

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH F. BABIARZ, JR.,

Plaintiff-Appellant,

V

AUDREY LESLIE,

Defendant-Appellee,

and

EVERGREEN TOWNSHIP BOARD OF
SUPERVISORS, SANILAC COUNTY BOARD
OF ROAD COMMISSIONERS, and JOHN DOE
EMPLOYEES OF SANILAC COUNTY BOARD
OF ROAD COMMISSIONERS,

Defendants.

UNPUBLISHED
February 21, 2012

No. 301927
Sanilac Circuit Court
LC No. 09-033197-NZ

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff, Joseph Babiarz, Jr., appeals as of right from the trial court's order granting summary disposition in favor of defendant, Audrey Leslie, Evergreen Township supervisor. We affirm.

Plaintiff and defendant own parcels of property separated by an intersection. Plaintiff's neighbor, Robert Chard, reported that he had to evict defendant's relatives when he found them hunting on plaintiff's property. Shortly after this eviction, the Sanilac County Road Commission, the entity contracted for road maintenance by Evergreen Township, removed trees from the right of way. Plaintiff did not receive advance notice of the tree removal. Plaintiff filed a complaint against defendant alleging negligence and gross negligence.¹ It was asserted that

¹ Plaintiff also filed suit against the township board, the county board of road commissioners, and the employees of the county board of road commissioners. All defendants moved for

defendant requested the destruction of plaintiff's trees in retaliation for the eviction of her relatives.

Defendant filed a motion for summary disposition, asserting that plaintiff's claims were precluded by governmental immunity. Specifically, defendant asserted that, as the highest elected official, she was entitled to absolute immunity. Defendant also asserted that the acts at issue did not rise to the level of gross negligence, and plaintiff could not establish that a request to examine the condition of the intersection at issue was the proximate cause of any injury. Plaintiff opposed the motion for summary disposition, alleging that defendant had an improper motive for ordering the tree removal and factual issues regarding the rationale for the tree removal precluded summary disposition. The trial court granted defendant's motion for summary disposition, holding that she was entitled to absolute governmental immunity.

Plaintiff alleges that the trial court erred in holding that defendant was entitled to governmental immunity. We disagree. A trial court's ruling on a motion for summary disposition presents a question of law subject to review de novo. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). A motion brought pursuant to MCR 2.116(C)(7) alleges that a claim is barred because of immunity by law. *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 264; 792 NW2d 781 (2010). To determine whether summary disposition is appropriate on the basis of MCR 2.116(C)(7), a court must examine all documentary evidence submitted by the parties and accept as true the allegations in the complaint unless affidavits or other documentation contradicts them. *Blue Harvest, Inc v Dep't of Transp*, 288 Mich App 267, 271; 792 NW2d 798 (2010). If there are no material facts in dispute or if reasonable minds could not differ regarding the legal effect of the facts, the application of governmental immunity is resolved as an issue of law. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). Affidavits offered in opposition to a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

“The governmental tort liability act, MCL 691.1401 *et seq.*, provides immunity from tort liability to governmental agencies engaged in a governmental function. MCL 691.1407(1). The act provides immunity from tort liability to governmental employees if, inter alia, the employee's conduct does not amount to gross negligence. The legislative immunity granted to governmental agencies and their employees is broad.” *Stanton v City of Battle Creek*, 466 Mich 611, 614-615; 647 NW2d 508 (2002).

MCL 691.1407 provides in relevant part:

(2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a

summary disposition, and the trial court granted the motions, holding that the road commission had the authority to cut the trees, and the township was immune from suit for making the tree removal request. Plaintiff has not appealed these rulings.

governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

* * *

(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.

* * *

(7) As used in this section:

(a) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

In *Odom v Wayne Co*, 482 Mich 459, 479-480; 760 NW2d 217 (2008), the Supreme Court held that the first inquiry is to determine if the highest ranking elected or executive official is entitled to absolute immunity pursuant to MCL 691.1407(5).

As an initial matter, we note that plaintiff's brief on appeal failed to cite any legal authority in support of the issue of absolute immunity. A party may not merely announce his position and expect this Court to discover and rationalize the basis for his claims. *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). A party must cite authority in support of his position. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). When a party fails to cite authority for his argument, this Court rejects the argument as abandoned on appeal. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 220; 761 NW2d 293 (2008). Consequently, this issue has been abandoned.²

² We note that plaintiff did cite authority in a reply brief in response to defendant's legal arguments and citation to authority.

