity applied and that the police chief was acting within his authority in responding to the citizen's complaint. *Id*. at 428, 431-432. Thus, the trial court correctly concluded that the defendant city was not vicariously liable for the alleged torts of its employees. This Court further stated that to the extent that the defendant employees' action were ultra vires, i.e., contrary to the defendant city's procedures,

the city would still not be vicariously liable pursuant to *Ross, supra* at 624-625. This Court affirmed the trial court's dismissal of the plaintiff's defamation and intentional infliction of emotional distress claims against the defendant city. *Meadows, supra* at 435.

In *American Transmissions, supra* at 136-137, the Attorney General held a press conference to explain an investigation that was being conducted involving independent transmission shops, including the plaintiff. During the press conference, the Attorney General made various comments, alleged by the plaintiff to be defamatory, that the plaintiffs were "fraudulent," "crooks and cheats," and operated "crooked transmission shops." *Id*. at 137. Our Supreme Court concluded that the Attorney General was clearly "immune from tort liability" because he "was acting within the scope of [his] executive authority." *Id*. at 144. Further, in *American Transmissions*, the Supreme Court overruled the case of *Gracey v Wayne Co Clerk*, 213 Mich App 412; 540 NW2d 710 (1995).

In *Gracey, supra* at 415-416, the plaintiff asserted that the Wayne County Clerk was not entitled to governmental immunity after the clerk held a press conference the day before an election, alleging that the plaintiff, who was running for office, had illegally handled absentee ballots. The plaintiff argued that the clerk held the press conference for the sole purpose of disseminating false information and swaying the electorate by dissuading voters from supporting the plaintiff. *Id*. at 416. This Court concluded that, if the clerk's purpose was to disseminate false information with an intent to sway an election, then these actions would be outside the scope of authority and the clerk would not be entitled to governmental immunity. *Id*. at 418. However, in *American Transmissions, supra* at 143, the Supreme Court stated that *Gracey* had been incorrectly decided, and, as correctly stated by the trial court in the case at bar, in overruling *Gracey*, our Supreme Court basically holds that "even if incorrect or false information is intentionally or malevolently disseminated by a public official, . . . if it is within the scope of . . . authority to disseminate this information, . . . [then the] executive officials are immune . . . ." Although instant plaintiff has not sued the individual township officers in this case, *American Transmissions* and *Gracey* are instructive. If the executive officials are immune from liability, the agency cannot be held vicariously liable.

In *Washington, supra* at 241, this Court applied the governmental immunity doctrine and held that a municipality was not vicariously liable after a police officer used excessive force while making an arrest because the arrest was in furtherance of a governmental function. The trial court in the present case analogized *Washington* to the instant facts and stated that, even if the Township employees explained in more detail than they should have about plaintiff's termination, this was similar to the police officers in *Washington* using excessive force to make an arrest. Just as this Court in *Washington* still found the excessive force to be in furtherance of a governmental function, the instant trial court believed that it was in furtherance of a governmental function for the Township employees to explain plaintiff's termination as a property inspector in the assessor's office.

Focusing on the general activity of Clerk Gee and Treasurer Watson, *Pardon, supra* at 649, we agree with the trial court that the activity at issue, i.e., explaining plaintiff's termination, was in furtherance of a governmental function and was not "nongovernmental." Governmental immunity embraces all activities that are incidents of running townships. See *Russell, supra*. Logically included

within these duties are the hiring and firing of personnel to assist in running the township and explaining to the resident taxpayers the decision made by the Township officials. Although plaintiff attempts to distinguish *Meadows* and *American Transmissions* by stating that the Township officers in the instant case "volunteered" the information about plaintiff's termination as opposed to responding to complaints or being compelled to do so as in *Meadows* and *American Transmissions*, we conclude that plaintiff's assertion regarding the fact that defendant's employees volunteered the information is a distinction without a difference. Thus, plaintiff's defamation claim must fail. With respect to plaintiff's self-defamation claim, this argument is also without merit. We agree with the trial court that it is "even clearer" that no vicarious liability exists with respect to this claim because the self-defamation claim "arises directly from the clearly governmental action of hiring and firing . . . township assessor workers."

Viewing the evidence in the light most favorable to plaintiff, *Locke*, *supra* at 223, defendant cannot be held vicariously liable for plaintiff's compelled self-defamation nor for any dissemination, on the part of Township officials, regarding the reasons plaintiff was terminated from defendant's employment. The trial court did not abuse its discretion in granting defendant's motion for directed verdict with respect to plaintiff's defamation and self-defamation claims. *Phinney*, *supra*.

Plaintiff also suggests a reexamination of the Supreme Court's "far-reaching decision" in *Ross*, *supra*. However, the Supreme Court must review this decision, not the Court of Appeals as we are bound by the Supreme Court's decisions until they are overruled or modified by that Court. *Mahaffey v Attorney Gen'l*, 222 Mich App 325, 339; 564 NW2d 104 (1997).

We affirm.

/s/ Michael R. Smolenski
/s/ Jane E. Markey
/s/ Peter D. O'Connell

[1] In stating the issue this way, this assumes, as did the trial court and the parties, that Clerk Gee and Treasurer Watson were acting "within the scope of [their] authority." *Ross*, *supra* at 625. However, even if this Court concluded that the actions of Gee and Watson were "nongovernmental," the argument can still be made that they were not acting "within the scope of [their] authority." "Scope of authority" is defined as "[t]he reasonable power that an agent has been delegated or might foreseeably be delegated in carrying out the principal's business." *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 409; 605 NW2d 690 (1999), quoting Black's Law Dictionary, 7th ed, p 1348. "The scope of an employee's authority must always be considered in the light of the particular circumstances of his or her employment." *Backus*, *supra* at 410.

In the present case, Township Supervisor Joseph Bartko, testified that because there was concern about information being disseminated regarding plaintiff's termination, defendant employees were told to tell people, if they asked, that plaintiff was no longer working for defendant Township. If the person proceeded to ask additional questions, Bartko indicated that employees were told to respond with a "[w]e don't know" statement. Thus, it could be argued that Gee and Watson did not have the power to disseminate the reasons for plaintiff's termination. If the actions of Gee and Watson

were ultra vires, i.e., outside the scope of authority, then defendant Township cannot be held vicariously liable. *Ross, supra* at 624-625; *Meadows v Detroit*,164 Mich App 418, 432; 418 NW2d 100 (1987).