STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL C. CHUPA, JENNIFER J. CHUPA, CHUPA & ASSOCIATES, P.C., D. TODD WILLIAMS, AND D. TODD WILLIAMS, P.C.,

Plaintiffs-Appellees,

v

CAROLYN KURKOWSKI MOCERI, JAMES R. FOUTS, MICHAEL J. WIECEK, MARY M. KAMP, and CITY OF WARREN,

Defendants-Appellants.

UNPUBLISHED
March 4, 2010

No. 288337
Macomb Circuit Court
LC No. 07-002977-CZ

Before: Hoekstra, P.J., and Stephens and M. J. Kelly, JJ.

PER CURIAM.

Defendants appeal by leave granted the trial court's order denying their motion for summary disposition under MCR 2.116(C)(10) on plaintiffs' claims for defamation, breach of contract, unjust enrichment, and account stated. We reverse the trial court's order on the claims for defamation and breach of contract, but affirm the order on the claims for unjust enrichment and account stated and remand for further proceedings.

Plaintiffs Michael C. Chupa (Michael), Jennifer J. Chupa (Jennifer), and D. Todd Williams sued defendants for defamation.[1] Michael and Jennifer also sued defendants, four members of the Warren City Council and the City of Warren (City), for breach of contract, unjust enrichment, and account stated. The defamation claim arose from statements that the individual defendants made at meetings of the Warren City Council on May 24, 2005, and September 13, 2005, and from statements by the individual defendants that appeared in various newspaper articles. The breach of contract, unjust enrichment, and account stated claims arose from the individual defendants' refusal to authorize the City's controller's officer to issue payment to Michael and Jennifer on orders of payment issued by the 37th District Court (District Court) for the representation that Michael and Jennifer provided to indigent defendants.

[1] The count in the complaint was titled "libel and slander."

The trial court denied defendants' motion for summary disposition under MCR 2.116(C)(10). It found that there was a question of fact whether the individual defendants had defamed plaintiffs and whether the orders for payment issued by the District Court had been fully paid by the City.[2]

I. Standard of Review

We review de novo a trial court's decision on a motion for summary disposition. *Johnson v Wausau Ins Co*, 283 Mich App 636, 641; 769 NW2d 755 (2009). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." We must view the submitted documentary evidence in the light most favorable to the nonmoving party. *Johnson*, 283 Mich App at 641.

II. Defamation

On appeal, defendants claim that they are entitled to summary disposition on plaintiffs' defamation claim for two reasons that were not argued before the trial court. Defendants argue that the alleged defamatory statements by the individual defendants were absolutely privileged, and, in the alternative, argue that governmental immunity protects the individual defendants, as legislators, from tort liability.

Because defendants did not raise the issues of absolute privilege and governmental immunity below, the issues are not preserved for appellate review. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). We are not obligated to address issues that are raised for the first time on appeal. *Michigan Ed Ass'n v Secretary of State*, 280 Mich App 477, 488; 761 NW2d 234 (2008). However, we may disregard preservation requirements. We may consider an unpreserved issue if the issue involves a question of law and the facts necessary for its resolution have been presented. *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 640; 734 NW2d 217 (2007). The issue whether a privilege attaches to a communication is a question of law, *Couch v Schultz*, 193 Mich App 292, 294; 483 NW2d 684 (1992), as is the application of governmental immunity, *County Road Ass'n of Michigan v Governor*, ___ Mich App ___; ___ NW2d ___ (2010). Our review of the record establishes that the necessary facts for resolution of the issues have been presented.[3] Accordingly, we exercise our discretion and review the issues of absolute privilege and governmental immunity.

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[2] Plaintiffs initially sued defendants in federal court. After that lawsuit was filed, the City paid lump sums of $17,252 and $21,762.50 to Michael and Jennifer, respectively. The federal district court dismissed the case after it granted summary disposition to defendants on plaintiffs' claims for violations of due process and equal protection.

[3] We note that plaintiffs argue that, had defendants raised the issue of governmental immunity below, they could have presented evidence to create a genuine issue of material fact regarding whether the individual defendants are entitled to immunity. Plaintiffs do not, however, explain what evidence they could and would have presented had the issue of governmental immunity

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A. Absolute Privilege

"A communication is defamatory if, under all the circumstances, it tends to so harm the reputation of an individual that it lowers the individual's reputation in the community or deters others from associating or dealing with the individual." *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000). There are four elements to a defamation action:

> (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. [*Oesterle v Wallace*, 272 Mich App 260, 263-264; 725 NW2d 470 (2006) (quotation omitted).]

