STATE OF MICHIGAN

COURT OF APPEALS

EDWIN J. KASBEN and WILLIAM E. KASBEN,

Plaintiffs-Appellants,

V

GLENN AYLSWORTH, THOMAS AYLSWORTH, BARBARA FIEBING, and JOSEPH KASBEN,

Defendants-Appellees.

UNPUBLISHED
October 5, 2001

No. 223084
Leelanau Circuit Court
LC No. 98-004557-NO

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

PER CURIAM.

Plaintiffs appeal by right the circuit court's grant of summary disposition to defendants on the basis of MCR 2.116(C)(7) and (10) in this multi-tort lawsuit between and among a family, their legal counsel, and the former county prosecutor arising out of a family property dispute. We affirm.

I

The first issue on appeal is whether the trial court's dismissal of plaintiff William Kasben's action was warranted because of William's failure to timely answer defendant Barbara Fiebing's request for admissions. This Court reviews de novo the interpretation of a court rule and a grant of summary disposition based on a failure to answer a request to admit. MCR 2.116(G); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Grzesick v Cepela*, 237 Mich App 554, 559; 603 NW2d 809 (1999). The narrow issue whether to grant additional time to answer requests for admissions is reviewed for an abuse of discretion. *LeGendre v Co of Monroe*, 234 Mich App 708, 741; 600 NW2d 78 (1999); *Medbury v Walsh*, 190 Mich App 554, 556; 476 NW2d 470 (1991). A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim and is reviewed to determine whether the affidavits, pleadings, depositions, or any other documentary evidence establish a genuine issue of material fact to warrant a trial. *Spiek*, *supra* at 337. This Court will give the nonmoving party the benefit of all reasonable inferences when determining whether summary disposition is appropriate. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 615; 537 NW2d 185 (1995). After the moving party

has made an initial showing of no genuine issue, the burden shifts to the nonmoving party to put forth evidence that a genuine issue of material fact actually is in dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

It is undisputed that William Kasben did not answer the requests to admit in a timely manner, "conclusively establish[ing]" the answers as admissions. MCR 2.312(B)(1), (D)(1). This conclusion persists unless the court permits withdrawal or amendment for good cause or on terms that are just. MCR 2.312(D)(1). The factors to consider in granting such a request are found in *Janczyk v Davis*, 125 Mich App 683, 692-693; 337 NW2d 272 (1983).

First, with regard to whether refusing the request would eliminate a trial on the merits, which militates against granting summary disposition, William Kasben prevails on this factor because not allowing late answers would result in a dismissal of his claim. With respect to the second factor, prejudice to the party requesting the admissions, the trial court aptly noted that given the history of William Kasben's failure to cooperate with discovery, prejudice had gradually been perpetrated on the defense. *Janczyk*, *supra* at 692-693. Third, William Kasben did plead inadvertence at the motion hearing; however, William did not legally or factually support his argument for excusable neglect. None of the trial court's findings on the latter two factors were an abuse of discretion. *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995); *Janczyk, supra* at 692-693. Thus, the trial court did not err in declining to find good or just cause to withdraw or amend the "conclusively established" admissions supporting its grant of summary disposition. MCR 2.312(D)(1); MCR 2.116(G).

II

Next, plaintiffs argue that their claims against former prosecutor Thomas Aylsworth should not have been dismissed on the basis of prosecutorial and witness immunity. We disagree. An MCR 2.116(C)(7) summary disposition decision is reviewed de novo by considering all documentary evidence filed or submitted by the parties and is appropriately made where immunity granted by law bars a claim. *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998); *Spiek*, *supra* at 337;. A prosecutor is absolutely immune from civil suits arising out of the initiation, prosecution, and presentment of the state's case. *Bischoff v Calhoun Co Prosecutor*, 173 Mich App 802, 808-809; 434 NW2d 249 (1988), citing *Imbler v Pachtman*, 424 US 409, 431; 96 S Ct 984; 47 L Ed 2d 128 (1976). This Court has followed federal precedent in identifying activity that is quasi-judicial in nature in cases where the acts depend on legal opinions or discretionary judgments, agreeing with that precedent that they are absolutely immune from suit. Prosecutorial activity that is essentially investigative or administrative is therefore entitled only to the protection of qualified immunity. *Bischoff, supra* at 808-809.

Thomas Alysworth's conduct in commencing a criminal investigation of William Kasben at the prompting of Edwin Kasben and his attorney, defendant Glenn Aylsworth, was investigatory and administrative in nature, entitling Thomas Aylsworth to qualified immunity. *Imbler, supra* at 431; *Bischoff, supra* at 809. Filing forgery charges against William Kasben and his then-wife was the exercise of a judicial function, because it involved a legal determination. *Id.* at 809. Thus, William Kasben's arraignment, based on the district judge's finding of probable cause, was protected within the scope of a prosecutorial activity. *Id*. Further, Thomas Aylsworth's activities thereafter in recusing himself from the prosecutor's office and becoming a

witness against William Kasben were absolutely protected by the witness immunity doctrine as the performance of a quasi-judicial function. *Maiden v Rozwood*, 461 Mich 109, 133-134; 597 NW2d 817 (1999). Moreover, Thomas Alysworth's testimony was "relevant, material, or pertinent to the issue being tried," because it purportedly contained William Kasben's confession to the charge. *Id*. Ultimately, there was no affirmative evidence given concerning whether Thomas Alysworth's activities as a prosecutor or witness were perjurious, which would make his conduct fall outside the protection of immunity. *Id*. at 134. Therefore, the trial court did not err in granting summary disposition to Thomas Aylsworth based on his prosecutorial and witness immunity. MCR 2.116(C)(7); *Spiek*, *supra* at 337.

III

Finally, Edwin Kasben contends that his action against defendant Glenn Aylsworth was erroneously dismissed on the grounds of res judicata and failure to answer Glenn's request for admissions. We disagree. This Court reviews a res judicata claim de novo as a question of law. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). Edwin Kasben's prior malpractice claim against Glenn Aylsworth is an action between the same parties with evidence and essential facts identical to his present claims regarding both the law raised and the facts. *Dart v Dart*, 224 Mich App 146, 156; 568 NW2d 353 (1997); *Jones v State Farm Mut Automobile Ins*, 202 Mich App 393, 401; 509 NW2d 829 (1993), modified sub nom *Patterson v Kleiman*, 447 Mich 429 (1994). Moreover, the first adjudication was made on the merits because it was a dismissal with prejudice for violation of court rules. *Dart*, *supra* at 156; *Makowski v Towles*, 195 Mich App 106, 108; 489 NW2d 133 (1992).

Res judicata bars relitigation of *claims* that are based on the same transaction or events as a prior suit, not just entire lawsuits. *Ditmore v Michalik*, 244 Mich App 569, 466; 625 NW2d 462 (2001). Thus, res judicata properly barred Edwin Kasben's second suit for Glenn Alysworth's involvement in Edwin's prosecution and was appropriately dismissed on summary disposition. MCR 2.116(C)(7); *Dart*, *supra* at 156.

In regard to the trial court's grant of summary disposition for failure to answer requests for admission, the alleged error is not preserved because Edwin Kasben has failed to argue the merits of the issue. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (appellant may not leave this Court to substantiate his claims); *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984), after remand 211 Mich App 214 (1995) (appellant must cite legal authority); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993) (appellant must argue his position's merits). Therefore, the trial court did not err in granting summary disposition on the ground of Edwin Kasben's failure to answer the request to admit. MCR 2.116(G); *Employers Mut Casualty Co*, *supra* at 62; *Vicencio*, *supra* at 506.

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter