STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH E. SCHULZE and JOSEPH R. SCHULZE,

Plaintiffs-Appellants,

v

CLAYBANKS TOWNSHIP, CLAYBANKS TOWNSHIP ZONING BOARD, and RICHARD SMITH,

Defendants-Appellees,

and

BRET OSTERHART, TOM OSTERHART, ARNOLD HOFFMEYER, AL OLSON, GORDON VERHULST, and JILL VERHULST,

Defendants.

UNPUBLISHED
February 12, 2009

No. 282428
Oceana Circuit Court
LC No. 07-006183-CZ

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

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants in this action involving a continuing dispute between plaintiffs and Claybanks Township (township) with respect to the harboring of numerous dogs (pit bulls) by plaintiffs.[1] This is one of four lawsuits between the parties filed over the past six years. We affirm.

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[1] For purposes of this opinion, we shall refer to plaintiff Joseph E. Schulze as JES and plaintiff Joseph R. Schulze as JRS. JES is the adopted son of JRS. Defendants include the township, township zoning board, the township supervisor - Richard Smith, and neighbors who voiced complaints about the dogs. A few months after the instant lawsuit was filed, plaintiffs and defendant neighbors stipulated to the dismissal of the suit, leaving only the township defendants.

We have carefully scrutinized the documents contained in the lower court record regarding not only this lawsuit but also the three other actions involving the various parties. The first lawsuit constituted an ordinance enforcement action by the township against JES and JRS. The second suit was an ordinance enforcement action by the township against JES alone. The third lawsuit, which is the instant suit, entailed a three-count complaint filed by plaintiffs against defendants. And the fourth lawsuit involved a request for superintending control or mandamus by JES against the township relative to an application for a conditional use permit.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).

Count I

With respect to count I of plaintiffs' complaint, they sought a declaration that the animal control nuisance and public safety ordinance (animal control ordinance), enacted in August 2003 during the first lawsuit, and the dangerous animal ordinance, enacted in December 2004 also during the first lawsuit, were void. Plaintiffs maintained that the ordinances were invalid because they constituted ex-post facto legislation, constituted bills of attainder, violated substantive due process, violated equal protection, constituted a deprivation of the right to possess and use property without due process, and because they were selectively enforced against JES on the basis that he is African-American.[2] Plaintiffs also prayed for money damages. The trial court dismissed count I on the basis of MCR 2.116(C)(6), res judicata, governmental immunity, lack of jurisdiction (discrimination aspect of claim), and because it failed substantively.

MCR 2.116(C)(6) provides for summary disposition where "[a]nother action has been initiated between the same parties involving the same claim." The second lawsuit, in which JES presented constitutional challenges to the enforcement of the dangerous animal ordinance, remained pending at the time summary disposition was granted in the instant case. Plaintiffs' argument in their appellate brief does not address MCR 2.116(C)(6), nor make any reference whatsoever to the court rule. Accordingly, summary disposition can be affirmed simply for failure to challenge a ground given by the trial court in support of its ruling. In a reply brief,

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[2] In regard to the selective enforcement claim in count I, as well as plaintiffs' allegations of discriminatory treatment in the township's handling of the applications for a conditional use permit, we shall treat them as "as applied" equal protection challenges and not claims asserted under the Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq.* There is no reference whatsoever in the allegations contained in the complaint to any CRA provision or any CRA language, nor is there any general statement that defendants violated the CRA. In their appellate brief, and in the context of discussing count II and governmental immunity, plaintiffs assert that the CRA applies to state and political subdivisions and that governmental immunity is not an available defense. That is the full extent of any CRA discussion. It is true that governmental immunity is not a defense to an action brought under the CRA. *Mack v Detroit*, 467 Mich 186; 649 NW2d 47 (2002). But there is no explanation as to how this case fits under the CRA and, again, a CRA case was not properly pled or alleged.

after defendants discuss MCR 2.116(C)(6) in their response brief, plaintiffs argue that (C)(6) is inapplicable because the second lawsuit and this case involve different parties and different claims. Raising an argument for the first time in a reply brief is not sufficient to present the issue for appellate review. *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 576; 692 NW2d 68 (2004); *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003). Moreover, MCR 2.116(C)(6) does bar the constitutional claims in count I as they pertain to JES and the dangerous animal ordinance. See *Fast Air, Inc v Knight*, 235 Mich App 541, 545-546; 599 NW2d 489 (1999).

