

STATE OF MICHIGAN
COURT OF APPEALS

STANLEY BURLAND, SR., Personal
Representative of the ESTATE OF STANLEY
BURLAND, JR., Deceased,

UNPUBLISHED
June 21, 2012

Plaintiff-Appellant,

v

JAMES FRENCH,

No. 305652
Kalamazoo Circuit Court
LC No. 2010-000227-NO

Defendant-Appellee.

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in defendant's favor pursuant to MCR 2.116(C)(7). Because governmental immunity barred plaintiff's claims, we affirm.

I. FACTS AND PROCEDURAL HISTORY

This case arises out of the unfortunate suicide of plaintiff's decedent, his 16-year-old son "Stan," who was a sophomore at Portage Northern High School. On the morning of October 28, 2008, defendant, the principal of the school, met with Teresa Martinez and her husband, the parents of "Jake," another student at the school. Martinez told defendant that she had discovered text messages on Jake's phone involving Jake, Stan and "Matt." Martinez showed defendant the messages, which referenced "chronic" and "purple stuff," and appeared to indicate that Jake and Matt were planning to purchase marijuana from Stan. Martinez told defendant that she believed that the transaction was going to occur at school and that she expected defendant to take some action. Defendant told her that he was going to investigate the matter. When defendant questioned Jake in his parents' presence, he denied trying to purchase drugs and maintained that he and Matt were not serious. After his parents left, however, Jake admitted to defendant that he and Matt were attempting to purchase drugs from Stan.

Defendant removed Stan from class and questioned him in the presence of Amy Jo DiMaggio, his school counselor. Stan initially denied any knowledge of the text messages, but then admitted sending messages to Jake. He claimed, however, that he was "just joking around." Although Stan was cooperative, defendant did not believe that he was being truthful and thought that he was involved in some manner in the plan to distribute drugs. Stan consented to a search

of his person, which did not reveal any contraband. Stan did not cry at any point during the interview and appeared calm. According to DiMaggio, defendant did not speak in an angry tone, did not threaten to suspend or expel Stan, appeared concerned, and wanted to find out as much information as possible.

After his discussion with Stan, defendant was left with the impression that Stan was involved in an effort to sell drugs, but defendant wanted to obtain more information. Defendant left to investigate the matter further, and Stan and DiMaggio went into DiMaggio's office where they discussed Stan's grades and other matters for approximately 20 or 30 minutes. Stan was not passing all his classes at that time, had to retake others that he had failed, and was concerned about his attendance and not being able to graduate if he missed more days. Stan and DiMaggio also discussed drugs, and Stan admitted that he "used to do this kind of stuff and [didn't] want to be involved with this stuff anymore[.]" DiMaggio told Stan that he needed to tell kids to leave him alone when they approached him about purchasing drugs. The only time that Stan showed emotion was when he told DiMaggio that he and a friend had stolen liquor and were kicked off the football team. As a result, plaintiff was upset with Stan, and Stan was worried that plaintiff would again be upset with him. Stan told DiMaggio that he did not want plaintiff to be mad at him. At the end of the conversation, DiMaggio asked Stan if he was okay emotionally and whether he felt safe to himself. Stan responded affirmatively and did not show any signs to the contrary or exhibit any cause for concern. DiMaggio moved Stan into the counseling office conference room and left him alone to work on homework.

After he interviewed Stan, defendant questioned Matt about the text messages. Matt told defendant that he, Jake, and Stan were planning a drug transaction. Matt was forthright and did not deny or try to cover up the plan. According to Matt, defendant was "pretty calm," spoke in a normal voice, and did not threaten or intimidate him.

Defendant then called plaintiff to come to the school because of a discipline issue involving Stan. Defendant did not recall telling plaintiff over the phone that the issue involved drugs. At his deposition, defendant denied accusing Stan of being a drug dealer and verbally abusing, ridiculing, or humiliating him while waiting for plaintiff to arrive. After plaintiff arrived, defendant met with plaintiff and Stan in the athletic director's office and read some of the text messages verbatim. After talking with Stan and plaintiff, defendant decided to suspend Stan for ten days. The meeting did not produce any information indicating that Stan was not trying to sell drugs. Defendant believed, based on his investigation, that Stan was trying to sell drugs on school grounds. Defendant admitted that, when he suspended Stan, he had not yet completed his investigation, and he told Stan and plaintiff that the suspension could ultimately be less than ten days.