A communication that is covered by absolute privilege is not actionable. *Oesterle*, 272 Mich App at 264. "The doctrine of absolute privilege is narrow. The privilege extends to: 1) proceedings of legislative bodies; 2) judicial proceedings; and 3) communications by military and naval officers." *Froling v Carpenter*, 203 Mich App 368, 371; 512 NW2d 6 (1994) (internal citations omitted); see also *Timmis v Bennett*, 352 Mich 355, 363-364; 89 NW2d 748 (1958). "The absolute privilege for legislative bodies extends to subordinate bodies, such as a city council." *Froling*, 203 Mich App at 371. However, a communication made by a legislative official during a legislative hearing is only privileged if the communication concerned a public matter and was made while the official was carrying out an official duty. *Id.* at 371-372. A statement is not absolutely privileged merely because it was made during a legislative proceeding. *Id.*

> The fact that a public official is a member of a legislative body and is in attendance at a duly convened proceeding of such body does not afford him an invitation to undertake an unrestricted slanderous campaign against whomever he pleases, concerning whatever he pleases. In addition to being spoken during a legislative or quasi-legislative session, the statements at issue must be made by the public official while in the process of carrying out an official duty. [*Gidday v Wakefield*, 90 Mich App 752, 756; 282 NW2d 466 (1979).]

Defendants claim that the alleged defamatory statements by the individual defendants made at the May 24, 2005, and September 13, 2005 city council meetings, as well as the alleged defamatory statements that appeared in various newspaper articles, are absolutely privileged. We begin by considering the communications at the two city council meetings.

At the May 24, 2005 meeting, the matter before the City Council was a rezoning request by Ferlito Construction, which was represented at the meeting by Williams. Plaintiffs cannot dispute that the rezoning request was an issue properly before the City Council. One function of the City Council was to decide rezoning requests. The alleged defamatory communications, which were made by defendants Fouts and Wiecek, were made after Williams confirmed that he

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been raised below.

had previously represented White Castle before the City Council and that both White Castle and Ferlito Construction had been represented by Michael before the planning commission. In addition, several of the alleged defamatory communications were made after a Warren resident asked Councilman Michael W. Chupa, the father of Michael and Jennifer, not to vote on the rezoning request, another Warren resident asked the City Council to "debate" the apparent "big switch" of Ferlito Construction's representation, and Councilman Chupa asked his fellow council members to vote on whether to excuse him from voting on the rezoning request. The alleged defamatory communications by Fouts and Wiecek were part of a larger discussion regarding the Ferlito Construction rezoning request. The larger discussion included debates on whether the Chupas, with the help of Williams, were attempting to "hoodwink" the City Council into approving the rezoning request and whether Councilman Chupa should be excused from voting on the rezoning request. Accordingly, the statements of Fouts and Wiecek concerned public matters and were made while Fouts and Wiecek were in the process of carrying out an official duty. The alleged defamatory communications at the May 24, 2005 city council meeting were absolutely privileged.

At the September 13, 2005 meeting, the matter before the City Council that sparked intense discussion were orders for payment from the District Court for the representation provided to indigent defendants by Michael and Jennifer. Again, it cannot be disputed that authorization of payment to Michael and Jennifer was an issue properly before the City Council. Although orders for payment had been issued by the District Court, the City Council had to authorize payment before any payment could be made. The alleged defamatory communications, which were made by all four of the individual defendants, were made in the City Council's discussion regarding whether to authorize payment to Michael and Jennifer. The discussion involved concerns by defendants that Michael and Jennifer received more court appointments than other attorneys because of Councilman Chupa's presence on the City Council and whether Councilman Chupa, by voting on the District Court budget from which his children received substantial income, violated the Council's ethics and anti-nepotism ordinances. The alleged defamatory communications were not part of "an unrestricted slanderous campaign" against Michael and Jennifer. Rather, the statements were made while the individual defendants, and other city council members, were discussing an issue that was properly before the City Council. Accordingly, the alleged defamatory communications at the September 13, 2005 city council meeting were absolutely privileged.

Because the alleged defamatory communications made by the individual defendants at the two city council meetings were absolutely privileged, the communications are not actionable. *Oesterle*, 272 Mich App at 264. The individual defendants, therefore, are entitled to summary disposition on plaintiffs' defamation claim in regard to the alleged defamatory communications that were made at city council meetings.

However, we cannot conclude that the alleged defamatory communications that appeared in various newspaper articles were also absolutely privileged. Although defendants claim that "[t]he record does not show that any of the complained-of statements were made outside of legislative proceedings," the record does not show that the communications were, in fact, made at city council meetings. The record is simply silent regarding when the communications contained in the newspaper articles were made. Because the record does not establish that the communications of the individual defendants that appeared in the newspaper articles were made

at city council meetings, defendants have not shown that the communications were absolutely privileged.