With respect to res judicata, the doctrine bars a subsequent action between the same parties when the evidence or essential facts are identical. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). Res judicata precludes a second action when (1) the first action was decided on the merits, (2) the decree in the prior action constituted a final decision, (3) the matter contested in the second action was or could have been resolved in the first action, and (4) both actions involved the same parties or their privies. *Id.*; *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001). Further, "[r]es judicata applies to consent judgments." *Id.* Additionally, this Court has stated that "[t]he dismissal with prejudice of [a] . . . suit, which arose out of the same facts as the instant suit, amount[s] to an adjudication of the merits and bars [the instant] action." *Wilson v Knight-Ridder Newspapers, Inc*, 190 Mich App 277, 279; 475 NW2d 388 (1991). On the basis of the record provided, and given the principles recited above, any constitutional claims made by JES in count I concerning the animal control ordinance were barred by res judicata arising out of the consent judgment entered in the first lawsuit. Furthermore, any constitutional claims made by JRS in count I concerning the animal control and dangerous animal ordinances were barred by res judicata arising out of the stipulated dismissal entered in the first lawsuit. The stipulated dismissal was entered with prejudice and without costs. Effectively, MCR 2.116(C)(6) and the doctrine of res judicata, together, supported summary dismissal of count I in its entirety.[3]

Additionally, with respect to the court's ruling that count I fails substantively, plaintiffs insufficiently address the issue, failing to present any legal analysis regarding ex-post facto legislation, bills of attainder, substantive due process, equal protection, and deprivation of property rights. Plaintiffs recite the constitutional rights that defendants allegedly violated and then contend that there was ample evidence to submit the constitutional claims to a jury. The "ample" evidence, according to plaintiffs, is that JES applied for a special or conditional use permit, that the application was denied on the basis of citizen complaints, that the dangerous animal ordinance was then enacted, that JES later applied for a permit to operate a kennel, that the township failed to act on the application, and that the township then filed the second lawsuit. The argument reflects a complete absence of any explanation tying these facts to the constitutional claims, a complete absence of any discussion regarding the principles associated with the constitutional claims and relevant authority, and a complete absence of any analysis. As our Supreme Court so eloquently stated in *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959):

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[3] We conclude that defendants township board and Smith are privies of the township.

> "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. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow."

Finally, even if substantively reviewed, plaintiffs' constitutional claims in count I fail for the most part. See US Const, art 1, § 10; US Const, Am XIV; Const 1963, art 1, § 10; Const 1963, art 1, § 2; *Champion v Secretary of State*, 281 Mich App 307, 324-325; __ NW2d __ (2008) (discussing equal protection); *Dorman v Clinton Twp*, 269 Mich App 638, 650-651; 714 NW2d 350 (2006) (discussing substantive due process); *In re McEvoy*, 267 Mich App 55, 72; 704 NW2d 78 (2005) (discussing bills of attainder); *People v Callon*, 256 Mich App 312, 316-318; 662 NW2d 501 (2003)(discussing ex post facto laws).[4]

Count II

Count II of plaintiffs' complaint alleged that defendants engaged in a civil conspiracy to deprive plaintiffs of their civil rights. The way the claim is structured is that it essentially mimics the allegations in count I and simply adds allegations that defendants acted in concert to violate plaintiffs' constitutional rights. In regard to a claim of civil conspiracy in general, the essential elements of a cause of action are: (1) a concerted action (2) by a combination of two or more persons (3) to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). Because this count mirrors count I, our analysis in regard to count I is equally applicable to count II. The conspiracy aspect of count II does not call for a different approach. The only point to add relates to the statute of limitations, which was argued by defendants as to count II and necessarily accepted by the trial court as a basis for dismissal when the court granted summary disposition for the reasons argued by defendants in their brief. On appeal, defendants present a fairly extensive argument that the statute of limitations barred count II, citing MCL 600.5805(10)(three-year statute of limitations) and *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005)(overruling prior precedent relative to continuing wrongful acts or continuing violations). We see no need to delve into the subject because plaintiffs did not present any argument in their appellate brief-in-chief on the issue of the statute of limitations. Only after

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[4] We do note, however, that governmental immunity did not bar the constitutional claims in count I. See 42 USC 1983; MCL 691.1407; *Jones v Powell*, 462 Mich 329, 334; 612 NW2d 423 (2000); *Smith v Dep't of Public Health*, 428 Mich 540, 641; 410 NW2d 749 (1987)(Boyle, J.), aff'd sub nom *Will v Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989); *Morden v Grand Traverse Co*, 275 Mich App 325, 332; 738 NW2d 278 (2007); *Burdette v Michigan*, 166 Mich App 406, 408-409; 421 NW2d 185 (1988).

defendants argued the matter in their appellate brief do plaintiffs take up the issue in their reply brief, which, as indicated earlier in this opinion, is insufficient to present the argument for appellate review. *Maxwell, supra* at 576; *Blazer Foods, supra* at 252. While there may be some merit to the arguments presented by plaintiffs in their reply brief regarding the statute of limitations, given our rulings above we see no need to explore the issue.

