

STATE OF MICHIGAN
COURT OF APPEALS

ANDRE THORNTON and CHIEF'S,

Plaintiffs-Appellees,

UNPUBLISHED
February 26, 2013

v

JOHN R. KING ACADEMIC AND
PERFORMING ARTS ACADEMY, JANE DOES,
and JOHN DOES,

No. 306385
Wayne Circuit Court
LC No. 10-004777-CZ

Defendants,

and

VIVIAN HUGHES-NORDAY,

Defendant-Appellant.

Before: RIORDAN, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

In this defamation action, defendant, Vivian Hughes-Norday,¹ appeals as of right the trial court's order denying her motion for summary disposition pursuant to MCR 2.116(C)(7), on the basis of governmental immunity. Because we conclude that there is a genuine issue of material fact regarding whether defendant acted with malice, we affirm.

This case arises from defendant's plans to relocate the John R. King Academic and Performing Arts Academy (JRK). The possible relocation site was across the street from plaintiff Andre Thornton's convenience store, Chief's. In determining whether to relocate the school, defendant sent a survey to all the parents of its current students. Survey questions six and eight are relevant to this action. Question six reads: "There is a candy store/carwash

¹ Defendant Hughes-Norday is the only appellant in this case; the John R. King Academic and Performing Arts Academy and John and Jane Does are not parties to this appeal. We spell defendant's name consistent with how it is spelled by the trial court; however, we note that in her brief on appeal defendant spells her name "Hughes-Nordé."

directly across from the Cerveny. It has been reported that drugs are sold on that site. Do you want your children at a school that is located so close to that environment?”² Question eight reads: “Would you be willing to picket in front of the school to close down the unsavory environment across from the school?” Defendant admits that a meeting was also held where the survey was discussed.

After learning of the survey and the meeting regarding the survey, plaintiffs filed this defamation action against defendant. Defendant answered plaintiff’s complaint, and eventually filed a motion for summary disposition pursuant to MCR 2.116(C)(7) on the basis of governmental immunity. Plaintiffs also filed a motion for summary disposition pursuant to MCR 2.116(C)(10). A hearing regarding both motions was held on July 29, 2011. After hearing arguments from both attorneys regarding both motions, the trial court denied summary disposition under both MCR 2.116(C)(7) and (C)(10) because it concluded that there were questions of fact.³ Defendant now appeals as of right.

On appeal, defendant argues that the trial court erred by denying her motion for summary disposition because she is entitled to governmental immunity from liability as a matter of law.

We review a trial court’s decision regarding a motion for summary disposition de novo. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). A party seeking summary disposition pursuant to MCR 2.116(C)(7) is entitled to judgment in their favor if a law of immunity, such as governmental immunity, bars the plaintiff’s claims. *Id.* “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). “The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with ‘affidavits, depositions, admissions, or other documentary evidence,’ the substance of which would be admissible at trial. ‘The contents of the complaint are accepted as true unless contradicted’ by the evidence provided.” *Odom*, 482 Mich at 466, quoting *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (footnotes omitted).

In *Odom*, 482 Mich at 461, this Court reaffirmed the *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984), test for governmental immunity from liability for an intentional tort on the basis that MCL 691.1407(3) states that the statute “does not alter the law of intentional torts as it existed before July 7, 1986.” Because defendant, a public school principal, is not a judge, legislator, or highest-ranking appointed executive official, she has only qualified immunity from intentional tort claims. *Odom*, 482 Mich at 479-480. In order to establish such immunity, defendant must demonstrate: “(1) the employee’s challenged acts were undertaken during the course of employment and that the employee was acting, or reasonably

² “The Cerveny” refers to the proposed new location for the school.

³ Plaintiffs do not appeal the trial court’s denial of the motion for summary disposition pursuant to MCR 2.116(C)(10).

believed he was acting, within the scope of his authority, (2) the acts were undertaken in good faith, and (3) the acts were discretionary, rather than ministerial, in nature.” *Id.* at 461.

In regard to the second factor, a government employee is not acting in good faith when the employee acts with malice or willful misconduct. Willful misconduct can be found where there is an intent to harm or an indifference to whether harm will result such that it is the equivalent of an intent to harm. *Id.* at 474-475. The good faith requirement “protects a defendant’s honest belief and good-faith conduct with the cloak of immunity while exposing to liability a defendant who acts with malicious intent.” *Id.* at 482. Whether an employee acted in good faith is a subjective determination. *Id.* at 481-482.

In this case, we conclude that the trial court properly determined that a question of fact precludes summary disposition. Specifically, in regard to the second element requiring proof that the acts were not undertaken with malice, the evidence in this case creates a question of fact. The evidence before the trial court that was relevant to whether defendant acted with malice included an affidavit executed by defendant wherein she specifically states:

That I did not make these statements due to any malice towards Chief’s or Mr. Thornton, rather, in an effort to execute my official duties as John R. King’s Principal for the purposes of providing important information to Parents and Administrators of John R. King School regarding the relocation of John R. King for September, 2009.

However, the survey itself also constitutes evidence relevant to whether defendant acted with malice. The survey clearly indicates that defendant intended to encourage parents to picket Chief’s, which it describes as an “unsavory environment,” for the purpose of closing Chief’s down. These statements amount to an intent to harm plaintiffs Thornton and Chief’s. Therefore, while defendant asserted in her affidavit that she believed her actions were proper and without malice because she believed she was protecting her students, she also expressed an intent to harm plaintiffs in her survey. Defendant’s self-serving affidavit alone is not sufficient to overcome the evidence of malice present in the survey that she sent out about plaintiffs. Therefore, the evidence before the trial court created a question of fact regarding whether defendant’s expressed intent amounts to malice. Accordingly, the trial court properly denied defendant’s motion for summary disposition. *Pierce*, 265 Mich App at 177. Because summary disposition was properly denied based on the questions of fact regarding good faith, we need not consider whether there are questions of fact regarding the other governmental immunity factors.

Affirmed.

/s/ Michael J. Riordan
/s/ Joel P. Hoekstra
/s/ Peter D. O’Connell