

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA A. LENTZ,

Plaintiff-Appellee,

V

ISABELLA COUNTY, TIM DOLEHANTY,
HUMANE ANIMAL TREATMENT SOCIETY,
INC, LEE FABIANO, TONI SMITH-HOLMES,
and CINDY SUE BRYAN,

Defendants,

and

DAVID A. LING,

Defendant-Appellant.

UNPUBLISHED

September 16, 2010

No. 292237

Isabella Circuit Court

LC No. 2008-006977-NZ

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order denying his motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was appointed Animal Control Director for defendant Isabella County in 1992. In this position, she was in charge of the county's animal shelter. She held the position until January 26, 2007, when defendant Dolehanty, the County Controller and Administrator, terminated her employment. This suit resulted from plaintiff's termination. Although plaintiff originally alleged two counts, the sole issue remaining on appeal is plaintiff's claim that defendant Ling,¹ a county commissioner, tortiously interfered with her business relationship with the County.

¹ "Defendant" in this opinion refers to the only defendant-appellant, Ling.

In addition to being a member of the Isabella County Board of Commissioners, defendant was a member of the county's Criminal Justice and County Affairs Committee (which reviewed plaintiff's job performance) and of Humane Animal Treatment Society ("HATS"), an advocacy group. Plaintiff's complaint alleged that HATS demanded the animal shelter be put under the management of HATS, and that this demand was fueled, at least in part, by the difference in belief between HATS members and plaintiff regarding euthanasia of shelter animals. Plaintiff further alleged that HATS members made defamatory statements to her employer and the press in order to "effectuate" the change in shelter management. She included copies of e-mails Ling sent to and received from HATS members. Defendant's motion for summary disposition argued that plaintiff failed to show he was a third party to the contract at issue. Because he was a member of the committee that reviews plaintiff's employment performance, defendant argued, he was a party to the employment relationship and could not have tortiously interfered with it.

The trial court disagreed with defendant. The court noted that although the general rule is that no tort will lie against one who is a party to the contract (citing *Dzierwa v Michigan Oil Co*, 152 Mich App 281, 287; 393 NW2d 610 (1986)), if a person responsible for exercising independent judgment in evaluating the plaintiff's performance acts out of personal motive, the plaintiff may have a valid claim (citing *Feaheny v Caldwell*, 175 Mich App 291; 437 NW2d 358 (1989), overruled on other grounds *Health Call v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 85-86; 706 NW2d 843 (2005)). The court found that a question of fact existed regarding defendant's motives in the matter. Plaintiff provided evidence that defendant acted as a member of HATS, rather than as an objective county commissioner. The court concluded that defendant was not immune from suit because he may have been acting outside the scope of his authority when he voiced his opinion and made defamatory statements against plaintiff. At such times, he was acting as a member of HATS, rather than within his official capacity. The emails from defendant indicated that he was acting "as a member of HATS." The court denied defendant's motion.

On appeal, defendant argues there is no question that he had the authority to evaluate plaintiff's job performance. As a local legislator, he was acting within the scope of his authority when he voiced his opinion about a matter of public interest, specifically, operation of the animal shelter. Thus, he was entitled to governmental immunity. Moreover, public statements by elected officials fall within the scope of their authority, and improper motive of the official is irrelevant. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 594; 640 NW2d 321 (2001).

In response, plaintiff, citing MCL 46.11(g) and (n), argues that, as a county commissioner, defendant only has authority to act during lawfully held meetings. The e-mails defendant sent did not constitute actions taken during a lawfully held meeting. Unlike the actions taken in the cases cited by defendant, the e-mails to HATS members did not fall within his narrow statutory authority. Moreover, despite defendant's membership in the board, it is legally possible for him to tortiously interfere with plaintiff's employment contract.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case.

Maiden v Rozwood, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

We find that plaintiff successfully created a question of fact regarding defendant's scope of authority. Just because defendant was a county commissioner does not provide blanket protection if plaintiff can show that defendant acted with tortious intent outside the scope of his authority. MCL 691.1407(5); *Feaheny*, 175 Mich App at 304-305; see also *Morgan v Andrews*, 107 Mich 33, 39-40; 64 NW 869 (1895). "[T]he interference with a business relationship must be improper in addition to being intentional. Improper means illegal, unethical, or fraudulent." *Formall, Inc v Community Nat'l Bank*, 166 Mich App 772, 779; 421 NW2d 289 (1988).

The governmental tort liability act provides in relevant part:

(2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

(3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.

* * *

(5) 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. [MCL 691.1407.]

We conclude that defendant in this case may have been acting outside the scope of his authority. MCL 46.30 prohibits a county commissioner from having a direct or indirect interest "in any contract or other business transaction with the county" unless the board is cognizant of the member's interest and three-quarters of the board approves the contract or transaction. Defendant's participation in HATS created a potential conflict of interest, given that HATS and plaintiff were essentially vying for control of the animal shelter. This dual role of defendant

distinguishes the present case from the law cited by defendant and could lead to the factual finding that defendant acted unethically or tortiously. The e-mail evidence presented by plaintiff shows that defendant understood he was not acting as a commissioner when he allegedly acted to galvanize the HATS members to lobby for plaintiff's removal. The case law cited by the trial court is on point.

Affirmed.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood