STATE OF MICHIGAN

COURT OF APPEALS

JULIA HARVEY, Plaintiff-Appellee,	UNPUBLISHED March 31, 2009
v ALICIA R. JONES, Defendant-Appellant.	No. 280777 Oakland Circuit Court LC No. 2007-080709-NO

Before: Wilder, P.J., and Meter and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting in part and denying in part her motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff and defendant were both elected members of the Oak Park School Board. Plaintiff filed this action for defamation, alleging that defendant falsely accused her of being "unprofessional and unfit" to be a school board member, using her school board position to secure special hiring privileges for her husband, using her school board position to obtain special education privileges for her daughter, and engaging in other illegal or unethical conduct. According to plaintiff's amended complaint, the defamatory statements were made at a televised school board meeting, in a *Detroit Free Press* web log, and in a recall petition that defendant filed against plaintiff in January 2007.

Defendant moved for summary disposition under MCR 2.116(C)(7) and (8), arguing that plaintiff's claims related to the statements made at the school board meeting and in the *Free Press* web log were barred by governmental immunity under MCL 691.1407(5), because defendant was an elected official acting within the scope of her executive authority when she made the statements. Defendant also argued that she was entitled to summary disposition with respect to the statements made in the recall petition, because those statements were privileged statements concerning a public official that involved a matter of public concern. The trial court granted defendant's motion with respect to the statements made at the school board meeting and in the *Free Press* web log, but denied the motion with respect to the statements made in the recall petition. Regarding the latter statements, the court concluded that plaintiff sufficiently plead that the statements were false and made with malice and an intent to harass plaintiff to preclude summary disposition under MCR 2.116(C)(8).

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Cairns v City of East Lansing,* 275 Mich App 102, 107; 738 NW2d 246 (2007). The applicability of governmental immunity is a question of law that this Court also reviews de novo. *Linton v Arenac Co Rd Comm,* 273 Mich App 107, 112; 729 NW2d 883 (2006).

Under the Governmental Tort Liability Act, MCL 691.1401 *et seq.,* "[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). There is no intentional tort exception to the statute's grant of absolute immunity. *American Transmissions, Inc v Attorney Gen,* 454 Mich 135, 143; 560 NW2d 50 (1997). School board members are elected executive officials and, when acting within the scope of their authority, are entitled to the protection of absolute government immunity. *Nalepa v Plymouth-Canton Community School Dist,* 207 Mich App 580, 587-588; 525 NW2d 897 (1994), aff'd 450 Mich 934 (1995). However, local government officials "are not immune from tort liability for acts not within their executive authority." *Marrocco v Randlett,* 431 Mich 700, 710-711; 433 NW2d 68 (1988).

> The determination whether particular acts are within their authority depends on a number of factors, including the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of government. [*Id.* at 711.]

The present appeal concerns only defendant's statements in the recall petition. The trial court dismissed plaintiff's claims relating to defendant's statements at the school board meeting and in the *Free Press* web log, and plaintiff has not appealed the dismissal of those claims. Regarding the statements in the recall petition, defendant does not challenge the trial court's determination that summary disposition was not warranted on the basis that the statements were protected by privilege. Instead, defendant argues that plaintiff's claims arising from the statements in the recall petition are also barred by governmental immunity because she was acting within her executive authority as a school board member when she filed the recall petition. We conclude, however, that defendant expressly waived any claim that the statements in the recall petition were made in the scope of her authority as a school board member. At the May 16, 2007, hearing on defendant's motion, defendant's attorney stated:

> The third, the recall petition, *we are not alleging that that was in the scope of her employment—I mean in the scope of her authority as a Board member.* Rather, your Honor, and again I cited a case. The recall petition was, if it is a matter of public concern . . . . [I]n this determination of whether or not there is a privilege, there is a question for this Court to decide . . . . [Emphasis added.]

At a second hearing on July 18, 2007, the following exchange occurred:

> *THE COURT:* Let me ask you, on the statements allegedly made in the recall petition, you're asserting qualified privilege because of the public nature of the issue.

Defendant's counsel: That's correct.

Defendant did not simply fail to argue that governmental immunity barred plaintiff's claims arising from the statements in the recall petition. Rather, defendant's attorney specifically stated that defendant was not taking the position that she was acting within the scope of her authority as a school board member when she filed the recall petition. Waiver, "the intentional relinquishment or abandonment of a known right," extinguishes any claim of error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). "A party may not take a position in the trial court and then subsequently argue that the resultant action was error." *Czymbor's Timber, Inc v City of Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006), aff'd 478 Mich 348 (2007). Thus, defendant waived her present argument that she was acting within the scope of her authority as a school board member when she filed the recall petition.

Even if defendant had not waived her argument, however, we would affirm the trial court's decision. Defendant focuses on the content of the statements made in the recall petition, which she characterizes as "virtually the same" as those made at the school board meeting and in the *Free Press* web log, to argue that summary disposition should have similarly been granted with respect to the statements in the recall petition. However, defendant improperly ignores the different manners in which the communications were made. The critical inquiry is whether defendant was acting within the scope of her official authority as a school board member when making the statements.

In determining whether an act is within an official's authority, "the nature of the specific acts alleged" must be considered. *Marrocco*, *supra* at 711. All of the challenged statements concerned alleged wrongdoing by plaintiff and plaintiff's alleged abuse of her position as a school board member. Defendant's statements at the school board meeting were made in the context of a motion to censure plaintiff. Those statements were made in defendant's capacity as a school board member at a duly convened meeting that defendant had a duty to attend and at which she was authorized to act. Defendant's statements in the *Free Press* web log were made in response to media inquiries concerning defendant's conduct on the school board. As such, they were protected under *American Transmissions*, *supra* at 144, which holds that an official is acting within his or her executive authority when responding to media questions or reports concerning the official's conduct in office. The scope of defendant's authority extended to freely expressing her concern about the conduct of other school board members at school board meetings and to responding to media reports about her conduct in office.

However, defendant has not identified any statutory or bylaw provision, or other relevant authority, authorizing a school board member to file a recall petition against another school board member. The right to recall elected officials is granted by state constitution and statute to the voters of the state of Michigan. Const 1963, art 2, § 8; MCL 168.951; *In re Wayne Co Election Comm*, 150 Mich App 427, 437; 388 NW2d 707 (1986). Defendant acknowledged in her deposition that she was acting in part as a concerned citizen when she made the allegations in the recall petition, that she filed the petition against plaintiff as a matter of public concern, and that she was not authorized by the school board to file a recall petition against plaintiff. Further, bylaw 144.2 of the school board's bylaws provides that board members will "take no private action that will compromise the Board or administration." Because the right to recall elected officials is granted to all voters, defendant acknowledged that she was at least partially motivated to file the recall petition as a concerned citizen, the action publicly compromised another board member, and defendant was not specifically authorized by the school board to file the recall petition, the trial court did not err in denying defendant's motion for summary disposition with respect to the statements made in the recall petition.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Deborah A. Servitto