Additionally, at the trial level, plaintiff did not contest that defendant was the highest elected official in Evergreen Township. Rather, plaintiff only took issue with whether defendant was acting within the scope of her authority and whether she acted in an individual capacity. A party may not harbor error as an appellate parachute by agreeing with action taken at the trial level and raising the issue as an error on appeal. *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005). Plaintiff cannot suddenly dispute this issue on appeal. *Id.*

Nonetheless, we will address the issue of absolute immunity. The plain language of MCL 691.1407(5) is “written with utter clarity.” *American Transmissions, Inc v Atty Gen*, 454 Mich 135, 143; 560 NW2d 50 (1997). If the language of the statute is clear and unambiguous, it is presumed that the Legislature intended the meaning plainly expressed in the statute. *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010). The individual or entity legislatively charged with essential government decision-making requires the broad protection of absolute immunity. *Grahovic v Munising Twp*, 263 Mich App 589, 595; 689 NW2d 498 (2004). This broad grant of immunity is necessary to prevent these officials from being intimidated or timid in the discharge of their public duties. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 632-633; 363 NW2d 641 (1984) (citation omitted).

In *American Transmissions, Inc*, 454 Mich at 136-137, the Attorney General, Frank J. Kelley, conducted a “sting” operation to determine whether independent transmissions shops were unnecessarily performing repairs. When the impetus for the investigation was called into question, the Attorney General gave a television interview during which he referred to the transmission shop owners as crooks and cheats. The plaintiffs, transmission shop owners, demanded a retraction, and when it apparently was refused, they filed suit for defamation. The defendant, Attorney General, filed a motion for summary disposition, asserting that he was entitled to absolute immunity pursuant to MCL 691.1407(5). The Supreme Court held that the highest executive officials of all levels of government are absolutely immune from all tort liability when acting within the scope of their authority, and there was no bad faith or motive exception to the general rule. *Id.* at 139-144. Accordingly, summary disposition was appropriate in favor of the Attorney General. *Id.* at 144.

In *Marrocco v Randlett*, 431 Mich 700, 710-711; 433 NW2d 68 (1988), the Court held that “the highest executive officials of local government are not immune from tort liability for acts not within their executive authority.” The Court enunciated the following test to determine if acts occurred within the scope of authority:

The determination whether particular acts are within their authority depends on a number of factors, including the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or

other local law defining the official's authority, and the structure and allocation of powers in the particular level of government. [*Id.* at 711.³]

In the present case, plaintiff contends that defendant is not entitled to absolute immunity because she was not acting within the scope of her authority. However, plaintiff did not present any local ordinances defining defendant's authority. Rather, plaintiff contends that defendant acted out of animus in light of the affidavit filed by Robert Chard, creating a factual issue. However, the Chard affidavit contains hearsay statements by road commission foreman Mark Bye, *Maiden*, 461 Mich at 120-121, and plaintiff failed to establish that these statements are admissible as evidence.⁴ Finally, even if we assumed that defendant acted with an improper motive, the *American Transmissions* Court held that the plain language on MCL 691.1407(5) did not contain a "malevolent-heart" exception, and the Court declined the invitation to include "motive" as one of the factors for determining if an official was acting within the scope of his authority. *American Transmissions*, 454 Mich at 139-144. Accordingly, in the present case, plaintiff's reliance on any incident involving defendant's relatives as a motive to cut the trees has no bearing on the immunity issue.⁵ The trial court properly concluded that defendant was entitled to absolute immunity.

Affirmed. Defendant as the prevailing party may tax costs. MCR 7.219.

/s/ Henry William Saad

/s/ Kirsten Frank Kelly

/s/ Michael J. Kelly

³ See also *American Transmissions, Inc.*, 454 Mich at 141; *Petipren v Jaskowski*, ___ Mich App ___, ___; ___ NW2d ___ (2011); *Bennett v Detroit Police Chief*, 274 Mich App 307, 312; 732 NW2d 164 (2007).

⁴ At the hearing regarding defendants' motions for summary disposition, plaintiff acknowledged that Bye had not been deposed. However, plaintiff failed to request an adjournment.

⁵ Alternatively, we note that summary disposition was proper in light of MCL 691.1407(2) because the road commission's action, not defendant's request, was the proximate cause of any injury. See *Robinson v City of Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000).