STATE OF MICHIGAN

COURT OF APPEALS

EUGENE BROWN,

Plaintiff-Appellant,

v

CITY OF DETROIT, BENNY NAPOLEON, WALTER SHOULDERS, and the DETROIT BOARD OF POLICE COMMISSIONERS,

Defendants-Appellees.

UNPUBLISHED
November 18, 2004

No. 249735
Wayne Circuit Court
LC No. 01-114482 CZ

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(10) (no genuine issue as to any material fact). We affirm.

Plaintiff is an officer with the Detroit Police Department (DPD) whose history of shootings in the line of duty attracted widespread media attention beginning in May 2000. On April 30, 2001, plaintiff filed a complaint against defendants City of Detroit, Detroit Board of Police Commissioners, Benny Napoleon, and Walter Shoulders, alleging 1) defamation, 2) false light invasion of privacy, 3) intentional infliction of emotional distress (IIED), 4) deprivation of due process under the Michigan Constitution, 5) equal protection violation under the Michigan Constitution, and 6) discrimination under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.* Defendant Napoleon was police chief at the time in question and defendant Shoulders was a deputy chief who headed a committee reinvestigating plaintiff's shootings. The litigants refer to the committee's internal report as the Shoulders Report.

Defendants moved for summary disposition, and the trial court granted the motion, dismissing plaintiff's defamation, false light invasion of privacy, and IIED claims under MCR 2.116(C)(10). The trial court dismissed plaintiff's equal protection and civil rights claims because plaintiff waived those claims by failing to argue and brief them. Finally, the trial court dismissed plaintiff's due process claim on collateral estoppel grounds, ruling that the claim was barred by the disposition of plaintiff's federal case. See *Brown v Detroit*, 259 F Supp 2d 611 (ED Mich, 2003).

We review de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5); *id.*, 626. When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), we "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001), citing *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999).

Plaintiff first argues that the trial court erred in dismissing his due process claim on the basis of collateral estoppel. On appeal, plaintiff has failed to argue the merits of his claim of error. Furthermore, plaintiff does not cite legal authority to support his claim of error. To properly present an appeal, an appellant must argue the merits of the issues he identifies in his statement of the questions involved. *Richmond Twp v Erbes*, 195 Mich App 210, 220; 489 NW2d 504 (1992), overruled in part on other grounds, *Bechtold v Morris*, 443 Mich 105, 108-109; 503 NW2d 654 (1993). A party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims or unravel and elaborate for him his arguments. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Because plaintiff has abandoned this issue, we need not address the issue and decline to do so.

Plaintiff's next issue concerns governmental immunity. According to plaintiff, defendant Shoulders was not shielded by governmental immunity[1] because his conduct amounted to gross negligence and he was not a high level governmental authority. The applicability of governmental immunity is a question of law which this Court reviews de novo on appeal. *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

Plaintiff's suggestion that defendant Shoulders is only protected by governmental immunity if he is a high level authority is incorrect. The governmental immunity statute, MCL 691.1407, provides that "immunity from tort liability" extends to "each officer and employee of a governmental agency" if the following conditions are met:

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[1]The trial court determined that plaintiff waived its governmental immunity arguments with respect to defendants City of Detroit, Napoleon, and the Detroit Board of Police Commissioners. To the extent that plaintiff argues on appeal that defendants City of Detroit, Napoleon, and the Detroit Board of Police Commissioners were not shielded from plaintiff's claims by governmental immunity, this argument has been abandoned because plaintiff's arguments on appeal are limited to the application of governmental immunity to defendant Shoulders. An appellant who fails to properly address the merits of his assertion of error has abandoned the issue. *Yee, supra*, 406.

> (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. [MCL 691.1407(2).]

Plaintiff's argument on appeal relates only to MCL 691.1407(2)(c). Plaintiff contends that defendant Shoulder's conduct constituted gross negligence and that the trial court disregarded plaintiff's evidence of gross negligence. In fact, while the trial court ultimately granted defendants' motion for summary disposition of plaintiff's tort claims for reasons we will discuss below, the trial court, mindful of its duty to consider the evidence in a light most favorable to the non-moving party in considering a motion for summary disposition under MCR 2.116(C)(10), held that a reasonable juror could have found that defendant's conduct constituted gross negligence. The trial court specifically observed: "[Plaintiff] contends that Defendants orchestrated a campaign of misinformation to brand him a killer cop, going so far as to invent stories about him. We believe that a reasonable juror could find that such conduct evinces a substantial disregard for injury." We therefore conclude that the record simply does not support plaintiff's contention that the trial court erred in disregarding plaintiff's evidence of gross negligence.

