DA 18-0459

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 103N

HEATHER ROOS,

Plaintiff and Appellant,

v.

THE CITY OF MILES CITY, MAYOR BUTCH GRENZ, and POLICE CHIEF DOUG COLOMBIK,

Defendants and Appellees.

APPEAL FROM: District Court of the Sixteenth Judicial District,
In and For the County of Custer, Cause No. DV 2016-72
Honorable Michael B. Hayworth, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

William A. D'Alton, D'Alton Law Firm, P.C., Billings, Montana

For Appellees:

Gerry P. Fagan, Peter M. Damrow, Moulton Bellingham PC, Billings, Montana

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Submitted on Briefs: February 27, 2019

Decided: April 30, 2019

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Heather Roos (Roos) appeals from a series of orders of the Sixteenth Judicial District Court, Custer County, which ultimately dismissed all her claims against the City of Miles City, former mayor of Miles City Butch Grenz (Grenz), and Miles City police chief Doug Colombik (Colombik). We affirm.

¶3 Roos was hired as a 911 dispatcher in Miles City in 1999. In July 2008, she was promoted to the newly-created full-time position of dispatch supervisor by Kevin Krausz, the then-Miles City Chief of Police. Roos understood that she was to work 40 hours per week, but not necessarily on a set schedule. Colombik became Chief of Police in 2010. In 2014, Roos met with Colombik regarding her desire to change her schedule to four 10-hour shifts per week, Monday through Thursday. Colombik did not approve the change, but Roos began filling out her timecard showing four 10-hour shifts per week anyway. Once Colombik noticed this, he met with Roos and informed her that she needed to work at least part of the day on Fridays. Roos then began filling out her timecards showing 10 hours on Monday, 10 hours on Tuesday, 9 hours on Wednesday, 9 hours on Thursday, and 2 hours on Friday each week. Roos also worked at a casino during this period.

¶4 In May 2015, Colombik was informed that the other 911 dispatchers were complaining that Roos did not appear to be working all the hours she claimed on her timecards and was frequently unavailable in the dispatch center. Colombik began an investigation, tasking the other dispatchers with monitoring when Roos was in the office, and then informed Grenz and City Attorney Dan Rice (Rice) about his suspicions that Roos was working fewer hours than she claimed. On June 8, 2015, Colombik sought permission from Grenz to have an outside agency independently investigate the claims due to the conflicts of interest in both the Miles City Police Department (MCPD) and Custer County Sheriff's Office—specifically the Division of Criminal Investigation at the Montana Department of Justice (DCI). Grenz instructed Rice to complete the internal investigation. On June 15, 2015, Roos was placed on paid administrative leave. Roos offered to step down as dispatch supervisor on June 22, 2015. On June 24, 2015, Rice issued his initial report, which found that Roos was unable to account for 17 hours of claimed work during the two-week period that she was monitored.

¶5 After Roos issued a written response to Rice's report, Grenz modified Roos's suspension from paid to unpaid effective July 1, 2015, pending the conclusion of the internal investigation. After the city concluded its internal investigation, Colombik obtained approval to refer the matter to DCI at some point prior to July 14, 2015. Roos was terminated on July 17, 2015. Roos appealed her termination and was reinstated after a December 11, 2015 grievance hearing. No criminal charges were ever filed.

¶6 Roos filed a complaint on October 3, 2016, alleging negligence, abuse of process, defamation, violation of Montana's Anti-Intimidation Act, and spoliation of evidence. The

District Court dismissed the negligence, defamation, and spoliation claims in an April 6, 2017 Order on Defendants' Motion for Judgment on the Pleadings Pursuant to Mont. R. Civ. P. 12(c). Roos then amended her complaint in August 2017 to allege abuse of process, defamation, and violation of the Anti-Intimidation Act. The District Court partially dismissed the defamation claim and dismissed the abuse of process and violation of Anti-Intimidation Act claims in a June 21, 2018 Order Granting, in Part, Defendants' Motion for Summary Judgment. After the pretrial conference, the District Court allowed the Defendants to file a summary judgment motion regarding the lone remaining defamation claim, and ultimately issued an Order Granting Defendants' Motion for Summary Judgment re: Report to DCI on July 17, 2018. With all her claims dismissed, Roos appealed to this Court, alleging that the District Court incorrectly dismissed her negligence, spoliation, abuse of process, and defamation claims.

¶7 We review a district court's decision on a motion for judgment on the pleadings pursuant to M. R. Civ. P. 12(c) de novo to determine if the court's decision was correct. *Firelight Meadows, LLC v. 3 Rivers Tel. Coop., Inc.*, 2008 MT 202, ¶ 12, 344 Mont. 117, 186 P.3d 869. We review summary judgment orders de novo, performing the same M. R. Civ. P. 56 analysis as the district court. *Ray v. Connell*, 2016 MT 95, ¶ 9, 383 Mont. 221, 371 P.3d 391.

¶8 The District Court dismissed Roos's negligence claim on a motion for judgment on the pleadings. A motion for judgment on the pleadings "is properly granted when, taking all of the well-pleaded factual allegations in the nonmovant's pleadings as true, the material facts are not in dispute and the moving party is entitled to judgment as a matter of law."

