

STATE OF MICHIGAN
COURT OF APPEALS

MOLLY HALL,

Plaintiff-Appellee/Cross-Appellant,

v

JOHN C. CLAYA,

Defendant-Appellant/Cross-
Appellee,

and

PONTIAC SCHOOL DISTRICT, WALLACE L.
DUNN, JR., and MILDRED MASON,

Defendants.

UNPUBLISHED

July 17, 2008

No. 277202

Oakland Circuit Court

LC No. 2005-065412-CD

Before: Fitzgerald, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Defendant, John C. Claya, appeals as of right from a judgment in favor of plaintiff, Molly Hall, following a jury trial, on her claim for tortious interference with a contractual relationship. Plaintiff cross appeals, challenging the trial court's order granting defendant's motion for a directed verdict on plaintiff's additional defamation claim. We affirm the judgment for plaintiff, but reverse the order directing a verdict in favor of defendant on plaintiff's defamation claim and remand for further proceedings.

Plaintiff, a full-time employee with defendant Pontiac School District, went on disability leave because of hypertension and thyroid surgery. Apart from her job with the Pontiac School District, plaintiff also worked part time as a real estate agent. She was covered by a privately purchased disability policy that provided her with disability benefits. The policy provided that she was eligible to receive benefits even if she worked part time, but not if she was engaged in full-time employment.

After plaintiff went on disability leave with the school district, defendant, as general counsel and executive director of human resources for the school district, hired a private investigator to ascertain whether plaintiff had outside employment while on leave. The private investigator recorded plaintiff's activities, went through her garbage, watched her house, and

reported to defendant that plaintiff had a job in real estate. The private investigator was not asked to determine whether plaintiff was working part time or full time. Defendant, without seeking authorization from the school district, thereafter contacted plaintiff's private disability insurer and other state agencies, and volunteered that plaintiff was working a full-time job while collecting disability. In a private email message to a state agency, defendant reported that plaintiff was involved in insurance fraud. The insurance company thereafter refused to pay plaintiff further benefits and demanded a refund of benefits already paid. According to plaintiff's witnesses, plaintiff worked only part time doing real estate work, no more than ten hours a week.

Plaintiff subsequently filed this action and proceeded to trial against defendant on claims for defamation and tortious interference with a contractual relationship. The trial court granted defendant's motion for a directed verdict with respect to the defamation claim, but denied defendant's motion with respect to the tortious interference claim. The jury returned a verdict for plaintiff and awarded her actual damages of \$9,466.67 and exemplary damages of \$170,000.

On appeal, defendant first argues that he was entitled to a directed verdict on the basis of governmental immunity. Plaintiff also filed this action against the Pontiac School District, which moved for summary disposition on the basis of governmental immunity. The trial court denied the school district's motion, but this Court reversed that decision in *Hall v Pontiac School Dist*, unpublished opinion per curiam of the Court of Appeals, issued October 19, 2006 (Docket No. 269981) (*Hall I*), concluding that the school district was engaged in the exercise or discharge of a governmental function by investigating whether plaintiff was engaged in full-time real estate employment in violation of her medical leave of absence. This Court stated that although the school district's governmental function did not necessarily encompass supervising its employees' relationships with their private insurers, plaintiff expressly involved the school district in her private contractual relationship by asking defendant to sign paperwork for her insurer verifying pertinent information related to her medical leave, and that the school district's governmental function encompassed providing accurate information regarding its employees' work-related conduct to parties having a legitimate interest in obtaining the information. *Id.*, slip op at 3.¹

Defendant asserts in particular that it is legally and logically inconsistent to conclude that he was engaged in the exercise of a governmental function as determined in *Hall I*, yet still find that he was not protected by governmental immunity. "When reviewing a trial court's decision on a motion for a directed verdict, the standard of review is de novo and the reviewing court must consider the evidence in the light most favorable to the nonmoving party." *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 220-221; 716 NW2d 220 (2006). A motion for a directed verdict should be granted only if the evidence fails to establish a claim as a matter of law. *Sniecinski v*

¹ During the trial against defendant, plaintiff presented evidence that the disability form she initially provided to defendant's office contained an error. Plaintiff thereafter contacted defendant's office to explain the error and provided a corrected copy of the form. Defendant retained the inaccurate form and refused to sign the corrected form. He later based his decision to contact plaintiff's insurance company on the inaccurate information, and the corrected form was never submitted to the insurer.

Blue Cross & Blue Shield of Michigan, 469 Mich 124, 131; 666 NW2d 186 (2003). “The applicability of governmental immunity is a question of law that is reviewed de novo on appeal.” *Herman v City of Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004).

Immunity is construed broadly and its exceptions are construed narrowly. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). A governmental employee, acting within the scope of his authority is generally immune from tort liability unless he was grossly negligent, and his gross negligence was the proximate cause of the injury or damage. MCL 691.1407(2)(a) - (c). But the immunity provision in § 1407(2) does not alter the law of intentional torts as it existed before July 7, 1986. MCL 691.1407(3). Thus, for immunity to attach in this case, in addition to requiring that defendant have acted within the course of his employment and act, or reasonably believe he was acting within the scope of his authority, he must also have acted in good faith. *Frohriep v Flanagan (On Remand)*, ___ Mich App ___, ___ NW2d ___ (Docket No. 273426, issued 4/29/2008), slip op at 5. This “qualified immunity” was not intended to “shield malicious or intentionally unlawful behavior when the actor is not engaged in broad, essential governmental decision-making.” *Id.* Therefore, “an individual employee’s intentional torts are not shielded by our governmental immunity statute.” *Sudul v City of Hamtramck*, 221 Mich App 455, 458; 562 NW2d 478 (1997). Accord *Lavey v Mills*, 248 Mich App 244, 257; 639 NW2d 261 (2001).