B. Governmental Immunity

Pursuant to MCL 691.1407(5), judges, legislators, and highest executive officials of all levels of government are absolutely immune from tort liability when acting within their judicial, legislative, or executive authority. See *American Transmissions, Inc v Attorney General*, 454 Mich 135, 139; 560 NW2d 50 (1997). MCL 691.1407(5) provides:

> A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.[4]

In *American Transmissions, Inc*, 454 Mich at 143, our Supreme Court stated that there was no "malevolent-heart" exception to MCL 691.1407(5). Likewise, the Court stated that an official's "motive" in making a statement is not a consideration in determining whether an official was acting within the scope of his authority. *Id.*; see also *Brown v Mayor of Detroit*, 271 Mich App 692, 723; 723 NW2d 464 (2006), vacated in part on other grounds 478 Mich 589 (2007) ("[R]egardless of whether Mayor Kilpatrick intended to lie or mislead the public about the two plaintiffs, he was acting within the scope of his authority as mayor to respond to questions about personnel and city issues. . . . [B]ecause *American Transmissions* holds that there is no motivation or intent exception to the immunity provided by MCL 691.1407(5), we cannot conclude that Mayor Kilpatrick was acting outside the scope of his authority . . . ."). Thus, if the individual defendants were acting within their legislative authority when they made the statements that appeared in the newspaper articles, the individual defendants are entitled to summary disposition based on governmental immunity, irrespective of their intentions in making the statements.

Although the circumstances of when the individual defendants made the statements that appeared in the newspaper articles are unknown, it is clear from the statements themselves that the individual defendants were speaking of matters that were before the City Council, specifically the authorization of payment to Michael and Jennifer for representation of indigent defendants in the District Court and whether Councilman Chupa could vote on the District Court budget without violating certain ordinances. For example, one article quoted defendant Kamp as saying, "They [Michael and Jennifer] should wait until dad no longer is in position to approve the budget, or let dad step down so that they can practice law for longer than he'll be on the council." An article quoted Wiecek as saying, "We do not intend to pay them until their father resigns." An article quoted Fouts as saying, "His children make financial gain. It's clear nepotism when he's approving the district court budget." Because the individual defendants were clearly speaking of matters before the City Council when they made the statements that

[4] Plaintiffs do not argue that the individual defendants are not "legislator[s]" subject to absolute tort immunity.

appeared in the newspaper articles, the individual defendants were acting within the scope of their legislative authority when the statements were made. Accordingly, the individual defendants are entitled to summary disposition on plaintiffs' defamation claim in regard to the alleged defamatory communications that appeared in various newspaper articles. We reverse the trial court's order denying defendants' motion for summary disposition on plaintiffs' defamation claim.

III. Breach of Contract

Defendants claim that the trial court erred in not granting summary disposition to them on the breach of contract claims because Michael and Jennifer did not have a contract with the City. We agree.

"The essential elements of a valid contract are the following: (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005) (quotation omitted). Consideration is a bargained-for exchange; "a benefit on one side, or a detriment suffered, or service done on the other." *Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 58; 698 NW2d 900 (2005) (quotations omitted).

The bargained-for exchange was between Michael and Jennifer and the District Court. Michael and Jennifer represented indigent defendants in the District Court, and the District Court paid Michael and Jennifer for the representation pursuant to a fee schedule. The complication in the present case was that the District Court was unable to directly pay Michael and Jennifer. It had to submit orders of payment to the controller's office, and the controller's office could only issue payment after the City Council authorized payment. Thus, without the City Council's authorization of the payment, any contract between Michael and Jennifer and the City could not be completed. However, the fact remains that there was no bargained-for exchange between Michael and Jennifer and the City. The City never agreed to pay Michael and Jennifer for any legal service. Because there was no contract between Michael and Jennifer and the City, we reverse the trial court's order denying defendants' motion for summary disposition on the breach of contract claims.

IV. Unjust Enrichment and Account Stated

Defendants assert that the trial court erred in not granting them summary disposition on the claims for unjust enrichment and account stated because the evidence established that the City paid Michael and Jennifer for the outstanding orders of payment. We disagree.

The complaint alleged that the City owed $17,970 to Michael and $25,625 to Jennifer. According to the complaint, after the City paid $17,525 to Michael and $21,762.50 to Jennifer in August 2006, the City still owed $445 to Michael and $3,862.50 to Jennifer. In the claims for unjust enrichment and account stated, Michael and Jennifer requested that judgment be entered against the City for these amounts. In response to defendants' motion for summary disposition, Michael and Jennifer presented an affidavit signed by Lynn Geist, an attorney with the law firm representing them. Geist averred that based on her review of the District Court's orders of payments and a list of payments received by Michael and Jennifer, the City still owed $2,900 to

Michael and $4,050 to Jennifer. Based on Geist's affidavit, there is a factual issue whether Michael and Jennifer have been paid on all the outstanding orders of payment. Accordingly, we affirm the trial court's order denying defendants' motion for summary disposition on the unjust enrichment and account stated claims.

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

/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly