STATE OF MICHIGAN

COURT OF APPEALS

CALIFORNIA CHARLEY'S CORPORATION and GERARD TRUDEL,

Plaintiffs-Appellees,

v

CITY OF ALLEN PARK, JOHN CIOTTI, ANTHONY NICHOLAS, MARTIN DELOACH, and GREGORY MURPHY,

Defendants-Appellants,

and

DAVID TAMSEN, KENNETH DOBSON, LEVON KING, BEVERLEY KELLEY, FRANCESCO TUCCI, and KEVIN WELCH,

Defendants.

UNPUBLISHED
June 22, 2006

No. 266383
Wayne Circuit Court
LC No. 04-409295-CZ

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendants Allen Park ("the city"), and individual defendants John Ciotti, Anthony Nicholas, Martin Deloach, and Gregory Murphy ("the individual defendants") appeal by right from a circuit court order denying their motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). Defendants' appeal concerns only whether plaintiffs' claims were barred by governmental immunity. We affirm in part, reverse in part, and remand for further proceedings. This case is being decided without oral argument pursuant to MCR 7.214(E).

The individual defendants served in appointed positions for the city. Defendant Ciotti was the building inspector; defendant Nicholas the assistant building inspector; defendant Deloach the fire chief, and defendant Murphy the fire inspector. Plaintiffs' first amended complaint essentially alleges that out of personal animosity and political influence defendants deliberately interfered with plaintiffs' attempts to open a nightclub. The complaint includes counts styled as "Concert of Actions," "Civil Conspiracy," "Tortious Interference with Contracts," "Tortious Interference with Business Relationships and/or Expectancies,"

"Intentional Infliction of Emotional Distress," "Business and Personal Defamation," and "Intentional Violations of Plaintiff Trudel's Civil Rights as a Person with a Disability."

On appeal, defendants first argue that the trial court should have granted summary disposition to the city on the basis of governmental immunity.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). . . . Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. [*Maiden, supra* at 119.]

MCL 691.1407 provides that governmental agencies (which include municipalities) are immune from tort liability when the agency is engaged in the exercise or discharge of a governmental function. The immunity is subject to certain statutory exceptions that are not applicable here. For example, a claim for damages against the *state* for the state's violation of the Michigan Constitution is not necessarily barred by governmental immunity. *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987). But, the holding in *Smith* does not extend to claims against municipalities or individual defendants. As explained in *Jones v Powell*, 462 Mich 329; 612 NW2d 423 (2000), a central concern that prompted the decision in *Smith*, i.e., the unavailability of any other remedy, is not present in actions against municipalities and individual defendants. "A plaintiff may sue a municipality in federal or state court under 42 USC 1983 to redress a violation of a federal constitutional right." *Jones, supra* at 337. Thus, *Jones* indicates that an action under 42 USC 1983 against a municipality is not barred by immunity, but an action against a municipality founded on an alleged violation of the Michigan Constitution is precluded.

In the present case, however, plaintiffs' complaint does not allege an action under 42 USC 1983. None of the 243 paragraphs in plaintiffs' amended complaint refers to 42 USC 1983 or a violation of the United States Constitution. Plaintiffs do not even address 42 USC 1983 in their brief on appeal. Therefore, we agree with defendants that the city was entitled to summary disposition with respect to plaintiff's tort claims.

Defendants also argue that the trial court should have granted the city summary disposition with respect to Trudel's claim under the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.*, because he failed to state a claim, he did not identify his disability, what rights were allegedly denied, and how the city denied them. But, defendants did not preserve this argument because it is not in the statement of the questions required by MCR 7.212(C)(5). *Preston v Dep't of Treasury*, 190 Mich App 491, 498; 476 NW2d 455 (1991).

With respect to the individual defendants, defendants note that MCL 691.1407(5) provides for immunity for the highest appointive executive officials of all levels of government and that defendant Deloach is the city's fire chief falls within the statutory provision.

Pursuant to MCL 691.1407(5), "the elective or highest appointive of all levels of government [is] 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 . . . executive authority." Whether an entity is a "level of government" depends on "whether the entity shares aspects of governance with other political subdivisions, such as the power to levy taxes, the power to make decisions having a wide effect on the members of a community, or the power of eminent domain," or possesses "broad-based jurisdiction or extensive authority similar to that of a judge or legislator." *Grahovac v Munising Twp*, 263 Mich App 589, 593; 689 NW2d 498 (2004)(citations omitted). In *Grahovac*, this Court held that the immunity did not extend to a township fire chief because there was no evidence that the township fire department had any powers of governance. In contrast, in *Davis v City of Detroit*, 269 Mich App 376, 381; 711 NW2d 462 (2006), this Court held that the city of Detroit Fire Department was a "level of government," and, therefore, the highest appointed official was entitled to immunity. The Court distinguished *Grahovac* because of the autonomous authority granted to the department in the Detroit city charter and the Detroit city code. In the present case, defendants assert that Deloach was the fire chief, but they do not address whether the Allen Park Fire Department is a "level of government."

> It 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 arguments, and then search for authority either to sustain or reject his position. [*Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

Because the record is insufficient to determine that the Allen Park Fire Department is a level of government as a matter of law, and defendants do not address this issue, defendants have not established that defendant Deloach was entitled to immunity under MCL 691.1407(5).

Defendants also argue that there was "no showing" that they acted improperly. With respect to a motion brought pursuant to MCR 2.116(C)(7), however, "[t]he contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Maiden*, *supra* at 119. Defendants did not present any documentation with their motion; they attached only a copy of the complaint.

Defendants include in their brief only short discussions of plaintiffs' specific claims and assertions that plaintiff failed to demonstrate various elements of the claims. These discussions raise separate issues that are outside the scope of this appeal and the statement of questions involved, which concern only governmental immunity. MCR 7.212(C)(5); *Preston*, *supra* at 498. In any event, these arguments do not persuade us that defendants were entitled to summary disposition. They amount to a contention that defendants were entitled to summary disposition under MCR 2.116(C)(10). But, when a motion is filed under MCR 2.116(C)(10), the moving party is required to submit affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion. See MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Although defendants cited MCR 2.116(C)(10), they failed to support their motion as required by MCR 2.116(G)(3)(b). Under the circumstances, defendants failed to establish that they were entitled to summary disposition pursuant to MCR 2.116(C)(10).

In sum, we reverse the trial court's order denying summary disposition to the city with respect to plaintiffs' tort claims and affirm the denial of summary disposition in all other respects.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Patrick M. Meter