STATE OF MICHIGAN

COURT OF APPEALS

BRANDON CASSISE, Plaintiff-Appellant,	UNPUBLISHED February 23, 2006
v	No. 257299 Oakland Circuit Court
WALLED LAKE CONSOLIDATED SCHOOLS, DAVID BARRY, NICK CONTI, and CHUCK APAP, Defendants-Appellees.	LC No. 2003-052129-NZ

Before: Hoekstra, PJ, and Neff and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition and dismissing each of plaintiff's claims. We affirm.

At the start of the second semester of his junior year of high school, plaintiff transferred from Walled Lake Central High School (Central) to St. Mary Preparatory High School in Orchard Lake, Michigan (St. Mary). Plaintiff's transfer was the subject of rumor and gossip at Central because plaintiff was the quarterback of Central's football team, and a member of the basketball team. Before his transfer, he told Central's football coach, defendant Chuck Apap, that he believed Central's basketball program was in disarray and he was considering a transfer for that reason. Plaintiff made similar statements to others. When plaintiff's mother approached Central's principal, defendant David Barry, to sign transfer papers, she indicated that the transfer was academically motivated. Barry had received contrary information from Apap, the parents of other Central students, and an office secretary, whose children saw instant messages from plaintiff regarding his dissatisfaction with the basketball program. Barry also knew that plaintiff had a high grade point average at the time of his transfer.

Barry filed a complaint with the Michigan High School Athletic Association (MHSAA), asserting that plaintiff's transfer was athletically motivated. MHSAA rules require a transfer student to refrain from playing interscholastic sports for one semester following a transfer, but if a transfer is athletically motivated, the student is disqualified for two semesters following the transfer. After receiving St. Mary's response, the MHSAA concluded there was insufficient evidence that plaintiff's transfer was athletically motivated. After the MHSAA's decision, a reporter for the *Oakland Press* contacted Barry and Apap for comment, and published an article criticizing the MHSAA decision. Several weeks later, a *Detroit Free Press* reporter also

contacted Apap and Barry and published an article that was critical of the MHSAA. Both Apap and Barry denied that they provided specific information to the reporters. Rather, they disclosed or affirmed general information, specifically that plaintiff was a good student, he had no discipline problems, and his parents had never complained about his academic progress, Central's programs, or Central's teachers. Both articles indicated Barry thought plaintiff's transfer was athletically motivated.

Barry appealed the MHSAA decision to the MHSAA executive board, which denied the appeal. Plaintiff commenced this action against Walled Lake Consolidated Schools, Barry, Apap, and Central's athletic director Nick Conti, who had told the Detroit Catholic League athletic director, Vic Michael, that plaintiff was a good student and athlete with no disciplinary problems. Plaintiff alleged a violation of MCL 600.2165, intentional infliction of emotional distress, defamation, abuse of process, and invasion of privacy. The trial court granted defendants summary disposition on all claims.

I

Plaintiff first argues he alleged a valid cause of action under MCL 600.2165. In discussing this issue, plaintiff merely cites a small portion of the statute and makes an undeveloped argument that a cause of action exists. An appellant may not announce a position and leave it to this Court to provide the basis for that claim, nor may he give it cursory treatment with little citation of authority. *Goolsby v Detroit,* 419 Mich 651, 655 n 1; 358 NW2d 856 (1984); *Korth v Korth,* 256 Mich App 286, 294; 662 NW2d 111 (2003). Nevertheless, the plain language of MCL 600.2165 makes clear that it does not apply when a school official discloses information outside of court proceedings. The claim was properly dismissed.

II

Plaintiff next argues his intentional infliction of emotional distress claim was improperly dismissed. A trial court's grant of summary disposition is reviewed de novo. *Ormsby v Capital Welding, Inc,* 471 Mich 45, 52; 684 NW2d 320 (2004). In reviewing a motion under MCR 2.116(C)(10), we consider submitted admissible evidence in a light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists. *Lockridge v State Farm Mut Automobile Ins Co,* 240 Mich App 507, 511; 618 NW2d 49 (2000).

> "[T]o establish intentional or reckless infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. Liability attaches only when a plaintiff can demonstrate that the defendant's conduct is 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. A defendant is not liable for mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." [*Heckmann v Detroit Police Chief,* 267 Mich App 480, 498; 705 NW2d 689 (2005), quoting *Lewis v LeGrow,* 258 Mich App 175, 196; 670 NW2d 675 (2003).]