If this case was limited only to defendant’s decisions to conduct an internal investigation and refusal to sign plaintiff’s disability slip, we would find merit to his argument that he was entitled to immunity. But defendant, who had no relationship with plaintiff’s insurance company, went further by volunteering inaccurate and unfounded information that the school district had conducted surveillance on plaintiff for two months and discovered she was working full time. Defendant testified that he did this on his own and because of his own conclusions about what he considered was “right” and ethical. The evidence disclosed that the information defendant possessed showed that the surveillance lasted only approximately two days, and there was no evidence that plaintiff ever worked at her real estate job on a full time basis. There was evidence that defendant also contacted the state Investment Division of Finance and Insurance Services, using his personal email, to report that plaintiff had engaged in insurance fraud, and that the state agency contacted the National Insurance Crime Bureau. Viewed in a light most favorable to plaintiff, this evidence was sufficient to enable a jury to conclude that defendant was not acting within the scope of his authority, did not act in good faith, and acted maliciously and intentionally when he contacted the agencies and provided false information. Thus, the trial court properly determined that defendant was not entitled to governmental immunity.

Defendant also argues that he was entitled to a directed verdict on plaintiff’s claim for tortious interference with a contractual relationship. To establish tortious interference with a contractual relationship, a plaintiff must show that the defendant improperly and unjustifiably instigated a breach of contract. *CMI Int’l, Inc v Internet Int’l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002). “The ‘improper’ interference can be shown either by proving (1) the intentional doing of an act wrongful per se, or (2) the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiffs’ contractual rights or business relationship.” *Advocacy Org for Patients & Providers v Auto Club Ins Ass’n*, 257 Mich App 365, 382-383; 670 NW2d 569 (2003). Actual malice has been defined as knowledge that a

publication was false, or reckless disregard regarding whether it was false. *Mino v Clio School Dist*, 255 Mich App 60, 73; 661 NW2d 586 (2003).

After reviewing the record, we conclude that defendant's argument that there was no evidence that his actions were either per se wrongful, or that they were performed with malice fails. The evidence permitted the jury to find that defendant had no legitimate purpose in contacting plaintiff's insurance company to report that she was working full time in real estate. The only "justification" that defendant offered was that he volunteered the information because he was an attorney and did what he thought was right. From the evidence that the information that defendant volunteered was false, however, a reasonable jury could conclude that defendant acted with malice or reckless disregard of the truth. The evidence showed that the inaccurate information conveyed by defendant caused plaintiff's insurer to cease paying benefits and demand a refund of benefits previously paid. The trial court did not err in denying defendant's motion for a directed verdict on this claim.

Next, defendant argues that the trial court abused its discretion in denying his post-judgment motion for relief from the award of \$170,000 in exemplary damages. We review the trial court's decision for an abuse of discretion. *McPeak v McPeak (On Remand)*, 233 Mich App 483, 489-490; 593 NW2d 180 (1999). There is no dispute that exemplary damages are proper in intentional tort cases "if they compensate a plaintiff for the humiliation, sense of outrage, and indignity resulting from injuries maliciously, willfully and wantonly inflicted by the defendant." *B & B Investment Group v Gitler*, 229 Mich App 1, 9-10; 581 NW2d 17 (1998). The idea behind an exemplary damage award is that the reprehensibility of the defendant's conduct intensified the plaintiff's injury. *Id.*

Here, the trial court instructed the jury to award exemplary damages only if it determined that defendant acted improperly, intentionally, and with malice. Plaintiff was already on disability leave from her position with the school district because of hypertension associated with job-related stress before defendant's tortious conduct. Plaintiff testified that she had suffered ongoing harassment by defendant even before he contacted her private insurer and conveyed the false information about her employment status. Defendant's conduct in contacting her insurer and accusing her of insurance fraud caused her feelings to intensify. Plaintiff believed that the invasions into her privacy were humiliating and outrageous, and she felt , helpless, and harassed. She stated that she lived alone and was frightened and afraid to leave her home by herself or at night.

While defendant argues that an award of \$170,000 is excessive and was influenced by improper considerations, he has not shown support for this claim in the record. In any event, the trial court was in a better position to determine whether the jury's verdict was influenced by passion, bias, or anger. *Palenkas v Beaumont Hosp*, 432 Mich 527, 534; 443 NW2d 354 (1989). The trial court did not abuse its discretion in denying defendant's request for relief from the award of exemplary damages.

Finally, plaintiff argues on cross appeal that the trial court erred in dismissing her defamation claim. The trial court did not disagree that plaintiff raised a question of defamation per se, but concluded that she had not shown damage to her reputation. The elements of defamation are "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the

part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication.” *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005). A false accusation of a crime is defamation per se. *Kevorkian v American Medical Ass’n*, 237 Mich App 1, 8; 602 NW2d 233 (1999). Defamatory statements are considered “published” when they are communicated to a third party. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 434, 444; 566 NW2d 661 (1997).

Here, the evidence showed that defendant conveyed false information about plaintiff’s employment status and accused her of insurance fraud, a criminal offense. The statements were published when defendant faxed or emailed them to the insurance company and a state agency. Although defendant argues that there was no evidence that plaintiff’s reputation was damaged, the lack of damage to her reputation is not fatal to this claim because proof of damage is not required where the claim involves defamation per se. Here, defendant falsely accused plaintiff of committing a crime, which is defamation per se. *Kevorkian, supra* at 8. Accordingly, the trial court erred in directing a verdict in favor of defendant on plaintiff’s defamation claim.

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

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Pat M. Donofrio