Plaintiff next argues that the trial court erred in dismissing his defamation claim under MCR 2.116(C)(10). Because plaintiff is a police officer and the allegedly defamatory statements concerned his conduct as a police officer, plaintiff is a public figure. *Tomkiewicz v Detroit News, Inc*, 246 Mich App 662, 671, 676; 635 NW2d 36 (2001). A public figure claiming defamation must prove by clear and convincing evidence that the publication was a defamatory falsehood and that it was made with actual malice through knowledge of its falsity or through reckless disregard for its truth. MCL 600.2911(6); see also *Kefgen v Davidson*, 241 Mich App 611, 624; 617 NW2d 351 (2000).

This Court defines actual malice in the following way:

> Actual malice is defined as knowledge that the published statement was false or as reckless disregard as to whether the statement was false or not. Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation. Furthermore, ill will, spite or even hatred, standing alone, do not amount to actual malice. Reckless disregard is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published. [*Kefgen,* supra, 624 (citations and internal punctuation omitted).]

Whether evidence is sufficient to support a finding of actual malice is a question of law. *Id.,* 624-625. On a motion for summary disposition, the court must determine whether the evidence is sufficient for a rational finder of fact to find actual malice by clear and convincing evidence. *Id.,* 625 (citation omitted). Clear and convincing evidence is evidence that:

> produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. . . . Evidence may be uncontroverted, and yet not be clear and convincing. . . . Conversely, evidence may be clear and convincing despite the fact that it has been contradicted. [*Id.* (citations and quotations omitted).]

We conclude that plaintiff failed to establish actual malice by clear and convincing evidence. Plaintiff claims on appeal that defendant Shoulders manufactured evidence in the Shoulders Report and that Shoulders had "serious doubts regarding the truth of his findings and published statements in the 'Shoulders Report.'" Our review of the record does not reveal any evidence that would establish that defendant Shoulders' investigation was so lacking that defendant Shoulders either knew the statements in the report were false or had serious doubts regarding whether statements in the report were false. "A general allegation of malice is insufficient to establish a genuine issue of material fact." *Glazer v Lamkin,* 201 Mich App 432, 436; 506 NW2d 570 (1993). We therefore find that the trial court did not err in dismissing plaintiff's defamation claim based on plaintiff's failure to establish a genuine issue of material fact regarding whether defendant Shoulders acted with actual malice. For the same reason, we also reject plaintiff's claims that the trial court erred in granting defendants' motion for summary disposition of plaintiff's false light invasion of privacy and IIED claims. Both claims also require a showing of actual malice by clear and convincing evidence. *Ireland v Edwards*, 230 Mich App 607, 624; 584 NW2d 632 (1998). Because plaintiff failed to demonstrate actual malice, these claims were properly subject to dismissal along with plaintiff's defamation claim.

Plaintiff finally argues that the trial court erred because it did not read the Shoulders Report firsthand. Neither party submitted a copy of the Shoulders Report as documentary evidence supporting or opposing summary disposition. Once the moving party has supported its claim for summary disposition, the burden shifts to the nonmoving party to present documentary evidence establishing the existence of a material fact. *Willis v Deerfield Twp,* 257 Mich App 541, 550; 669 NW2d 279 (2003). If plaintiff desired for the trial court to read the Shoulders Report, he should have submitted it as documentary evidence. Moreover, in denying plaintiff's motion for reconsideration, the trial court indicated that plaintiff had detailed the contents of the Shoulders Report and it had accepted as true plaintiff's version of the report. Furthermore, the trial court had the benefit of the news articles that plaintiff alleged published the contents of the Shoulders Report. Whatever the Shoulders Report contained that plaintiff did not present in one form or another to the trial court presumably was not published and therefore would be irrelevant for purposes of plaintiff's defamation claim. The trial court did not err in failing to read a document that neither party submitted for its consideration.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff