

STATE OF MICHIGAN  
COURT OF APPEALS

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STEVEN COX,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION and  
ROBERT L. RICHARDS,

Defendants-Appellants.

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UNPUBLISHED

August 28, 2008

No. 278452

Wayne Circuit Court

LC Nos. 06-614770-CD;

06-001387-NZ<sup>1</sup>

Before: Schuette, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court order denying their motion for summary disposition, pursuant to MCR 2.116(C)(7), as to plaintiff’s claim of wrongful discharge in violation of public policy against Michigan Department of Transportation (MDOT). We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This Court reviews de novo decisions to grant or deny summary disposition. Summary disposition under MCR 2.116(C)(7) is proper when a claim is barred by immunity granted by law. To get past such a motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity. *Marchyok v Ann Arbor*, 260 Mich App 684, 687; 679 NW2d 703 (2004).

MCL 691.1407 provides that “a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.” “Immunity from tort liability, as provided by MCL 691.1407..., is expressed in the broadest possible language—it extends immunity to all governmental agencies for *all* tort liability whenever they are engaged in the exercise or discharge of a governmental function.” *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156; 615 NW2d 702 (2000). Because the immunity

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<sup>1</sup> Plaintiff originally filed his claim against defendant Department of Transportation in the Court of Claims (lower court no. 06-001387-NZ). That case was transferred to the Wayne Circuit Court and consolidated with lower court no. 06-614770-CD.

conferred upon governmental agencies is broad, the statutory exceptions to such immunity are to be narrowly construed. *Id.* at 158.

There is no intentional tort exception to governmental immunity. *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd sub nom *Will v Michigan Dep't of State Police*, 491 US 58 (1989). Moreover, a governmental agency may be vicariously liable for the acts of its employee only when the 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. *Scameheorn v Bucks*, 167 Mich App 302, 310; 421 NW2d 918 (1988).

Plaintiff alleges that defendant Richards instructed him to perform electrical repairs at designated worksites without proper safety equipment. Plaintiff further alleges that after he complained to MDOT's Safety Board about the failure to follow proper safety procedures, MDOT discharged him.

The maintenance and repair of a highway are governmental functions. *Thomas v Dep't of State Hwys*, 398 Mich 1, 12; 247 NW2d 530 (1976). The making of decisions regarding the hiring and firing of MDOT employees is also a government function. See MCL 247.806a(b). Thus, it is clear that the conduct complained of by plaintiff constitutes the exercise or discharge of a governmental function by MDOT.

With regard to plaintiff's claim of wrongful discharge in violation of public policy, a claim of retaliatory discharge from employment sounds in tort. See *Dunbar v Dep't of Mental Health*, 197 Mich App 1, 10; 495 NW2d 152 (1992). An essential element of an intentional tort is either intent or willfulness where the conduct alleged shows the intent to harm or indifference as to whether harm would result. See *Hill v Saginaw*, 155 Mich App 161, 170; 399 NW2d 398 (1986). Retaliation, by definition, is an intentional act. Thus, we hold that a public policy-based retaliatory discharge constitutes an intentional tort.

Accordingly, we find that the trial court erred in failing to find that plaintiff's claim of wrongful discharge in violation of public policy against MDOT was barred by governmental immunity. In performing the actions complained of by plaintiff, MDOT was exercising a governmental function and was therefore immune from tort liability. See MCL 691.1407. Because there is no intentional tort exception to governmental immunity, *Smith, supra*, the trial court should have dismissed the claim of wrongful discharge in violation of public policy against MDOT pursuant to MCR 2.116(C)(7).

Plaintiff argues that the application of immunity in this case means that MDOT, unlike other employers in Michigan, will be permitted to discharge employees for reporting safety violations. However, governmental immunity is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a governmental agency on the basis that public entities are fundamentally different from private persons and therefore should not be liable in the same way. *Nawrocki, supra* at 155-156.

Plaintiff also complains that the claim of wrongful discharge in violation of public policy is his sole remedy against MDOT. However, because immunity necessarily implies that a

“wrong” has occurred, it is inevitable that some tort claims against a governmental agency will go unremedied. *Id.* at 157.

Reversed and remanded for entry of an order granting summary disposition to MDOT on plaintiff’s claim of wrongful discharge against public policy. We do not retain jurisdiction.

/s/ Bill Schuette

/s/ Brian K. Zahra

/s/ Donald S. Owens