Defendant did not recall whether Stan cried during the meeting with defendant and plaintiff, but testified that Stan was emotional toward plaintiff and apologized to plaintiff for disappointing him. Defendant denied raising his voice, standing over plaintiff and Stan, telling them that the city attorney was getting a court order for the text messages, and telling them that "this is going to be big." He maintained that he was sitting down during the meeting and was not agitated or angry. Defendant admitted telling plaintiff and Stan that if he determined that Stan had intended to deliver drugs during school, it could result in his expulsion. According to defendant, plaintiff was supportive of defendant's efforts to ascertain Stan's involvement in the

matter, and plaintiff asked questions of Stan to help “get to the bottom of the issue[.]” At the end of the meeting, plaintiff thanked defendant and told him that he was sorry that defendant had to deal with the situation.

Plaintiff provided a different version of events. Plaintiff testified that defendant called him at approximately 9:40 a.m. and told him to come to the school immediately to pick up Stan because Stan was being suspended for coordinating drug deals. When plaintiff arrived at the school, he saw Stan crying in the athletic director’s office. Defendant was holding his phone and said that the city attorney was getting a court order for the text messages. Plaintiff testified that defendant “was hell bent on getting Stan” and “had already decided everything he was going to do at that point.” According to plaintiff, defendant was standing up and “trying to [] tower over us, holding his Blackberry seven-and-a-half feet up in the air[.]” Stan expressed concern that he was not going to be able to graduate, and defendant again mentioned that the city attorney was working on getting the text messages. Defendant then said that the police were going to be involved and held his arms out wide while saying, “[t]his is going to be big[.]” Plaintiff assured Stan that he would graduate and said that he, plaintiff, would “take care of this.” Defendant then told them that he was suspending Stan for ten days, and Stan started crying again. Defendant told them that the days missed would not count against Stan academically, but that Stan would most likely be expelled. Plaintiff testified that as he and Stan were leaving the building, he told Stan:

I’ve picked you up from school a couple times for this. I said, these kids aren’t your friends. He said, I know. I said, I promise I will take care of this. I said, you meet me halfway and quit dealing with these kids that aren’t even your buddies. He said, yeah, I know, I will.

Plaintiff testified that when he picked up Stan on previous occasions, the incidents did not involve drugs. Plaintiff drove Stan home and then left to return to work. When he left, Stan was making his lunch in the kitchen and appeared normal.

Later that day, plaintiff discovered that Stan had committed suicide. He left a suicide note, apologizing to his family for letting them down and for all of the pain that he had caused. He expressed that he did not want to disappoint plaintiff anymore and “just had to do this.” He also stated, “dont [sic] think you could have stoped [sic] this. I have problems and they could not be fixed.”

On April 21, 2010, plaintiff filed a complaint against defendant, alleging false arrest, false imprisonment, intentional infliction of emotional distress, and gross negligence. Defendant moved for summary disposition, arguing in part that governmental immunity barred plaintiff’s claims against him. The trial court agreed with defendant and dismissed plaintiff’s claims on that basis.

II. PRINCIPLES OF LAW

The applicability of governmental immunity is a question of law that we review de novo. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). We also review de novo a trial court’s ruling on a motion for summary disposition. *Burise v Pontiac*, 282 Mich App 646,

650; 795 NW2d 161 (2010). Summary disposition under MCR 2.116(C)(7) is appropriate when a claim is barred by immunity granted by law. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). In reviewing a decision under subrule (C)(7), this Court considers the affidavits, depositions, admissions, and other documentary evidence to determine whether the defendant is entitled to immunity. *Poppen v Tovey*, 256 Mich App 351, 353-354; 664 NW2d 269 (2003). “If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law.” *Pierce v Lansing*, 265 Mich App 174, 177; 694 NW2d 65 (2005).

Pursuant to MCL 691.1407(1) of the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, “a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.” The term “governmental agency” includes a “political subdivision,” such as a “school district.” MCL 691.1401(a) and (e).¹ MCL 691.1407 grants immunity to individual actors and employees of governmental agencies. That provision states, 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.

* * *

(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.

¹ Our Legislature amended MCL 691.1401 pursuant to 2012 PA 50, effective March 13, 2012. At the time of the events giving rise to this case, the relevant terms were located in subsections (b) and (d) of the statute.

In *Odom v Wayne Co*, 482 Mich 459, 470; 760 NW2d 217 (2008), our Supreme Court held that subsection (2) “encompasses only *negligent* tort liability.” (Emphasis in original.) The Court explained that in subsection (3) of the statute, “the Legislature unambiguously expressed its intent to maintain ‘the law of *intentional* torts as it existed before July 7, 1986.’” *Id.*, citing MCL 691.1407(3) (Emphasis in original.) Subsection (3) provides, “Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.”

Under the common law, as it existed before July 7, 1986, governmental employees enjoyed “qualified immunity from intentional-tort liability[.]” *Odom*, 482 Mich at 473. At that time, *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984), was the seminal case pertaining to individual governmental immunity from tort liability. See *id.* at 472.