Count III

This count alleged malicious prosecution of JRS and conspiracy to maliciously prosecute JRS relative to the ordinance enforcement action brought against him in the first lawsuit. To establish a claim of malicious prosecution, a party must show that (1) a defendant initiated a criminal prosecution against him, (2) criminal proceedings terminated in his favor, (3) an absence of probable cause, and (4) the action was undertaken with malice. *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 378; 572 NW2d 603 (1998). To the extent that the first lawsuit was a civil matter, *Huron Twp v City Disposal Systems, Inc*, 448 Mich 362, 365; 531 NW2d 153 (1995), Michigan recognizes a cause of action for malicious civil prosecution, which requires proof of the same elements as for malicious criminal prosecution, changing the reference from criminal proceedings to civil proceedings in the first two elements, plus there is a need to show special injury, *Friedman v Dozorc*, 412 Mich 1, 48; 312 NW2d 585 (1981); *Hall v Citizens Ins Co of America*, 141 Mich App 676, 683; 368 NW2d 250 (1985).

This claim was dismissed, at least in part, based on governmental immunity. Momentarily setting aside the issue of governmental immunity, the malicious prosecution claim is clearly lacking in merit, where the crux of the claim is that JRS had no ownership or possessory interest in the property or the dogs such that he should have been sued for violating the ordinances, but where the answer to the complaint in the first lawsuit admitted that he had an interest. Indeed, the first lawsuit proceeded for a lengthy period of time without any attempt by JRS to have the case dismissed based on the lack of an interest in the property or the dogs. Also, the first application for a conditional use permit, pursued during lawsuit one, identified JRS and JES as the owners of the property. When the township was first presented with evidence to the contrary, it stipulated to dismissal of JRS. Furthermore, the stipulated dismissal was with prejudice and without payment of costs.

With respect to governmental immunity, plaintiffs argue that it does not protect any of the defendants because the township and township board were not engaged in a governmental function and defendant Smith was acting outside the scope of his authority. Plaintiffs only present this argument in the context of challenging the dismissal of count II, not count III, so on that basis alone we can affirm dismissal of count III. Governmental immunity relative to count III is first raised in plaintiffs' reply brief, presenting the same argument as to governmental immunity posed by plaintiffs when addressing count II. Regardless, governmental immunity does protect all of the defendants from the malicious prosecution claim.

"Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). There is no dispute that a claim of malicious prosecution entails tort liability. Under MCL 691.1407, governmental agencies are immune from tort liability as long as they are engaged in the exercise or discharge of a governmental function, such as the operation of a police force to pursue, arrest, and detain criminal suspects. *Payton v Detroit*, 211

Mich App 375, 391-392; 536 NW2d 233 (2005) (holding city immune from claim of malicious prosecution). The immunity granted by the governmental immunity act to a municipality is based on the general nature of the activity that was being undertaken when injury occurred rather than specific conduct. *Id.* at 392. Indeed, to use anything other than the general activity standard would subvert the broad grant of governmental immunity, as it is difficult to envision a tortious act that is a governmental function. *Id.*

Here, the general nature of the governmental function at issue concerned the township enforcing its ordinances by way of a complaint against JRS, and certainly an ordinance enforcement action by a township constitutes the exercise or discharge of a governmental function regardless of whether the specific conduct complained of in prosecuting the action was tortious.

Additionally, "[a] judge, a legislator, and the elective or highest appointive executive official of all levels of government are 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 judicial, legislative, or executive authority." MCL 691.1407(5); *Odom v Wayne Co*, __ Mich __; __ NW2d __, issued December 30, 2008 (Docket No. 133433), slip op at 9-10; *Payton*, *supra* at 394 (police chief absolutely immune from malicious prosecution claim when acting within the scope of his authority). Defendants assert that township supervisor Smith was absolutely immune from tort liability as the highest executive official at the township level. Plaintiffs do not dispute this characterization, and there is supporting authority for the proposition. MCL 41.70; MCL 125.1502a(i); MCL 125.2652(i); MCL 259.109(k); MCL 400.1103(2); *Grahovic v Munising Twp*, 263 Mich App 589, 595; 689 NW2d 498 (2004). MCL 691.1407(5) therefore provides absolute immunity for defendant Smith if he was acting within the scope of his authority. Bringing and pursuing an ordinance enforcement action is an act within the scope of a township supervisor's authority regardless of whether the action was pursued in a tortious manner. In sum, governmental immunity protects all of the defendants from the malicious prosecution claim.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Stephen L. Borrello