STATE OF MICHIGAN

COURT OF APPEALS

JOHN NICKLAS, M.D.,

Plaintiff-Appellee,

v

TODD KOELLING, M.D.,

Defendant-Appellant.

UNPUBLISHED
December 7, 2004

No. 248870
Washtenaw Circuit Court
LC No. 98-004517-NO

JOHN NICKLAS, M.D.,

Plaintiff-Appellee,

v

KIM EAGLE, M.D.,

Defendant-Appellant.

No. 248871
Washtenaw Circuit Court
LC No. 98-004517-NO

Before: Fitzgerald, P.J., and Hoekstra and Borrello, JJ.

PER CURIAM.

Defendants Koelling and Eagle appeal as of right from the trial court order denying them summary disposition pursuant to MCR 2.116(C)(7) on the ground that they were not entitled to governmental immunity. Plaintiff had filed a claim against defendants, his colleagues at the University of Michigan Medical School, alleging defamation against Koelling and intentional interference with an advantageous business relationship against Koelling and Eagle. We affirm.

The first issue concerns whether the trial court should have dismissed plaintiff's claim for interference with advantageous business relations against Eagle because of immunity granted by MCL 691.1407(5). Reviewing this issue de novo, *Diehl v Danuloff*, 242 Mich App 120, 122; 618 NW2d 83 (2000), we find that the trial court properly denied Eagle summary disposition because he was not a "highest appointive executive official" within the meaning of the statute.

At the time this case was filed, MCL 691.1407(5) provided:

> Judges, legislators, and the elective or highest appointive executive officials of all levels of government are immune from tort liability for injuries to persons or damages to property whenever they are acting within the scope of their judicial, legislative, or executive authority.

Immunity under this subsection applies only to those who have been "charged with broad, essential governmental decision-making." *Grahovac v Munising Twp*, 263 Mich App 589, 595; __NW2d __ (2004). For example, immunity does not extend to a township's fire chief where the fire department is wholly controlled by the township board. *Id.*, 594.

The University of Michigan constitutes a governmental unit to which Michigan's governmental immunity statute applies. *Harris v University of Michigan Bd of Regents*, 219 Mich App 679, 683; 558 NW2d 225 (1996). But control over the university is vested in its Board of Regents. *Id.*, 683-684, n 1, citing Const 1963, art 8, § 5. Even if Eagle, in his roles as Senior Associate Chair of Internal Medicine, Chief of Clinical Cardiology, and Quality Assurance Director of the Division of Cardiology, is the head of departments within the University Medical School, there is no indication that he is "charged with broad, essential governmental decision-making." As with the township board in *Grahovac*, such authority rests with the University's Board of Regents. We conclude that Eagle does not qualify as a "highest appointive executive official" under MCL 691.1407(5). Thus, he is not entitled to absolute immunity under this subsection of the governmental immunity act.

We note that Eagle correctly asserts that the absolute immunity provided by MCL 691.1407(5) applies even where a plaintiff's claim alleges the commission of an intentional tort. See *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 592-594; 640 NW2d 321 (2001). But because Eagle does not qualify as the "highest appointive executive official" of a level of government, the trial court did not err in denying him summary disposition pursuant to MCR 2.116(C)(7). This Court will not reverse when the trial court reaches the correct result regardless of the reasoning employed. *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997).

Koelling and Eagle next argue that they are entitled to governmental immunity pursuant to MCL 691.1407(2) on plaintiff's claim for interference with advantageous business relations. We disagree.

At the time this case was filed, MCL 691.1407(2) and (3) provided as follows:

> (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 shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while in the course of employment or service or 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. As used in this subdivision "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

(3) *Subsection (2) shall not be construed as altering the law of intentional torts as it existed prior to the effective date of subsection (2).* [Emphasis added.]

As this Court has recognized, government employees are not immune from liability for intentional torts that were not barred by governmental immunity before July 7, 1986, the date that subsection (2) of the statute was enacted. MCL 691.1407(3); *Sudul v City of Hamtramck*, 221 Mich App 455, 458 (Corrigan, J); 480-481 (Murphy, J); 562 NW2d 478 (1997).

Relevant case law reveals that governmental immunity did not bar claims for the intentional torts of defamation and tortious interference before July 7, 1986. In *Tocco v Piersante*, 69 Mich App 616, 618, 622-626; 245 NW2d 356 (1976), this Court held that there is no governmental immunity for public officials engaged in intentional malicious conduct such as defamation. Similarly, in *Randall v Delta Charter Twp*, 121 Mich App 26, 33-34; 328 NW2d 562 (1982), citing *McCann v Michigan*, 398 Mich 65; 247 NW2d 521 (1976), this Court observed that our Supreme Court has "ruled that governmental immunity does not extend to intentionally tortious acts" such as intentional interference with economic relations, defamation, and slander.

Because claims alleging defamation or tortious interference were not barred by governmental immunity before the effective date of the statute, such claims are not barred by MCL 691.1407(2). *Sudul, supra*. Consequently, the trial court did not err in denying defendants summary disposition under MCR 2.116(C)(7).

Nevertheless, defendants contend that in *Sudul*, this Court ignored its earlier binding decision in *Bell v Fox*, 206 Mich App 522, 525; 522 NW2d 869 (1994), stating that there "is no intentional tort exception to the doctrine of governmental immunity." Under the "first-out rule" this Court must follow "the rule of law" established by a prior published opinion issued on or after November 1, 1990. *Horace v City of Pontiac*, 456 Mich 744, 754; 575 NW2d 762 (1998); MCR 7.215(J). But statements not essential to the outcome of a case constitute dicta and are not binding precedent. *People v Maynor*, 256 Mich App 238, 241; 662 NW2d 468 (2003), citing *People v Borchard-Ruhland*, 460 Mich 278, 286; 597 NW2d 1 (1999).

In *Bell*, the plaintiff filed suit against the police officers who mistakenly arrested her. This Court held that, "because defendants had probable cause to arrest the plaintiff, they were protected from suit by governmental immunity." *Id.*, at 525, and found that the officers actions were within the scope of their authority, in furtherance of a governmental function, and not grossly negligent. *Id.*, at 525. This Court further stated, "We note that, contrary to plaintiff's argument, there is no intentional tort exception to the doctrine of governmental immunity" and cited *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987) and *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 450; 487 NW2d 799 (1992). *Id.*, 525-526.

Thus, this Court's statement concerning intentional torts was not essential to the outcome in *Bell* and does not constitute binding precedent. Consequently, this Court did not err in disregarding the statement when deciding *Sudul* and we decline to do otherwise.[1]

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello

[1] Additionally, we note that the cases cited in *Bell* merely hold that there is no intentional tort exception to the doctrine of governmental immunity applicable to *governmental agencies*. See *Smith*, *supra*, 593-594; *Harrison*, *supra*, 450. They do not stand for the premise that individual government agents are immune from liability for all intentional torts and such a reading would contravene the plain language of MCL 691.1407(3). See also *Sudul*, *supra* 483-484 (Murphy, J. concurring), distinguishing *Smith* on these grounds.