STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM HEFFELFINGER, Plaintiff-Appellant,	UNPUBLISHED January 13, 2011
v	No. 294752 Huron Circuit Court
BAD AXE PUBLIC SCHOOLS and JAMES WENCEL, Defendants-Appellees.	LC No. 2008-003937-NZ

Before: FORT HOOD, P.J., and MURRAY and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in defendants' favor. We affirm.

Plaintiff was employed as the band director for Bad Axe Public Schools for many years. In 2007, in an apparent response to certain of plaintiff's conduct during his employment, plaintiff signed a "last chance agreement" which provided that plaintiff must meet certain conditions in order to continue his employment with the school. In 2008, the school superintendent, James Wencel, began investigating plaintiff after discovering inappropriate photographs and information on his school computer, and for other alleged improper conduct. According to plaintiff, the allegations concerning inappropriate computer use and other allegations by Wencel (including inappropriate behavior toward a female student and drinking alcohol with underage students outside of school) were patently false. Also according to plaintiff, Wencel reported these allegations to a parent of one of plaintiff's students. The allegations and plaintiff's employment status were later discussed at a board of education meeting, open to the public, and attended by both citizens and news media. The board ultimately determined that plaintiff had violated the "last chance agreement" and, as required by the agreement, plaintiff thereafter submitted his resignation.

Plaintiff initiated the instant action against Superintendant Wencel and the school district, alleging that Wencel defamed plaintiff by falsely accusing him of inappropriate conduct. Plaintiff also brought claims of invasion of privacy and intentional infliction of emotional distress, and asserted that the school district was liable for Wencel's actions under the doctrine of respondeat superior.

Defendants moved for summary disposition and the trial court granted defendants' motion, finding, among other things, that defendants were entitled to governmental immunity as to some of plaintiff's claims of defamation (libel and slander), and that his remaining defamation claim was not supported by any evidence and/or that the complained of statements made by Wencel were true. The trial court further found that Wencel's conduct did not rise to the level contemplated by a claim of intentional infliction of emotional distress. Plaintiff now appeals that ruling.[1]

While the trial court did not cite the rule upon which it relied in granting defendants' motion for summary disposition, it cited to the governmental immunity statute (MCL 691.1407) and clearly looked beyond the pleadings. We will therefore review the decision as though premised on MCR 2.116(C)(7) and MCR 2.116(C)(10). We review de novo a trial court's decision to grant summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

A trial court properly grants summary disposition under MCR 2.116(C)(7) where a claim is barred because of immunity granted by law. When reviewing a motion under subrule (C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. *Dextrom v Wexford Co*, 287 Mich App 406, 429; 789 NW2d 211 (2010). "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court." *Id*. at 430. Conversely, if a factual dispute exists as to whether immunity applies, summary disposition is not appropriate. *Id.* When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

On appeal, plaintiff first contends that the existence of material questions of fact precluded summary disposition in defendants' favor on plaintiff's defamation claims and that the trial court engaged in inappropriate fact-finding in determining that the challenged statements were true. We disagree.[2]

---

[1] Summary disposition was granted in defendants' favor on all of plaintiff's claims. However, plaintiff does not appeal the trial court's decision with respect to his invasion of privacy claim.

[2] While plaintiff does not present any argument as to why summary disposition was inappropriate specifically in favor of Bad Axe Public Schools, we would note that all of plaintiff's claims stem from the intentional actions of Wencel. A government entity cannot be held liable for the intentional torts of its employees. *Payton v City of Detroit*, 211 Mich App 375, 393; 536 NW2d 233 (1995). As a result, summary disposition in favor of Bad Axe Public Schools was proper.

A communication is defamatory if, considering all the circumstances, it tends to so harm the reputation of an individual as to lower that individual's reputation in the community or deter third persons from associating or dealing with that individual. *Kevorkian v American Medical Ass'n*, 237 Mich App 1, 5; 602 NW2d 233 (1999). The elements of a cause of action for defamation are (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication 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 the publication (defamation per quod). *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 726; 613 NW2d 378 (2000). Whether a publication is privileged is a question of law for the court, unless the facts needed to make that determination are disputed. *New Franklin Enterprises v Sabo*, 192 Mich App 219, 221; 480 NW2d 326 (1991).

Plaintiff identifies three primary publications made by Wencel which serve as the basis for his defamation claims: (1) Wencel's telling the school board members that plaintiff viewed and kept pornography on his school computer and showing them the alleged inappropriate content; (2) Wencel's repeating the pornography allegations at a school board meeting open to the public; and, (3) Wencel's telling a parent of one of plaintiff's band students that plaintiff viewed pornography on his school computer, that plaintiff drank beer with students outside class, and that plaintiff made inappropriate advances toward one of his female students. With respect to the first and second publications, we find that summary disposition was properly granted.

