STATE OF MICHIGAN

COURT OF APPEALS

BRADLEY YOUNCE,

Plaintiff-Appellant,

v

DENNIS HURST and JOHN MCBAIN,

Defendants-Appellees.

UNPUBLISHED
November 3, 2000

No. 217790
Jackson Circuit Court
LC No. 97-082656-CZ

Before: Meter, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

In this action brought under 42 USC 1983, plaintiff appeals as of right from the trial court's order granting summary disposition to defendants. We affirm.

This case arises from the seizure of plaintiff's vehicle by the Michigan State Police pursuant to a court order entered by Judge Charles Nelson in the criminal case against plaintiff's girlfriend (now wife) Marsha Lee Denman. In July 1995, Denman entered a plea of nolo contendere to obtaining money under false pretenses over $100. Her conviction resulted from an investigation by the Michigan State Police, which revealed that she had defrauded hundreds of victims out of almost a half million dollars. Defendant Dennis Hurst (Hurst), as the elected prosecuting attorney for Jackson County, and members of his staff, represented the People of the State of Michigan in the case against Denman. Defendant John McBain (McBain) is the current prosecuting attorney for Jackson County, and was never personally involved in Denman's case.

On September 26, the day before Denman's scheduled sentencing, she sold her 1994 Pontiac Bonneville to plaintiff for approximately $12,000. Plaintiff financed the purchase of the vehicle with a $10,000 loan from NBD Bank, and filed a certificate of title with the State of Michigan listing himself as owner of the vehicle. At the time of the purchase, plaintiff and Denman were engaged and had been living together platonically and then romantically for approximately two years.

On September 27, 1995, Denman was sentenced to four to ten years' imprisonment and was ordered to pay restitution as a condition of probation. During the sentencing hearing on November 15, 1995, Hurst advised the court that there were certain assets that he believed should be made "available

for disbursement to the victims with the notation that that would be credited against her restitution order."[1] The court responded by stating on the record that it would sign an order to that effect. Subsequently, Hurst and an assistant prosecutor presented the court with an exparte order listing assets identified as proceeds of Denman's crime. The order stated, in part, that the prosecutor's office had learned of the "fraudulent transfer of title" to the vehicle from Denman to plaintiff the day before sentencing, and required that the vehicle "be forfeited to the Office of the Prosecuting Attorney for sale at public auction with said proceeds of said auction to be distributed to the victims on a pro-rata basis." The court signed the order after a discussion with the prosecutors outside Denman's presence and without notice to plaintiff.[2]

On December 5, 1995, the Michigan State Police seized the vehicle Denman sold to plaintiff. Almost two months later, plaintiff received a letter from the prosecutor's office indicating that the vehicle had been seized pursuant to court order based on the prosecutor's belief that it had been fraudulently transferred; that the prosecutor's office intended to sell the vehicle at public auction and distribute the proceeds to the victims of Denman's crimes; and that it would assume plaintiff waived any rights or claims to the vehicle if he failed to object within ten days. Plaintiff's counsel's response to the letter stated that plaintiff did not waive his rights to the vehicle, demanded its immediate return, and requested legal authority for seizing the vehicle. The prosecutor's office replied that the seizure and sale of the vehicle was authorized pursuant to the Uniform Fraudulent Conveyance Act, MCL 566.11 *et seq*.; MSA 26.881 *et seq*.

Seeking monetary, declaratory, and injunctive relief, plaintiff originally filed suit against Hurst in federal district court under 42 USC 1983, alleging that Hurst had seized his property without notice or a hearing in violation of his Fourteenth Amendment rights. The United States District Court for the Eastern District of Michigan dismissed Hurst's motion for summary judgment without prejudice and stayed further proceedings pending the outcome of proceedings in state court. Instead of attempting to intervene in the criminal case, plaintiff subsequently filed the instant lawsuit in Jackson County against

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[1] In their appellate brief, defendants assert that at the time of Denman's plea, her attorney had represented to the court that there would be a substantial effort to make restitution before sentencing and therefore requested that sentencing be set late in September of 1995. Defendants also claim that part of the sentence recommendation, which was served on Denman's attorney prior to the scheduled sentencing date, "asked the court to order that the 1994 Pontiac be forfeited to the County of Jackson and sold in order to provide a small measure of restitution to the victims of Ms. Denman's crimes." This information, however, is not included in the lower court record.