When considering whether conduct is so extreme and outrageous that it triggers liability, the court asks whether an average person would have his resentment aroused and exclaim,

"outrageous!" when given the facts of the case. *Id.* at 498. Summary disposition may be granted if reasonable minds would agree that the conduct was not outrageous. *Id.* at 499. Even if the defendant acted tortiously or criminally, a claim will not arise without the requisite showing of outrageous conduct. *VanVorous v Burmeister,* 262 Mich App 467, 481-482; 687 NW2d 132 (2004). In this case, defendants were entitled by MHSAA rules to challenge plaintiff's eligibility to play sports for a two-semester period. While some defendants later spoke to reporters, the reporters were already aware of the story, and talking to them did not rise to the outrageous level of behavior required to sustain a claim for intentional infliction of emotional distress. *Vanvorous, supra* at 481-482; cf. *Haverbush v Powelson,* 217 Mich App 228, 230-233; 551 NW2d 206 (1996).

Furthermore, to satisfy the element of severe emotional distress, the distress must be so severe that no reasonable person could be expected to endure it. *Haverbush, supra* at 235. In determining its severity, the intensity and duration of the distress should be considered. *Id.* In this case, plaintiff testified that he was "offended" and "annoyed." He thought people changed their attitude about him, and some people called him a traitor or a "sell out." Plaintiff discussed the issue with school counselors on approximately five occasions. This was insufficient to establish that plaintiff suffered distress of the intensity and duration necessary to sustain a claim for intentional infliction of emotional distress.

III

Plaintiff next argues the trial court erred in summarily dismissing his claims of defamation and invasion of privacy on governmental immunity grounds. Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by immunity granted by law. *Downs v Saperstein Assoc Corp,* 265 Mich App 696, 698; 697 NW2d 190 (2005). In ruling on a motion brought under MCR 2.116(C)(7), all submitted documentary evidence must be considered, and the plaintiff's pleadings must be accepted as true and construed in his favor unless contradicted by the documentary evidence. *Id.* When the trial court granted summary disposition, MCL 691.1407 provided, in relevant part:

> (1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.

A governmental function is an activity "expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). When determining whether a governmental agency is engaged in a governmental function, a court must focus on the general activity rather than the specific conduct at the time of the tort. *Tate v Grand Rapids,* 256 Mich App 656, 661; 671 NW2d 84 (2003). Control of interscholastic athletics falls within the province of individual school boards. *Breighner v Michigan High School Athletic Ass'n,* 471 Mich 217, 220; 683 NW2d 639 (2004). Because Walled Lake Consolidated Schools was exercising a governmental function, it was immune from tort liability. MCL 691.1407(1).

With regard to the individual defendants, a different analysis is required. MCL 691.1407(2) governs the issue of immunity for individual government employees. However, MCL 491.1407(3) limits the scope of subsection (2). Under MCL 491.1407(3), the governmental immunity provision of MCL 691.1407(2) "does not alter the law of intentional

torts as it existed before July 7, 1986." In *Sudul v City of Hamtramck,* 221 Mich App 455, 458 (Corrigan, J.); 480-481, 487 (Murphy, J.); 562 NW2d 478 (1997), this Court held that government employees were not immune from intentional torts unless the torts were barred by governmental immunity before July 7, 1986.

Before July 7, 1986, governmental immunity did not bar defamation claims. See, e.g., *Tocco v Piersante,* 69 Mich App 616, 618, 622-626; 245 NW2d 356 (1976), and *Randall v Delta Twp,* 121 Mich App 26, 33; 328 NW2d 562 (1982), citing *McCann v Michigan,* 398 Mich 65; 247 NW2d 521 (1976). Because a claim of defamation was not barred by governmental immunity before July 7, 1986, the individual defendants in this case were not immune from the defamation claim. Additionally, there is no indication that governmental immunity barred claims of invasion of privacy before July 7, 1986, and, thus, the individual defendants were not entitled to governmental immunity on the invasion of privacy claim. *Sudul, supra* at 458, 481, 487. Nevertheless, we may affirm a trial court's summary disposition decision if it reached the correct result for the wrong reason. *Taylor v Laban,* 241 Mich App 449, 458; 616 NW2d 229 (2000).

Defamatory communications are those communications that tend to lower a person's reputation in the community or deter others from associating or dealing with that person. *Ireland v Edwards,* 230 Mich App 607, 614; 584 NW2d 632 (1998). A prima facie case of defamation requires a showing

> (1) that the defendant made a false and defamatory statement concerning the plaintiff, (2) that the defendant published the defamatory statement to a third party, (3) that the defendant was at least negligent in publishing the statement, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication (defamation per quod). [*Colista v Thomas,* 241 Mich App 529, 538; 616 NW2d 249 (2000).]

If the alleged defamatory statement is a statement of qualified privilege, it is not actionable unless the plaintiff shows it was made with actual malice. *Smith v Fergan,* 181 Mich App 594, 596-597; 450 NW2d 3 (1989). The elements of qualified privilege are met where there is good faith, an interest to be upheld, a statement limited in scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. In this case, Barry's statements to the MHSAA were made in good faith and were based on information from others that plaintiff transferred for athletic reasons. Central had an interest in upholding the integrity of its athletic and academic reputation. Moreover, the statements were limited to furthering Central's interest and were made on a proper occasion in a proper manner to the MHSAA. There was no evidence that the statements were made with actual malice.

