



Direct Representation of Municipalities, Municipal Law Practice Groups

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COURT CLARIFIES QUALIFIED IMMUNITY FOR PUBLIC EMPLOYEES IN INTENTIONAL TORT CASES

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In a Dec. 30, 2008 opinion, *Odom v. Wayne County*, the Michigan Supreme Court clarified the law regarding governmental immunity for intentional torts, after recognizing that the analysis had become muddled over the years and needed clarification.

The Supreme Court held that the Governmental Tort Liability Act (GTLA) provided immunity from intentional tort liability, as it existed at common law before July 7, 1986, the date on which the legislature amended the GTLA, to governmental employees. The court further held that the proper test to be applied in determining if a governmental employee enjoys immunity is found in *Ross v. Consumers Power Co. (On Rehearing)*, 420 Mich. 567; 363 NW2d 641 (1984).

Ross provides for qualified immunity for governmental employees for intentional torts. To enjoy such immunity under the *Ross* analysis, a governmental employee must raise governmental immunity as an affirmative defense and establish that (1) the employee's challenged acts were undertaken during the course of employment and that the employee was acting, or reasonably 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.

The plaintiff in *Odom* was criminally cited by a deputy of the Wayne County Sheriff's Department for "disorderly conduct (flagging) impeding the flow of vehicular and pedestrian traffic", a citation that according to the Supreme Court is frequently associated with prostitution. The plaintiff objected to the citation and maintained her innocence. The prosecution eventually dismissed the charge because of insufficient evidence.

The plaintiff subsequently filed suit against the defendant-deputy, Wayne County and the City of Detroit. The parties stipulated to the dismissal of the city, and the trial court granted summary disposition to the county on the basis of governmental immunity. The court denied the deputy's motion for summary disposition, concluding that the plaintiff was proceeding under a gross negligence theory and found that because there

remained questions of fact concerning the deputy's probable cause to arrest and prosecute the plaintiff, the court could not determine whether the deputy enjoyed immunity as a matter of law.

The Michigan Court of Appeals affirmed the decision, but on other grounds, holding that the plaintiff had alleged intentional torts and to enjoy immunity, the deputy's acts had to be justified or objectively reasonable, rather than not grossly negligent. Given the conflicting evidence, the court held that it could not determine if the deputy's acts were justified as a matter of law.

The deputy sought leave to appeal to the Michigan Supreme Court. Initially, the Court denied leave to appeal, but upon reconsideration, granted leave.

The Supreme Court began its analysis by reviewing the history of the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.* and the origins of governmental immunity at common law. The court then reviewed the test as laid out in *Ross*, which it referred to as the "seminal pre-July 7, 1986 case defining the parameters of governmental immunity for individuals from tort liability."

The court then applied the *Ross* test to the facts of the present case. The court first noted that the defendant was indisputably a lower level government employee and not entitled to absolute immunity under MCL 691.1407(5). Furthermore, the plaintiff's allegations of false imprisonment and malicious prosecution were intentional, rather than negligent torts. Therefore, the trial court was required to determine if the defendant enjoyed immunity at common law as it existed prior to July 7, 1986.

The court stated that the defendant raised governmental immunity in her first responsive pleading and motion for summary disposition, but that the trial court applied the wrong legal standard and did not properly apply the *Ross* test to determine whether the defendant established that she was acting in the course of employment and at least reasonably believed that she was acting within the scope of her authority, that her actions were discretionary, and that they were in good faith.

The court further noted that a police officer would be entitled to immunity under the *Ross* test if the arrest was made in good faith, under an honest belief that probable cause existed, even if the belief was later revealed to be mistaken. The court also noted that the appellate court erred in applying an objective standard as to the reasonableness of the defendant's conduct, stating that under *Ross*, the good faith element is a subjective standard.

Therefore, the Supreme Court remanded the case to the trial court to determine whether the defendant had a good faith belief that she had probable cause to arrest before determining the defendant's motion for summary disposition on the grounds of governmental immunity.

Plunkett Cooney's appellate lawyers, Mary Massaron Ross and Christine Oldani, filed an *amicus brief* on behalf of the Michigan Municipal League and the Municipal League Liability and Property Pool in the case. If you have any additional questions, please feel free to contact Mary Massaron Ross at (313) 983-4801, Christine D. Oldani at (313) 983-4796 or any of the firm's government law attorneys.