STATE OF MICHIGAN

COURT OF APPEALS

KURT JACOBONI,

Plaintiff-Appellee,

v

ROYAL OAK TOWNSHIP, ROYAL OAK TOWNSHIP POLICE DEPARTMENT,

Defendants-Appellants,

and

ANDREW ORDIWAY, OAK PARK POLICE DEPARTMENT, AFSCME COUNCIL 25, LOCAL 3075, and SUB LOCAL 20,

Defendants.

UNPUBLISHED
July 16, 1999

No. 208095
Oakland Circuit Court
LC No. 94-472778 CZ

KURT JACOBONI,

Plaintiff-Appellant,

v

ROYAL OAK TOWNSHIP, ROYAL OAK TOWNSHIP POLICE, ANDREW ORDIWAY, and OAK PARK POLICE DEPARTMENT,

Defendants-Appellees.

No. 208105
Oakland Circuit Court
LC No. 94-472778 CZ

Before: Collins, P.J., and Jansen and White, JJ.

PER CURIAM.

In Docket No. 208095, defendants Royal Oak Township and Royal Oak Township Police Department ("Royal Oak") appeal as of right from a judgment in favor of plaintiff in the amount of $595,965.72, inclusive of interest and costs, pursuant to an arbitration award. In Docket No. 208105, plaintiff appeals as of right from an order granting summary disposition in favor of defendants Oak Park Department of Public Safety ("Oak Park Public Safety") and Oak Park Police Officer Andrew Ordiway under MCR 2.116(C)(7) (governmental immunity). We affirm in part and remand for reconsideration of the court's award of fees and costs.

This case stems from a criminal investigation of plaintiff, a Royal Oak police officer, by Oak Park Police Officer Ordiway, involving plaintiff's alleged improper activities during a police raid at an Oak Park home. Plaintiff was criminally charged by the Oakland County Prosecutor,[1] suspended initially without pay by Royal Oak, and then ultimately terminated from his position as a police officer.

Docket No. 208095

On appeal, Royal Oak argues that the trial court erred in summarily dismissing its motion to set aside the arbitration award on the basis that the motion was untimely. We agree.

This Court reviews the trial court's determination that the motion was untimely for an abuse of discretion. See *Maryland Casualty Co v Allen*, 221 Mich App 26, 31; 561 NW2d 103 (1997). MCR 3.602(J)(2) provides:

> An application to vacate an award must be made within *21 days* after *delivery of a copy of the award* to the applicant, except that if it is predicated on corruption, fraud, or other undue means, it must be made within 21 days after the grounds are known or should have been known. [Emphasis added.]

Here, the trial court found that the twenty-one-day period in which to file an application began on the date that the transcript of the panel's findings of fact was delivered to the parties. However, under the facts of this case, we conclude that the twenty-one-day period began on the date that the signed award and judgment was delivered to the parties. After issuing its decision and findings of fact on the record, the neutral arbitrator indicated that, once the panel received the record, it "will be signed by the panel." In addition, months after the transcript had been delivered to the parties, the neutral arbitrator faxed letters to the parties indicating the need for a meeting because "the order of the arbitration panel has not been signed." These facts support the conclusion that the matter was not finalized until the decision was signed.[2] We also find it significant that, when filing the motion for entry of the award, plaintiff's counsel attached the written and signed document, as opposed to the transcript. We therefore conclude that, under the facts of this case, the trial court erred in summarily dismissing Royal Oak's motion on the basis that it was untimely.[3]

Nevertheless, we reject Royal Oak's contention that the award should be vacated because the arbitration panel exceeded its authority, the neutral arbitrator was partial and engaged in misconduct, or because the award was arbitrary. See MCR 3.602(J).[4] This Court's review of an arbitration award is limited. When reviewing an award, this Court determines whether the arbitrator exceeded his

contractual authority or whether he made an error of law on a controlling issue that is apparent on the face of the award. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 496-497; 475 NW2d 704 (1991); *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996). This limited standard precludes review on the basis that the award was against the great weight of the evidence or was not supported by substantial evidence. *Donegan v Michigan Mutual Ins Co*, 151 Mich App 540, 549; 391 NW2d 403 (1986).

The record does not support Royal Oak's claim that the panel exceeded its power in deciding whether plaintiff was denied due process. The scope of an arbitrator's remedial authority is limited to the contractual agreement of the parties, and this Court is reluctant to vacate an award when the agreement does not expressly limit an arbitrator's power. *Dohanyos, supra; Ehresman v Bultynck & Co*, 203 Mich App 350, 355; 511 NW2d 724 (1994). In this case, the arbitration agreement empowered the arbitrators to determine the remaining claim against Royal Oak, which was a breach of contract claim, based on the parties' collective bargaining agreement ("CBA"). Such a claim would include the issues of whether plaintiff was terminated without just cause and whether plaintiff was denied due process as it related to his termination, given that Articles 9 and 10 of the CBA guaranteed due process to individuals involved in termination matters. Finally, Royal Oak has failed to submit the documentation that supposedly limited the arbitration to the sole issue of "just cause." A party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Likewise, the panel did not exceed its authority in awarding plaintiff a monetary award rather than returning him to work with back pay. Because the arbitration agreement included all claims and disputes with regard to plaintiff's breach of contract claim, the award is presumed to be within the scope of the arbitrators' powers absent express language to the contrary. Thus, the computation of damages for breach of contract is presumed to be included in the arbitrators' powers. See *Gordon Sel-Way, supra* at 497-498.

We further find that the record does not support Royal Oak's claim that the neutral arbitrator was partial and engaged in misconduct. "Partiality or bias which will allow a court to overturn an arbitration award must be certain and direct, not remote, uncertain or speculative." *Belen v Allstate Ins Co*, 173 Mich App 641, 645; 434 NW2d 203 (1988). The burden of proof is on the party attacking the impartiality of an arbitrator. *Emmons v Lake States Ins Co*, 193 Mich App 460, 466; 484 NW2d 712 (1992). Here, a review of the record reveals that the neutral arbitrator simply responded to plaintiff's counsel's objections, controlled the hearing, and directed the hearing to relevant topics. Moreover, contrary to Royal Oak's' claim, the record shows that Royal Oak was given ample opportunity to examine plaintiff. We conclude, therefore, that Royal Oak's theory in this regard is merely speculative and thus insufficient to justify setting aside the arbitration award.

We also find that Royal Oak's claim that the arbitration award was arbitrary and without an evidentiary basis to be without merit. The narrow standard of review of arbitration awards precludes review on the basis that the award was against the great weight of the evidence or was not supported by substantial evidence. *Donegan, supra*. Even upon cursory review of the entire record, it is apparent that plaintiff submitted evidence in support of his position. Therefore, although the trial court erred in

summarily dismissing Royal Oak's motion to set aside the award, Royal Oak failed to present sufficient grounds under MCR 3.602(J)(1) to set aside the award. Accordingly, appellate relief is not warranted for this issue.

Royal Oak next argues that the trial court erred in granting plaintiff certain costs and fees pursuant to the arbitration award. Because the trial court entered judgment on the arbitration award after summarily dismissing Royal Oak's objections and motion, the record is devoid of any documentation or other evidence supporting the amount of the costs and fees granted. Therefore, we remand this matter to the trial court for reconsideration of the propriety of the costs and fees granted to plaintiff and articulation of its basis for awarding such costs and fees.[5] Upon reconsideration, the court should take the following into account. First, although the final judgment awarded plaintiff the costs covering the arbitrator's fees, in a later order, the trial court indicated that the "parties each [] pay ½ of neutral arbitrator['s fees]." Second, the trial court improperly awarded plaintiff mediation sanctions because an arbitration hearing is not a trial and an arbitration award or the confirmation of an award is not a verdict within the meaning of MCR 2.403(O)(1). *St George Greek Orthodox Church v Laupmanis Associates, PC*, 204 Mich App 278, 283-284; 514 NW2d 516 (1994). Further, there is nothing in the record to support the amount of attorney fees granted to plaintiff, or any indication that the trial court inquired into the services actually rendered before approving the costs. See *Auto Club Ins Ass'n v State Farm Ins*, 221 Mich App 154, 167; 561 NW2d 445 (1997); *Papo v Aglo Restaurants*, 149 Mich App 285, 299-300; 386 NW2d 177 (1986). Fourth, costs for deposition transcripts may be taxed under MCL 600.2549; MSA 27A.2549, if (1) the deposition is "read in evidence" at trial or where it is "necessarily used," and (2) the deposition transcript is "filed in any clerk's office." *Portelli v IR Const Products Co, Inc*, 218 Mich App 591, 605-606; 554 NW2d 591 (1996). Here, there is no indication that the trial court considered the necessary requirements before granting plaintiff costs for deposition transcripts. Finally, with regard to the remaining costs and fees (arbitration transcripts, expert witness fees, court fees and service fees), there is likewise nothing in the record to support the amount awarded.

Royal Oak's final argument is that the trial court erred in denying its motion for summary disposition because plaintiff failed to exhaust his administrative remedies before proceeding to trial. We decline to address this issue because Royal Oak has failed to provide a transcript of the hearing on its motion for summary disposition, has failed to support the standard of review with citation to appropriate authority, and gives only cursory treatment to this issue in its brief. MCR 7.210(B); MCR 7.212(C)(7); *Myers v Jarnac*, 189 Mich App 436, 444; 474 NW2d 302 (1991); *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987). We nevertheless note that, even if we reviewed this issue, we would conclude that it is without merit.

Docket No. 208105

Plaintiff's sole argument on appeal is that defendants Ordiway and Oak Park Public Safety were not entitled to summary disposition under MCR 2.116(C)(7), because their actions did not fall within the purview of governmental immunity. We disagree.

The applicability of governmental immunity is a question of law that is reviewed de novo on appeal. *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995). This Court must consider any pleadings, affidavits, or other documentary evidence submitted by the parties to determine whether there is a genuine issue of material fact. If no facts are in dispute, whether the plaintiff's claim is barred by governmental immunity is a question for the court as a matter of law. See MCR 2.116(G)(5); *Sewell v Southfield Public Schools*, 456 Mich 670, 674; 576 NW2d 153 (1998). In order to survive a motion for summary disposition, a plaintiff must allege facts which justify application of an exception to immunity. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Terry v Detroit*, 226 Mich App 418, 428-429; 573 NW2d 348 (1997).

MCL 691.1407; MSA 3.996(107), provides in pertinent part:

> (1) Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function . . .
>
> (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 governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while in the course of employment or service or 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. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

See also *Cebreco v Music Hall Center for the Performing Arts, Inc*, 219 Mich App 353, 362; 555 NW2d 862 (1996).

Governmental agencies that are subject to immunity include the state, political subdivisions, and municipal corporations. *Vargo v Sauer*, 457 Mich 49, 68; 576 NW2d 656 (1998). 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); MSA 3.996(101)(f); *Coleman v Kootsillas*, 456 Mich 615, 619; 575 NW2d 527 (1998). This definition is to be broadly applied and only requires

that there be some constitutional, statutory or other legal basis for the activity in which the agency was engaged. *Hyde v University of Michigan Board of Regents*, 426 Mich 223, 252-253; 393 NW2d 847 (1986); *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 97; 494 NW2d 791 (1992). In determining whether an employee's activity was governmental, this Court looks to the general activity of the employee, rather than the specific allegedly tortious act. *Pardon v Finkel*, 213 Mich App 643, 649; 540 NW2d 774 (1995).

With regard to Oak Park Public Safety, a police department, it is evident that it is a governmental agency for purposes of MCL 691.1407(1); MSA 3.996(107)(1). In managing and operating the police department and its officers, Oak Park Public Safety was engaged in the exercise or discharge of a governmental function. *Isabella County v Michigan*, 181 Mich App 99, 105; 449 NW2d 111 (1989); *Hill v City of Saginaw*, 155 Mich App 161, 170; 399 NW2d 398 (1986). Likewise, the training of police officers "is of a public nature, for the public good, and the exercise of a governmental function." *Dionne v City of Trenton*, 79 Mich App 239, 246; 261 NW2d 273 (1977). Further, viewing the general activity of investigating a potential crime following several complaints from Oak Park residents, it is apparent that Oak Park Public Safety's act of assigning an officer to investigate the complaints was governmental in nature. Therefore, plaintiff's claim of negligence against Oak Park Public Safety is barred by governmental immunity.

With regard to Ordiway, it is questionable whether plaintiff actually pleaded gross negligence against Ordiway; rather, it appears that plaintiff's allegations involve only simple negligence and malicious prosecution. In any event, there is nothing in the record to support a claim that Ordiway's conduct amounted to gross negligence. Ordiway, as a police officer, was an employee of a governmental agency for purposes of MCL 691.1407(2); MSA 3.996(107)(2). Further, based on the evidence submitted, Ordiway was performing a governmental function and was acting within the scope of his authority in furtherance of a governmental function when he investigated plaintiff. The investigation was initiated after Oak Park Public Safety received several complaints regarding plaintiff's actions during a raid at an Oak Park home. Again, viewing the general activity of investigating a potential crime following complaints from Oak Park residents, it is apparent that Ordiway's actions were governmental in nature.

In addition, there is no support for plaintiff's claim of malicious prosecution against Ordiway. In order to state a prima facie case of malicious prosecution, the plaintiff must prove: (1) prior proceedings terminated in favor of the present plaintiff; (2) absence of probable cause for those proceedings; (3) malice; and (4) a special injury that flows directly from the prior proceedings. *Payton v City of Detroit*, 211 Mich App 375, 394-395; 536 NW2d 233 (1995). An action for malicious prosecution is proper against a police officer if he knowingly swears to false facts in a complaint, without which there is no probable cause; one who makes a full and fair disclosure to the prosecutor is not subject to an action for malicious prosecution. *Id.* at 395. Here, plaintiff did not allege or submit any evidence that Ordiway knowingly swore to false facts in a complaint or failed to fully disclose facts to the prosecutor's office. Therefore, the trial court did not err in granting Ordiway summary disposition.[6]

Affirmed in part and remanded for reconsideration of the court's award of fees and costs, consistent with this opinion. We do not retain jurisdiction.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ Helene White

[1] Following a criminal trial, plaintiff was acquitted of all charges.

[2] There is no indication that the panel signed the transcript.

[3] We do not hold that an arbitration award must be in writing or signed to be final; our finding is limited to the facts of this case.

[4] MCR 3.602(J) provides, in pertinent part:

> (1) On application of a party, the court shall vacate an award if:
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> * * *
>
> (b) there was evident partiality by an arbitrator, appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
>
> (c) the arbitrator exceeded his or her powers[.]

[5] Where there is no statutory authority, costs are not recoverable. *Beach v State Farm Mutual Automobile Ins Co*, 216 Mich App 612, 621; 550 NW2d 580 (1996).

[6] Defendants also argue that they are entitled to summary disposition because plaintiff's claims were untimely. Because the trial court declined to address this argument, this Court need not do so. See *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996); *Schubiner v New England Ins Co*, 207 Mich App 330, 331; 523 NW2d 635 (1994).