Firelight Meadows, ¶ 11. The District Court held that Roos's negligence claim was preempted by Montana's Wrongful Discharge From Employment Act (WDEA), § 39-2-901, et seq., MCA. The WDEA "provides the exclusive remedy for wrongful discharge from employment." *Blehm v. St. John's Lutheran Hosp., Inc.*, 2010 MT 258, ¶ 19, 358 Mont. 300, 246 P.3d 1024; § 39-2-902, MCA.

¶9 Roos's negligence claim stated that "Miles City owed Heather a duty to professionally conduct an investigation before reporting Heather to DCI." The city's investigation ultimately led to Roos's termination on July 17, 2015. Though she was eventually reinstated after a grievance hearing, the District Court found that the negligence claim was "inextricably intertwined with and based [up]on" Roos's termination from employment, and therefore preempted by the WDEA. *Kulm v. Mont. State Univ.-Bozeman*, 285 Mont. 328, 333, 948 P.2d 243, 246 (1997). We agree. The city's investigation was completed and Colombik contacted DCI before Roos was terminated. The facts of the city's investigation and Roos's termination are inextricably intertwined, because Roos was terminated based on the city's investigation. Neither outside parties conducting a criminal investigation after Roos's termination nor her eventual reinstatement change this fact, and the District Court correctly dismissed Roos's negligence claim.

¶10 The District Court also dismissed Roos's spoliation claim on a motion for judgment on the pleadings. Here again, dismissal of Roos's claim is only proper when "material facts are not in dispute and the moving party is entitled to judgment as a matter of law." *Firelight Meadows*, ¶ 11. The material facts regarding the spoliation claim are not in dispute. After Roos was terminated, counsel for Roos requested that Colombik and Toni

Strouf (Strouf), a 911 dispatcher involved in the city's investigation, preserve their text messages regarding the investigation. Both Colombik and Strouf deleted their text messages.

¶11 "The torts of intentional and negligent spoliation are stand alone torts that must be affirmatively plead and apply only to non-parties to the litigation." *Estate of Willson v. Addison*, 2011 MT 179, ¶ 23, 361 Mont. 269, 258 P.3d 410. Roos attempts to fashion an argument that Colombik is somehow a third-party tortfeasor with regards to the spoliation claim, but this is entirely unconvincing. Colombik started the investigation, Colombik deleted the text messages, and Colombik is a named defendant in this case. We have previously held that there is "no reason to recognize a new tort theory to provide relief to litigants when evidence is intentionally or negligently destroyed by a party to the litigation." *Oliver v. Stimson Lumber Co.*, 1999 MT 328, ¶ 32, 297 Mont. 336, 993 P.2d 11. The District Court correctly dismissed Roos's spoliation claim because it was asserted against direct parties to the litigation. The only third party involved was Strouf, and Roos filed no claim against her.

¶12 The District Court dismissed Roos's abuse of process claim on the Defendants' motion for summary judgment. Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Hughes v. Lynch*, 2007 MT 177, ¶ 8, 338 Mont. 214, 164 P.3d 913. Roos argues that the District Court erred in granting summary judgment to the Defendants due to an incorrect definition of the word "process." The elements of an abuse of process claim are "(1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular

conduct of the proceeding." *Hughes*, ¶ 21 (quoting *Brault v. Smith*, 209 Mont. 21, 28, 679 P.2d 236, 240 (1984)). "The legal process must be 'put to a use perverted beyond its intended purpose.'" *Salminen v. Morrison & Frampton, PLLP*, 2014 MT 323, ¶ 29, 377 Mont. 244, 339 P.3d 602 (quoting *Brault*, 209 Mont. at 29, 679 P.2d at 240).

¶13 Here, the city conducted an internal investigation of Roos; Colombik, as the Chief of Police, referred the matter to an outside law enforcement agency to determine whether criminal charges were warranted; and the Montana Attorney General's Office (AG) ultimately decided not to bring criminal charges against Roos. Roos asserts that this Court should interpret "process" in the context of the abuse of process tort to include the filing of a criminal complaint, but the simple fact is that no criminal complaint was ever filed in this case. *See* § 46-11-101, et seq., MCA. We have previously held that in the "context of the abuse of process tort, process may refer to summons, subpoenas, attachments, garnishments, replevin or claim and delivery writs, arrest under a warrant, injunctive orders, and other orders directly affecting obligations of persons or rights in property." *Hughes*, ¶ 23 (citation omitted). Colombik, the Chief of Police, began an investigation of his direct subordinate for not working the hours that she claimed on her timecards. Colombik later requested an outside law enforcement agency investigate the matter to determine if criminal charges were warranted due to the inherent conflicts involved in MCPD investigating one of its own employees, and the AG ultimately declined to pursue criminal charges. The legal process was not perverted in this case, it performed as intended. The District Court correctly followed our precedent in interpreting the meaning of

"process" and properly granted summary judgment to the Defendants on Roos's abuse of process claim.