[2] Hurst stated in a sworn affidavit that during the meeting with the court, they discussed the evidence that showed that the vehicle was property obtained by the sale or exchange of proceeds of the crime; that the court shared the prosecutors' belief that the transfer of title to plaintiff was fraudulent and, therefore, the vehicle belonged to Denman and was subject to forfeiture by the court; and that the court understood that the vehicle was titled in plaintiff's name before it signed the order.

both Hurst and McBain in their individual and official capacities based on the same claim alleged in federal court. The case was assigned to Judge Timothy Pickard.

Defendants moved for summary disposition, arguing that plaintiff failed to state a claim on which relief could be granted, that plaintiff's claims were barred by the doctrines of absolute and qualified prosecutorial immunity, and that there were no genuine issues of material fact. Defendants also argued that with respect to plaintiff's requests for the return of the vehicle and an injunction and declaration, the court should refrain from ruling in accordance with MCR 2.613(B), which provides that "[a] judgment or order may be set aside or vacated . . . only by the judge who entered the judgment or order unless that judge is absent or unable to act." Judge Pickard held defendants' motion in abeyance pending plaintiff's attempt to intervene in the original criminal case to challenge the order authorizing the seizure of the vehicle.[3] Following plaintiff's unsuccessful attempt to challenge the seizure order, defendants filed a renewed motion for summary disposition before Judge Pickard. Following a hearing, the court stated it was "going to grant Defendant's motion" because their actions "were in an official capacity as prosecutors and they are immune from liability." The trial court subsequently entered an order granting defendants' motion "for all the reasons set forth in Defendants' Motion for Summary Disposition . . . ."

Plaintiff argues on appeal that the trial court erred in granting summary disposition on the basis of absolute prosecutorial immunity. Plaintiff contends that defendants are not entitled to such immunity because the actions which violated his constitutional rights occurred after the completion of all criminal proceedings and therefore were not activities associated with initiating a prosecution and presenting the state's case. We disagree.

A trial court's grant of summary disposition is reviewed de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999). Summary disposition is proper under MCR 2.116(C)(7) for a claim that is barred due to immunity granted by law.[4] *Smith v Kowalski*, 223 Mich App 610, 615; 567 NW2d 463 (1997). In reviewing a motion under MCR 2.116(C)(7), this Court accepts as true the plaintiff's well-pleaded allegations and construes them in the plaintiff's favor. *Amburgey v Sauder*, 238

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[3] Plaintiff apparently filed a "Petition for Leave to Request Correction of Order" which was heard by Judge Perlos, who had been assigned to replace Judge Nelson. Judge Perlos entered an order denying all relief to plaintiff and ordered that Judge Nelson's seizure order stand unchanged.

[4] Defendants moved for summary disposition under MCR 2.116(C)(8) and (10), and the trial court did not specify under which subrule it granted the motion with respect to the immunity issue. Although summary disposition was properly granted, we conclude that it would have been most appropriately granted under MCR 2.116(C)(7) because plaintiff's monetary claims against defendants were barred by immunity granted by law. *Smith*, *supra* at 616; see also *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 216; 561 NW2d 854 (1997) (an order granting summary disposition under the wrong subrule may be reviewed under the correct subrule); *Berlin v Superintendent of Public Instruction*, 181 Mich App 154, 160; 448 NW2d 764 (1989) (the mere mislabeling of a motion for summary disposition does not preclude appellate review if an appropriate factual record was preserved in the lower court).

Mich App 228, 231; 605 NW2d 84 (1999). In addition to the pleadings, this Court must consider all affidavits, admissions and other documentary evidence submitted by the parties. *Id.* Summary disposition is proper if , even considering the complaint to be true, the claim is barred as a matter of law. *Otero v Warnick*, 241 Mich App 143, 147; 614 NW2d 177 (2000).

In an action brought under 42 USC 1983, the plaintiff must establish that a person acting under the color of state law deprived him of a right, privilege or immunity secured by the United States Constitution.[5] *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 74; 592 NW2d 724 (1998). Prosecutors, however, may be subject to absolute or qualified immunity for claims brought under § 1983. See generally, *Lomaz v Hennosy*, 151 F3d 493 (CA 6, 1998).[6] The basic law pertaining to absolute or quasi-judicial immunity was recently summarized in *Prince v Hicks*, 198 F3d 607 (CA 6, 1999):

> The Supreme Court has repeatedly endorsed a "functional approach" to determine whether a prosecutor is entitled to absolute immunity. *Buckley* [*v Fitzsimmons*, 509 US 259, 269; 113 S Ct 2606; 125 L Ed 2d 209 (1993)]. This approach looks to "the nature of the function performed, not the identity of the actor who performed it." *Id.* (quoting *Forrester v White*, 484 US 219, 229; 108 S Ct 538; 98 L Ed 2d 555 (1988)). The Court has also explained that "the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Burns v Reed*, 500 US 478, 486; 111 S Ct 1934; 114 L Ed 2d 547 (1991).
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> A prosecutor is entitled to absolute immunity when the prosecutor acts "as an advocate for the State" and engages in activity that is "intimately associated with the judicial phase of the criminal process." *Imbler v Pachtman*, 424 US 409, 430; 96 S Ct 984; 47 L Ed 2d 128 (1976). . . . The Supreme Court has explained, however, that "[a] prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial

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[5] Plaintiff apparently sued defendants in their individual and official capacities. To the extent plaintiff maintains an official capacity action under § 1983, it must fail. See *Pusey v City of Youngstown*, 11 F3d 652, 657 (CA 6, 1993) (because a prosecutor acts as a state agent when prosecuting criminal charges, the suit against a prosecutor in his official capacity is to be treated as a suit against the state and a suit against a state is not cognizable under § 1983); see also *Will v Michigan Department of State Police*, 491 US 58, 71; 109 S Ct 2304; 105 L Ed 45 (1989) (a suit against a state is not cognizable under § 1983). We therefore focus on plaintiff's claims against defendants in their personal or individual capacity.

[6] State law immunities and defenses, whether derived from statute, common law, or state constitutional provisions, do not protect persons otherwise subject to § 1983 liability for violation of federal constitutional rights. *Rushing v Wayne Co*, 436 Mich 247, 259; 462 NW2d 23 (1990).

> proceedings are not entitled to absolute immunity." *Buckley*, [*supra* at 273]. For example, a prosecutor "who performs the investigative functions normally performed by a detective or police officer" such as "searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested" is entitled only at most to qualified immunity. *Id.* [*Prince, supra* at 611.]
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> . . . . [A]lthough prosecutors generally are not absolutely immune when they engage in administrative or investigative acts, the absolute immunity question nonetheless turns on the specific circumstances of the case. See *Ireland v Tunis*, 113 F 3d 1435, 1447 [(CA 6, 1997)] ("Absolute prosecutorial immunity will likewise attach to administrative or investigative acts necessary for a prosecutor to initiate or maintain the criminal prosecution." . . . .; *Guzman-Rivera Cruz*, 55 F3d 26, 29 [CA 1, 1995] ("[A]bsolute immunity may attach even to . . . administrative or investigative activities when these functions are necessary so that the prosecutor may fulfill his function as an officer of the court.") . . . .[*Prince, supra* at 612]

Accord *Kalina v Fletcher*, 522 US 118; 118 S Ct 502; 139 L Ed 2d (1997) (a prosecutor's conduct in connection with preparation and filing of charging documents was protected by absolute immunity, but the prosecutor was not entitled to such immunity with respect to her actions in executing certification for the determination of probable cause); *Cooper v Parrish*, 203 F3d 937, 946-947 (CA 6, 2000) (prosecutors and investigators were protected by absolute immunity for their actions in seizing property and detaining nightclub customers pursuant to temporary restraining orders); *Lomaz, supra* at 497 (prosecutors were protected by absolute immunity for obtaining and executing a search warrant, and for their actions relating to the evidence seized pursuant to that warrant); *Manetta v Macomb Co Enforcement Team*, 141 F3d 270, 274 (CA 6, 1998) (prosecutor was absolutely immune against claims based on his actions of obtaining arrest warrants and prosecuting arrestees for extortion); *Ireland v Tunis*, 113 F3d 1435, 1443-1445 (CA 6, 1997) (prosecutors were absolutely immune for seeking an arrest warrant); see also *Payton v Wayne Co*, 137 Mich App 361, 367-368; 357 NW2d 700 (1984) (summarizing *Imbler, supra*, and federal cases decided before 1984). Further, in applying the functional approach, courts must focus "on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question whether it was unlawful." *Lomaz, supra* at 497, citing *Buckley supra* at 271.