Pursuant to MCL 691.1407(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.

"[T]he superintendent of the school district is [] absolutely immune from tort liability under MCL 691.1407(5)." *Nalepa v Plymouth-Canton Community School Dist*, 207 Mich App 580, 589; 525 NW2d 897 (1994).

It is uncontested that Wencel, as the superintendent of schools, is the highest appointed executive official of the school district. There has also been no assertion that Wencel was acting outside the scope of his authority in reporting plaintiff's alleged misconduct to the school board and repeating the allegations at the school board meeting. Plaintiff, in fact, alleged in his complaint that Wencel was "working in his capacity as the [s]uperintendent and in the course and scope of his employment at all times relevant herein." And, it is clear that the statements at issue were made by Wencel during the course of his official duties as superintendent, given that they involved a question of whether a teacher's conduct within the school was appropriate and whether a teacher should remain employed by the school district. Consequently, Wencel is entitled to absolute immunity with respect to the statements made to the school board, both at and prior to the school board meeting.

Moreover, in the context of a suit for defamation "[c]ommunications deemed absolutely privileged are not actionable, even when spoken with malice." *Kefgen v Davidson*, 241 Mich

App 611, 618; 617 NW2d 351 (2000). The doctrine of absolute privilege has been extended to apply to "communications made by a public official in furtherance of an official duty during proceedings of subordinate legislative and quasi-legislative bodies," including those rendered by a public official at a duly convened meeting of a school board. *Id.* at 618-619; see also *Nalepa v Plymouth-Canton Community School Dist*, 207 Mich App at 586-587. Thus, Wencel's communications to the school board were absolutely privileged.

Finally, with respect to the statements made at the school board meeting, we cannot ignore the fact that plaintiff was unequivocally given the option of having the meeting closed to the public. Plaintiff admitted the same and testified that his union representative advised him to have a closed meeting. Plaintiff further testified that he was aware that whatever was said at the meeting would be a matter of public record. Having known that the allegations would be brought out at the board meeting, and having admitted that to the extent the allegations were published at the board meeting, it was because he requested that the meeting be open, plaintiff cannot now complain about the implicitly consented-to publication. For the above reasons, the trial court did not err in granting summary disposition to defendants as it pertains to statements Wencel made to the school board and during the school board meeting.

Plaintiff's last basis for defamation involves Wencel allegedly telling a band parent several negative things about plaintiff. Wencel denied making such statements. However, in an affidavit submitted to the court, Ms. Maryanne Neeb swore that in late May or early June of 2008, Wencel told her that: (1) plaintiff drinks beer with students outside of school; (2) plaintiff made inappropriate advances toward a female band student outside of school; and, (3) that plaintiff's online dating profile indicates he has a fetish for five inch stiletto heels. Ms. Neeb swore that Wencel also, (4) asked her how she would feel if one of her daughter's teachers was viewing pornography on his school computer, which Ms. Neeb felt was an accusation against plaintiff. With respect to these statements, the trial court determined that making such statements to a parent was arguably outside the scope of Wencel's authority such that absolute immunity would not apply, but that the statements were nonetheless not actionable because they were true. We agree, in part.

Again, the first element necessary to establish a defamation claim is a false and defamatory statement concerning the plaintiff. *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App at 726. Truth, then, is an absolute defense to a defamation claim. *Porter v Royal Oak*, 214 Mich App 478, 486; 542 NW2d 905 (1995).

With respect to statement (1), plaintiff testified that he had on one occasion drunk beer at a bar when a student and her mother were present. It could be argued, then, that statement (1) was true. As to statement (2), Ms. Neeb did not specify what constituted the "improper advance." Plaintiff did admit that he had been reprimanded for buying female students gifts. To the extent that such action could be construed as making improper advances, the statement would be true. However, absent any specific allegation purportedly made by Wencel about an "improper advance" we simply cannot conclude that plaintiff has established that the statement was false.

As to statement (3) in Ms. Neeb's affidavit, plaintiff admitted that he posted a profile on the website Match.com and did not deny that the profile indicated that he may have a fetish for

shoes. A printed copy of the Match.com profile purported to be plaintiff's contains such a statement. Truth, then, is a defense to an allegation that the statement is defamatory.