Under *Ross*, to be immune from liability for intentional torts, the governmental employee must first establish that the acts were taken “during the course of . . . employment and” that the employee was “acting, or reasonably believe[d] [he was] acting, within the scope of [his] authority[.]” This requirement ensures that a governmental employee will not be afforded immunity when committing ultra vires acts, as these are outside the scope of the employee’s authority. However, it also protects a governmental employee who reasonably believes that he was authorized to take certain actions, but later learns that he was mistaken.

The governmental employee must also establish that he was acting in “good faith.” *Ross* did not elaborate on this element, relying instead on Prosser on Torts and the cases cited therein. Prosser noted that the “considerable majority of the state courts take the position that there is no immunity where the inferior officer does not act honestly and in good faith, but maliciously, or for an improper purpose.” “[O]fficial immunity should not become a cloak for malicious, corrupt, and otherwise outrageous conduct on the part of those guilty of intentional abuse of power. . . .” “The cases cited by Prosser indicate that there is no immunity when the governmental employee acts *maliciously* or with a *wanton or reckless disregard of the rights of another*.”

* * *

The final *Ross* element to be considered when determining whether an individual is entitled to governmental immunity is whether the challenged “act” was ministerial or discretionary in nature. As explained in *Ross*, “ ‘A ministerial officer has a line of conduct marked out for him, and has nothing to do but to follow it; and he must be held liable for any failure to do so which results in the injury of another.’ ” Ministerial acts “constitute merely an obedience to orders or the performance of a duty in which the individual has little or no choice.” The execution of an act once a decision has been made is also ministerial in nature. “Discretion,” on the other hand, “ ‘implies the right to be wrong.’ ” Discretionary acts “require personal deliberation, decision and judgment.” Although the decision need not be extraordinary, governmental immunity is not afforded for

“every trivial decision” an actor may make. Granting immunity to an employee engaged in discretionary acts allows the employee to resolve problems without constant fear of legal repercussions. [*Id.* at 473-476 (citations omitted, brackets and italics in original).]

To simplify the test outlined in *Odom*, our Supreme Court offered the following steps “to follow when a defendant raises the affirmative defense of individual government immunity[.]”²

(1) Determine whether the individual is a judge, a legislator, or the highest-ranking appointed executive official at any level of government who is entitled to absolute immunity under MCL 691.1407(5).

(2) If the individual is a lower-ranking governmental employee or official, determine whether the plaintiff pleaded an intentional or a negligent tort.

(3) If the plaintiff pleaded a negligent tort, proceed under MCL 691.1407(2) and determine if the individual caused an injury or damage while acting in the course of employment or service or on behalf of his governmental employer and whether:

(a) the individual was acting or reasonably believed that he was acting within the scope of his authority,

(b) the governmental agency was engaged in the exercise or discharge of a governmental function, and

(c) the individual’s conduct amounted to gross negligence that was the proximate cause of the injury or damage.

(4) If the plaintiff pleaded an intentional tort, determine whether the defendant established that he is entitled to individual governmental immunity under the *Ross* test by showing the following:

(a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,

(b) the acts were undertaken in good faith, or were not undertaken with malice, and

(c) the acts were discretionary, as opposed to ministerial. [*Id.* at 479-480.]

III. APPLICATION

² As stated in *Odom*, 482 Mich at 479, “the burden continues to fall on the governmental employee to raise and prove his entitlement to immunity as an affirmative defense.”

It is undisputed that defendant, a public school principal, is not a judge, a legislator, or the highest-ranking appointed executive official. Therefore, he is not entitled to absolute immunity under MCL 691.1407(5). See *Odom*, 482 Mich at 479. Moreover, plaintiff alleged both intentional torts and gross negligence. We first address the intentional torts. In order to show that he was governmentally immune from liability for false arrest, false imprisonment, and intentional infliction of emotional distress, defendant was required to show that:

(a) The acts that he undertook were in the course of his employment, and he was acting, or reasonably believed that he was acting, within the scope of his authority,

(b) he undertook the acts in good faith and without malice, and

(c) the acts were discretionary rather than ministerial. [See *Id.* at 480.]

It is undisputed that defendant's acts were undertaken in the course of his employment as the principal of Portage Northern High School. Plaintiff argues, however, that defendant was not acting within the scope of his authority when he detained and questioned Stan a second time because he possessed no evidence that the alleged drug deal was going to occur at school, or within 500 feet of the school, and he had no authority to suspend or threaten to expel Stan for activities that occurred outside of school.