¶14 The final cause of action appealed by Roos in this case is her claim of defamation. Roos's original defamation claim was dismissed on the Defendants' motion for judgment on the pleadings, before being replead in her Amended Complaint. The amended defamation complaint was partially dismissed on the Defendants' first motion for summary judgment, and completely dismissed on the Defendants' second motion for summary judgment. "Defamation is effected by libel or slander." *Ray*, ¶ 11 (citing § 27-1-801, MCA). Roos alleged that the Defendants committed both libel and slander by making various statements regarding the investigation and Roos's employment status. There are three claims Roos asserts amount to defamation: (1) a letter from Grenz to the Custer County Commissioners informing them that Roos had been placed on administrative leave, (2) statements made by Grenz at a city council meeting, and (3) Grenz and Colombik reporting Roos to DCI. The District Court dismissed each claim as being either nondefamatory or privileged by law.

¶15 The first defamation claim is regarding Grenz's letter to the Custer County Commissioners. On June 15, 2015, after placing Roos on administrative leave pending an investigation into potential violations of city policy, Grenz informed the county commissioners that Roos had been placed on administrative leave pending an investigation into potential violations of city policy. Roos claims that there is a material dispute over whether Grenz's letter to the city council was true at the time it was made. Generally, the truth or falsity of a statement is one for the jury to decide, however, when "the evidence is

so overwhelming that any other conclusion is unreasonable, the court is afforded the discretion to make a proper finding." *Hale v. City of Billings*, 1999 MT 213, ¶ 17, 295 Mont. 495, 986 P.2d 413 (internal quotations omitted). Grenz's letter to the commissioners provided accurate information. Any other conclusion than the letter being truthful would be unreasonable. "Truth is a complete defense against a defamation claim." *Amour v. Collection Prof'ls, Inc.*, 2015 MT 150, ¶ 17, 379 Mont. 344, 350 P.3d 71 (citing *Citizens First Nat'l Bank of Wolf Point v. Moe Motor Co.*, 248 Mont. 495, 501, 813 P.2d 400, 404 (1991)). The District Court properly granted summary judgment on Roos's defamation claim regarding Grenz's letter.

¶16 The second defamation claim is regarding statements made by Grenz at a city council meeting. In her amended complaint, Roos claims that Grenz "stated to the public and City Council members that Heather broke the law." The record does not support that Grenz ever stated that Roos broke the law at the city council meeting. At the meeting in question, Grenz posed a hypothetical about what he should do as mayor when he believes that a city employee is possibly breaking the law. At no point did he mention Roos's name. Claims of defamation may not be based on innuendo or inference, allegedly defamatory statements "must be aimed specifically at the person claiming injury." *McConkey v. Flathead Elec. Coop.*, 2005 MT 334, ¶ 47, 330 Mont. 48, 125 P.3d 1121 (citing *Wainman v. Bowler*, 176 Mont. 91, 94, 576 P.2d 268, 270 (1978)). The District Court correctly found that Grenz never named Roos in his hypothetical. Furthermore, the District Court found that Grenz's statements during the city council meeting were privileged pursuant to § 27-1-804(2), MCA ("A privileged publication is one made . . . in any legislative or

judicial proceeding or in any other official proceeding authorized by law"). Roos argues that Grenz's statements were not part of his official function as mayor. The mayor may certainly pose hypotheticals about his duties to his city council and he did not name Roos in his hypothetical. The District Court correctly granted summary judgment on Roos's defamation claim regarding Grenz's statements to the city council.

¶17 The third defamation claim is regarding Colombik and Grenz reporting Roos to DCI for investigation. Roos claims that the District Court "addressed whether Chief Colombik's letter to the DCI in Helena amounted to defamation." The letter in question is not from Colombik to DCI, but from Colombik to Grenz. The District Court correctly found that there were no statements attributed to Grenz in the letter and granted summary judgment on that portion of the claim. The District Court further found that the letter was privileged because it was made in the discharge of Colombik's official duties as Chief of Police. "A privileged publication is one made . . . in the proper discharge of an official duty." Section 27-1-804(1), MCA. When facts are not in dispute, "determination of whether a publication is privileged is a question of law for the court." *Hale*, ¶ 35. "The chief of police . . . shall perform all duties required in the prevention and detection of crime." The Code of Ordinances of Miles City, Montana, § 18-101. Even assuming, *arguendo*, that Colombik repeated the claims of his letter verbatim to DCI—which there is no support for in the record—his referral to DCI for an investigation of Roos is privileged. Colombik was informed by his employees that Roos was not working the hours she claimed on her timecards, began an investigation, handed that investigation off to the city, and then, when the city's investigation determined that Roos was not working the hours she claimed

on her timecards, requested DCI conduct an outside investigation due to conflicts of interest with the MCPD. Because Colombik's duties include the prevention and detection of crime, his statements referring the case to DCI to determine whether criminal charges were warranted were privileged. The District Court correctly granted summary judgment on Roos's defamation claim regarding statements made to DCI.

¶18 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶19 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ JIM RICE