We must therefore examine the challenged actions and determine whether defendants have engaged in preliminary conduct that is simply administrative or investigative in nature, or whether they have engaged in conduct that is either "intimately associated with the judicial phase of the criminal process," *Burns, supra* at 493, or "undertaken . . . in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of [their] role as . . . advocate[s] for the State." *Buckley, supra* at 273; see also *Prince, supra* at 612; *Lomaz, supra* at 498. In his complaint, plaintiff alleged that Hurst violated his constitutional rights when he "seized the automobile without providing either a pre-deprivation or post-deprivation administrative remedy or hearing to Plaintiff." At his deposition, however, plaintiff acknowledged that the police and not defendants actually seized the vehicle, and

clarified that he was complaining of Hurst's conduct of "requesting a judge to issue an order to permit the seizure of [his] vehicle."[7]

In this case, the seizure/forfeiture order arose out of Denman's sentencing hearing where Hurst, apparently consistent with a recommendation in the presentence investigation report, advocated for restitution for the victims of Denman's crimes. Hurst's actions fell squarely within the scope of his duty under Michigan law to "appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications, and motions whether civil or criminal . . . ." MCL 49.153; MSA 5.751. Contrary to plaintiff's contention, we cannot conclude that Hurst's duty or role as an advocate ceased upon conviction of the accused. Rather, as a representative of the people of the state, the prosecutor is committed to advocating for an appropriate sentence and has a vested interest in protecting the victims of crimes. In seeking the appropriate sentence, which included restitution for the victims, Hurst was not performing an investigative or administrative function normally performed by another agency or group, but was acting in a role reserved for prosecuting attorneys and in a manner consistent with the restitution provisions of the Crime Victim's Rights Act, 780.751 *et seq*. MSA 28.1287 *et seq*. See e.g., MCL 780.766(2); MSA 28.1287(766)(2) ("[t]he court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate"); see also MCL 769.1a; MSA 28.1073. We therefore conclude that Hurst's conduct in requesting the seizure order at Denman's sentencing hearing, and carrying out the court's request for such an order immediately thereafter, was "intimately associated with the judicial phase of the criminal process" as it was both physically and temporally related to the judicial sentencing process, and with Hurst's role as an advocate for the state. *Burns*, *supra* at 439. Finally, plaintiff alleges no conduct in his complaint regarding the acts for which defendant McBain could be liable in his individual capacity. We therefore conclude that the trial court properly determined that defendants are absolutely immune from personal liability under 42 USC 1983.

Plaintiff also argues that (1) "[t]he Fourteenth Amendment to the U.S. Constitution prohibits the adjudication of the rights of an owner of an automobile without jurisdiction, without notice or opportunity to be heard with respect to the owner whose rights are forfeited and (2) "[a]n individual has a cause of action under 42 USC § 1983 to obtain a declaration that the adjudication of the rights of an individual without jurisdiction over the individual is a void proceeding." We deem these issues abandoned because they were not adequately briefed. *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 717; 591 NW2d 696 (1998). In presenting these issues, either the statement of questions involved does not correspond with the sparse argument sections, or plaintiff provides boilerplate citations to cases without explaining how they apply to this case. It is well established that "[i]t is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his

[7] On appeal, plaintiff argues in part that Hurst "erroneously advised a Circuit Judge of law and facts" after the completion of all criminal proceedings. This allegation was not included in the original complaint, but was the subject of his proposed amended complaint. The lower court denied his motion to amend the complaint, and plaintiff does not challenge that ruling on appeal.

arguments, and then search for authority to sustain or reject his position." *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998), quoting *Mitcham v Detroit*, 335 Mich 182, 203; 94 NW2d 388 (1959). We therefore decline to address these issues. Plaintiff has not otherwise provided any argument or authority in support of his claims for injunctive or declaratory relief.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Michael J. Talbot