With respect to the statements to the reporters, no evidence of the last element of defamation was presented. Defendants' statements that plaintiff was a good student, had no disciplinary problems, and transferred for athletic reasons, did not constitute defamation per se. Defamation per se includes words charging the commission of a crime or words imputing a lack of chastity. *Burden v Elias Bros Big Boy Restaurants,* 240 Mich App 723, 727-728; 613 NW2d 378 (2000). Further, there was no evidence of special harm caused by publication. There was no showing that plaintiff's reputation was damaged or third persons were deterred from dealing with plaintiff. While plaintiff complained that some unidentified people called him names, it was not possible to connect this name calling with defendants' statements to reporters when plaintiff

openly spoke about his transfer at school, and it was the subject of many rumors. Because plaintiff failed to demonstrate the existence of a genuine question of material fact on his defamation claim, defendants were entitled to summary disposition. *Bergen v Baker,* 264 Mich App 376, 381; 691 NW2d 770 (2004).

Regarding the invasion of privacy claim, the only communications at issue are those between defendants and the reporters. The common-law tort of invasion of privacy may be based on four distinct theories: (1) intrusion upon another's seclusion or solitude, or into another's private affairs; (2) a public disclosure of embarrassing private facts about the individual; (3) publicity, which places the plaintiff in a false light in the public eye; and (4) the appropriation of the plaintiff's likeness for the defendant's advantage. *Lewis, supra* at 193; *Doe v Mills,* 212 Mich App 73, 80; 536 NW2d 824 (1995). Plaintiff appears to argue his claim was based on "public disclosure of private facts" about himself.

> A cause of action for public disclosure of embarrassing private facts requires (1) the disclosure of information (2) that is highly offensive to a reasonable person and (3) that is of no legitimate concern to the public. [*Doe, supra* at 80.]

In this case, Apap and Barry admitted talking to reporters. They disclosed or affirmed that plaintiff was a good student who did not have disciplinary problems and that they believed his transfer was athletically motivated. Clearly, there was a disclosure of information. However,

> to satisfy the final element of an action for public disclosure of embarrassing private facts, the information disclosed must concern the individual's private life. Liability will not be imposed for giving publicity to matters that are already of public record or otherwise open to the public. [*Doe, supra* at 82 (citation omitted).]

In *Swickard v Wayne Co Medical Examiner,* 438 Mich 536, 550-551, 554; 475 NW2d 304 (1991), the Court acknowledged that, to have a successful claim of public disclosure of embarrassing private facts, the matter at issue must not be of public concern. It gave examples of issues of public concern, which included publications concerning crimes, arrests, suicides, marriage, divorces, fires, catastrophes of nature, deaths from narcotics use, the birth of a child to a twelve-year-old girl, "and many other similar matters of genuine, even if more or less deplorable, popular appeal." *Id.*, quoting 3 Restatement of Torts, 2d, § 652D, comment g, pp 390-391. In this case, the subject matter that sparked the disclosures was already a matter of public interest. Plaintiff was a popular star athlete by all accounts. His potential transfer, which he discussed at school, resulted in gossip among students, parents, and staff. A complaint related to the transfer was made to the MHSAA, to which Central belonged. The rejection of that complaint became known to the reporters, and they explored the issue. The record does not divulge how the reporters came into possession of the story. Nevertheless, the subject matter, plaintiff's reason for transferring from Central High School was a matter of "genuine, even if more or less deplorable, popular appeal" and was not private. *Id.*

IV

Finally, plaintiff argues he stated a valid cause of action for abuse of process. To establish abuse of process, a plaintiff must plead and prove (1) an ulterior purpose, and (2) an act in the use of process that is improper in the regular prosecution of the proceeding. *Bonner v Chicago Title Ins Co,* 194 Mich App 462, 472; 487 NW2d 807 (1992).

> In *Vallance v Brewbaker,* 161 Mich App 642, 646; 411 NW2d 808 (1987), this Court described a meritorious claim of abuse of process as a situation where the defendant has used a proper legal procedure for a purpose collateral to the intended use of that procedure. The Court further stated that there must be some corroborating act that demonstrates the ulterior purpose. *Id.* A bad motive alone will not establish an abuse of process. *Id.* [*Bonner, supra*.]

Plaintiff alleged defendants abused the MHSAA appeal process for an ulterior motive. However, not only did plaintiff fail to identify the nature of any ulterior purpose, he failed to provide evidentiary support. His speculation and innuendo were insufficient to create genuine issues of material fact related to the abuse of process claim. *Bergen, supra*.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Donald S. Owens