With respect to statement (4) in Ms. Neeb's affidavit, assuming that Ms. Neeb's interpretation of the general statement about a teacher viewing pornography on his school computer was in reference to plaintiff, it appears that plaintiff had already made the accusation against him public by sharing it with his students--one of whom was Ms. Neeb's daughter. Wencel testified that Ms. Neeb approached him with concerns about what she had been hearing about plaintiff, and Ms. Neeb did not suggest otherwise. Nowhere in her affidavit does Ms. Neeb state that the questioned posed to her by Wencel was the first time she had heard any suggestion that plaintiff was being accused of accessing pornography on his school computer.

Additionally, while the trial court did not find it to be so, we are satisfied that Wencel, as superintendent, was acting within the course and scope of authority when speaking to Ms. Neeb and allegedly advising her of his concerns with respect to plaintiff. Again, plaintiff alleged as much in his complaint. And, the scope of a superintendent's authority is broad because of his responsibility *in loco parentis*, with his role having been said to include any act taken as chief administrator and disciplinarian in the school district. See, *Baker v Couchman*, 447 Mich 1097, 729 NW2d 520 (2007).

Moreover, to avoid liability, it is not necessary for a defendant to prove that a publication is literally and absolutely accurate in every detail. *Collins v Detroit Free Press, Inc*, 245 Mich App 27, 33; 627 NW2d 5 (2001). Rather, substantial truth is an absolute defense to a defamation claim. *Id.* "It is sufficient for the defendant to justify so much of the defamatory matter as constitutes the sting of the charge, and it is unnecessary to repeat and justify every word . . . so long as the substance of the libelous charge be justified. . ." *Rouch v Enquirer & News of Battle Creek Michigan*, 440 Mich 238, 259; 487 NW2d 205 (1992), quoting *McAllister v Detroit Free Press Co*, 85 Mich 453, 460-461; 48 NW 612 (1891).

Here, Wencel testified that he was present when the school's technology director conducted testing to see if the school's newly installed computer filter system was working properly. According to Wencel, during the testing he witnessed the access and block of access to certain websites from plaintiff's workstation under plaintiff's login and password, and that some of the websites contained objectionable content and images. Wencel further testified that he had the hard drive on plaintiff's computer preserved and that he thereafter engaged the services of an expert to review the contents of the same. The expert prepared a report stating that a forensic examination on the hard drive confirmed access (or attempted access) to inappropriate websites. While plaintiff flatly denied accessing or attempting to access inappropriate websites on the computer, he also testified at deposition that he is unaware of anyone using his password on the computer assigned to him. Plaintiff also agreed that if pornographic images were on his computer hard drive, accessed by way of his password, they would be attributable to him. There was no evidence suggesting that the findings of the expert, or that Wencel's statements concerning what he witnessed on plaintiff's computer were not true. Given the testimony, the statements attributed to Wencel can be deemed substantially true. Summary disposition was appropriate on plaintiff's defamation claim as it pertains to statements made to Ms. Neeb.

Plaintiff next contends that he adequately established all of the necessary elements of his claim of intentional infliction of emotional distress, such that summary disposition on this claim was inappropriate. We disagree.

The elements of a claim for intentional infliction of emotional distress are "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999). A party is only liable for the intentional infliction of emotional distress when "the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999). Whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery is a question of law for the court. If reasonable minds could differ on the subject, the issue becomes a question of fact for the jury. *Lewis v LeGrow*, 258 Mich App 175, 197; 670 NW2d 675 (2003).

Plaintiff asserts that Wencel's statements concerning plaintiff were so derogatory in nature and made without any basis whatsoever, such that they meet the threshold for a claim of intentional infliction of emotional distress. As previously indicated, however, Wencel, as superintendent, is entitled to absolute immunity so long as he is acting within the scope of his executive authority. Generally, "[t]here is no 'intentional tort' exception to governmental immunity." *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987). Having already determined that the statements made by Wencel were within the scope of his authority, plaintiff's claim of intentional infliction of emotional distress fails.

Moreover, we do not find that the challenged statements rise to the level of extreme or outrageous conduct, or that there has been a demonstration that Wencel intended the statements to inflict emotional pain upon plaintiff. Wencel is the superintendent of schools and oversees the schools in his district. Wencel received evidence of a teacher's alleged misconduct, some of which occurred during school hours and on school property, and discussed the same with the school board. The allegations having been made and made public (even by plaintiff), it is not unreasonable that Wencel would discuss the same with a concerned parent of one of plaintiff's students. Even absent the application of immunity, then, plaintiff's claim of intentional infliction of emotional distress would be properly dismissed.

Affirmed.

/s/ Karen Fort Hood
/s/ Christopher M. Murray
/s/ Deborah A. Servitto