A review of the record shows that defendant was acting within the scope of his authority when he questioned Stan a second time and suspended him pending the outcome of his investigation. "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. On the morning of October 28, 2008, Martinez showed defendant text messages and told him that a drug transaction was going to take place at school. Defendant interviewed Jake, Stan, and Matt and determined that Stan was not being truthful when he claimed that he was "just joking around." Both Jake and Matt admitted to defendant that they were planning on purchasing drugs from Stan. Moreover, Matt testified during his deposition that the plan was for the transaction to occur during school. Thus, based on the text messages and his discussions with Martinez, Matt, Stan, and Jake, defendant believed that Stan was involved in a plan to sell drugs on school grounds. He therefore suspended Stan for ten days pending the completion of his investigation. Defendant's actions were within the scope of his authority as the principal of the school that the students attended and where the drug transaction was supposed to take place.

Plaintiff also argues that defendant failed to demonstrate that he acted in good faith and without malice. Plaintiff relies on the fact that no marijuana was found on Stan when defendant searched him, and defendant never established a specific time that the transaction was to occur. Plaintiff contends that no evidence supported defendant's conclusion that the transaction was to occur on school grounds. To the contrary, Martinez told defendant that the transaction was going to take place at school, and Matt testified that the sale was supposed to occur during school hours. In addition, the text messages referenced Stan obtaining the marijuana "tomorrow" and that the plants were "just harvested" and had to dry. Because the messages were sent the

previous day, they led defendant to believe that the transaction might occur the following day, on October 29, 2008. Moreover, no evidence indicates that defendant acted maliciously or for an improper purpose. See *Odom*, 482 Mich at 474. In fact, defendant had no previous dealings with plaintiff's family, had never previously disciplined Stan, and would not have recognized Stan if he had seen him in the hallway. Thus, the record shows that defendant acted in good faith and without malice.

Plaintiff also argues that defendant's acts were ministerial rather than discretionary. Plaintiff's argument lacks merit. Defendant's acts required deliberation and the exercise of judgment and were not merely matters regarding which he had little or no choice. See *Odom*, 482 Mich at 476. Defendant had to evaluate all the information that he was provided and determine whether he believed Stan's claim that he was "just joking around." Defendant also had to determine the proper course of action to take pending the outcome of his investigation. His decision to suspend Stan for ten days was the product of his exercise of judgment and decision-making authority. Thus, defendant's acts were unquestionably discretionary rather than ministerial.

Because defendant satisfied all the requisites of the *Ross* test, see *Odom*, 482 Mich at 480, he established his entitlement to governmental immunity for plaintiff's intentional tort claims. Accordingly, the trial court properly granted summary disposition in defendant's favor on plaintiff's false arrest, false imprisonment, and intentional infliction of emotional distress claims.

The trial court also properly granted summary disposition for defendant on plaintiff's gross negligence claim. In order to show that he was governmentally immune from liability with respect to that claim, defendant was required to establish that:

- (a) he was acting or reasonably believed that he was acting within the scope of his authority,
- (b) he was engaged in the exercise or discharge of a governmental function, and
- (c) his conduct did not amount to gross negligence that was the proximate cause of the injury. [See *Odom*, 482 Mich at 480.]

As previously discussed, defendant's actions were within the scope of his authority. Moreover, "[t]he operation of a public school is a governmental function." *Stringwell v Ann Arbor Pub Sch Dist*, 262 Mich App 709, 712; 686 NW2d 825 (2004). Further, we conclude that defendant's conduct did not amount to gross negligence and was not the proximate cause of Stan's death.

MCL 691.1407(7)(a) defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Defendant's conduct did not meet that standard. The record shows that defendant's actions were taken in an earnest effort to determine whether a drug transaction was going to occur on school grounds. DiMaggio testified that, during defendant's first interview with Stan, defendant did not speak in an angry tone, did not threaten to suspend or expel Stan, and appeared concerned about the situation. Before he interviewed Stan a second time, defendant called plaintiff to be present during the

interview. Although plaintiff's and defendant's testimony differed regarding defendant's demeanor during the second interview, plaintiff admitted that he never heard defendant tell Stan that he was not going to be able to graduate, and defendant assured plaintiff and Stan that the suspension would not count against Stan's attendance record. Neither plaintiff nor defendant had any indication that Stan would commit suicide later that day. Thus, the record does not show that defendant engaged in "conduct so reckless as to demonstrate a lack of concern for whether an injury results." MCL 691.1407(7)(a).

Further, defendant's conduct was not the proximate cause of Stan's death, as required for governmental immunity under MCL 691.1407(2)(c). See also *Odom*, 482 Mich at 480. "The proximate cause," as that term is used in MCL 691.1407(2)(c), "means the one most immediate, efficient, and direct cause preceding an injury[.]" *Robinson v Detroit*, 462 Mich 439, 445-446; 613 NW2d 307 (2000). Here, the proximate cause of Stan's death was his decision to take his own life and not defendant's conduct earlier in the day. Accordingly, pursuant to MCL 691.1407(2), governmental immunity barred plaintiff's gross negligence claim.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens