STATE OF MICHIGAN

COURT OF APPEALS

JAMES ROBERT COREY, Plaintiff-Appellant,	UNPUBLISHED March 15, 2016
v	No. 325465 Wayne Circuit Court
WAYNE COUNTY and CATHY M. GARRETT, Defendants-Appellees.	LC No. 14-010111-NZ

Before: SAAD, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition and dismissing his complaint. Because the trial court properly granted defendants' motion for summary disposition, we affirm.

I. FACTS AND PROCEDURAL HISTORY

In March 2012, plaintiff's then-wife filed for divorce in Wayne Circuit Court and paid $230 in filing fees. In June 2012, plaintiff filed a motion regarding custody of his minor child in the divorce action, at which time plaintiff paid an $80 "Friend of the Court" fee, collected by the clerk of the court pursuant to the former MCL 600.2529(1)(d)(*i*), which provided:

> (1) In the circuit court, the following fees shall be paid to the clerk of the court:
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> * * *
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> (d) Before entry of a final judgment or order in an action in which the custody, support, or parenting time of minor children is determined or modified, the party submitting the judgment or order shall pay 1 of the following fees:

(*i*) In an action in which the custody or parenting time of minor children is determined, $80.00.[1]

In August of 2014, plaintiff filed a class action lawsuit in Wayne County Circuit Court, alleging claims of common law conversion, fraud, statutory conversion, unjust enrichment, and violations of due process. This lawsuit pertains to the collection of the $80 fee by the clerk of the court, Cathy Garrett and, in particular, the assertion that Garrett illegally collected this fee contrary to MCL 600.2529(1)(d)(*i*) and the directives of the Supreme Court Administrative Office (SCAO). Simply stated, plaintiff contends that Garrett could not collect a fee when he filed his motion because his wife paid any filing fees when she initiated the divorce action and the assessment of a duplicative fee was not appropriate given that the relief plaintiff sought in his motion for custody was temporary and would not have resulted in a final disposition. Plaintiff claims that, after collecting the unauthorized $80 fee, Garrett did not refund the fee to him, but transferred the funds to the Wayne County Treasurer, MCL 600.2529(4), and then appropriated the funds pursuant to MCL 600.2530(2). Plaintiff brought this action "on behalf of himself and all other individuals who have been illegally charged the $80 fee contrary to MCL 600.2529(1), and who have not received a refund of that particular fee."

To support his claims, plaintiff relied on two memorandums issued by the SCAO, in 2009 and again in 2012, advising circuit courts that the fee prescribed by MCL 600.2529(1)(d)(*i*) applies only to orders and judgments finally disposing of a specific action or motion in the case and do not apply to interim or temporary orders, which are not final dispositions of an action or motion, or to any orders entered while a final determination is pending. In these memorandums, the SCAO recommended the circuit courts establish policies and procedures governing the collection and management of the fees prescribed by MCL 600.2529(1)(d), including, among other things, establishing procedures (1) to assure that the judgment fee is only collected once per final judgment or order and (2) for refunding the fees in cases in which a final judgment or order is not entered.

After plaintiff filed his complaint, defendants brought a motion for summary disposition under MCR 2.116(C)(7) and (C)(8). Defendants argued that they are immune from tort liability under the Governmental Tort Liability Act, (GTLA) MCL 691.1401 *et seq*., and that plaintiff's non-tort claims could not be maintained. After conducting a hearing, the court granted defendants' motion for summary disposition with respect to all of plaintiff's claims and dismissed the complaint against defendants. Plaintiff appeals as of right.

II. STANDARD OF REVIEW

This Court reviews de novo a circuit court's decision regarding a motion for summary disposition. *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). "Questions of law, such as construction of a statute, are also reviewed de novo." *Id.* "When a claim is barred by governmental immunity, summary disposition is appropriate under MCR 2.116(C)(7)." *Petipren v Jaskowski*, 494 Mich 190, 201; 833 NW2d 247 (2013). Under MCR 2.116(C)(7), the moving

[1] MCL 600.2529(1)(d) was amended by Pub Acts 2014, No. 532, effective April 14, 2015.

party may support its motion with affidavits, depositions, admissions, or other documentary evidence. *Id*. "In reviewing a motion under MCR 2.116(C)(7), we accept the factual contents of the complaint as true unless contradicted by the movant's documentation." *Id.* When the material facts are not in dispute, courts may decide whether a plaintiff's claim is barred by immunity as a matter of law. *Id.*

Defendant also moved for summary disposition under MCR 2.116(C)(8). However, with respect to this motion, the parties both relied on evidence beyond the pleadings in support of their positions in the trial court. See MCR 2.116(G)(5). Because the trial court considered materials outside of the pleadings, the motion is properly considered under MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and is properly granted when no material question of fact remains. *Beckett-Buffum Agency, Inc v Allied Prop & Cas Ins Co*, 311 Mich App 41; 873 NW2d 117 (2015). In analyzing a motion brought under (C)(10), a reviewing court must consider the affidavits, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

III. TORT CLAIMS AND GOVERNMENTAL IMMUNITY

Plaintiff's complaint includes three tort claims subject to the GTLA: common law conversion, statutory conversion,[2] and fraud. The trial court concluded that Garrett and Wayne County were entitled to immunity from tort liability under the GTLA. Plaintiff now contests this determination on appeal with respect to Garrett, asserting that Garrett could not claim absolute immunity under MCL 691.1407(5) because her collection and retention of the fee in question fell outside of her authority as the highest ranking executive official of a level of government.[3] We disagree.

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[2] Although the trial court did not dismiss plaintiff's statutory conversion claim on governmental immunity grounds, statutory conversion is a tort, *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 497 Mich 337, 361; 871 NW2d 136 (2015), and the GTLA provides immunity from *all* tort liability, *Nawrocki*, 463 Mich at 158.

[3] Plaintiff confines his appellate arguments to Garrett's entitlement to immunity and he does not challenge the trial court's determination that the GTLA provided Wayne County with immunity from tort liability. Because plaintiff fails to brief this issue on appeal, we consider it abandoned. See *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003). In any event, the collection and retention of fees incident to court filings plainly constitutes a governmental function, and Wayne County is immune from all tort liability when engaged in a governmental function. See MCL 691.1407(1); MCL 691.1401(a), (b), and (e). None of the statutory exceptions to this broad grant of immunity apply, and the trial court thus properly granted

Under the GTLA, "[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). This provision provides the identified high-ranking officials with "absolute immunity from tort liability." *Petipren*, 494 Mich at 204. The purpose of this broad grant of immunity is to ensure that "these officials and, therefore, their governmental agencies, will not be intimidated nor timid in the discharge of their public duties." *Grahovac v Munising Twp*, 263 Mich App 589, 595; 689 NW2d 498 (2004) (quotation omitted). To qualify for this absolute immunity, the individual governmental employee must (1) be a judge, legislator, or the elective or highest appointive executive official of a level of government and (2) he or she must have acted within the scope of his or her judicial, legislative, or executive authority. *Petipren,* 494 Mich at 204.

In this case, Garrett is the Wayne County Clerk, an elected executive official of the County. See Const. 1963, art 7, § 4. In this role of high-ranking executive official in county government, "county clerks are absolutely immune if they are acting within their executive authority." *Gracey v Wayne Co Clerk*, 213 Mich App 412, 416-417; 540 NW2d 710 (1995), abrogated on other grounds by *Am Transmissions, Inc v Attorney Gen*, 454 Mich 135; 560 NW2d 50 (1997). Therefore, pursuant to MCL 691.1407(5), Garrett is entitled to absolute immunity from tort liability so long as she was acting within the scope of her "executive authority."

As used in MCL 691.1407(5), the phrase "executive authority" refers to "*all* authority vested in the highest executive official by virtue of his or her role in the executive branch." *Petipren*, 494 Mich at 193-194, 208 (emphasis is original). This includes the performance of acts that might otherwise be performed by a lower-level employee if those actions fall within the authority vested in the official by virtue of his or her role as an executive official. *Id.* at 194. "The determination whether particular acts are within their [executive] 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 206, quoting *American Transmissions, Inc*, 454 Mich at 141. Acts expressly or impliedly authorized by constitution, statute, or other law are part of the actor's "executive authority." See *Petipren*, 494 Mich at 213; *Marrocco v Randlett*, 431 Mich 700, 708 nn 7 & 8; 433 NW2d 68 (1988).

In Garrett's case, she undoubtedly had the statutory authority, as a result of her election as Wayne County Clerk, to collect case filing fees, including fees related to cases involving custody or parenting time. See former MCL 600.2529. In particular, by virtue of her position as Wayne County Clerk, Garrett became vested with the authority to act as clerk of the circuit court. See Const. 1963, art 6, § 14; MCL 600.571(a). Thus, as directed by the judiciary, Garrett must perform noncustodial ministerial duties related to court administration. See *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 149-150, 161-164, 170-171; 665 NW2d 452 (2003). It follows that Garrett's authority included the authority to collect case filing fees, including fees

summary disposition to Wayne County on the basis of governmental immunity. See MCL 691.1407(1); *Nawrocki*, 463 Mich at 158.

related to cases involving custody or parenting time. See former MCL 600.2529. Indeed, MCL 600.2529(1)(d)(*i*) explicitly directs the clerk of the court to collect the $80 filing fee before entry of a final judgment in an action in which the custody or parenting time of minor children is determined or modified. Thus, as prescribed by MCL 600.2529(1)(d)(*i*), Garrett had the authority to collect such fees.

Plaintiff does not dispute Garrett's authority under MCL 600.2529 to collect fees as a general proposition. Rather, plaintiff contends that the manner in which Garrett carried out this function was improper and illegal in light of the SCAO memorandums advising circuit courts on the proper collection and return of fees. In other words, because of Garrett's purported violation of these memoranda, plaintiff argues that Garrett acted outside the scope of her "executive authority" when she collected duplicative filing fees from plaintiff and failed to refund these amounts. This argument is without merit. It is true that the judiciary possesses the authority to prescribe the clerk of the court's ministerial duties. See *Lapeer Co Clerk*, 469 Mich at 161-164, 171; MCL 600.571(f); MCR 8.110(C)(1) and (3). But, in this case, neither the Supreme Court, nor the Chief Judge of Wayne Circuit Court, mandated or ordered Garrett, in her capacity as the clerk of the court, to collect the fees in accordance with the SCAO's interpretation of MCL 600.2529(1)(d) or in the manner set forth in the SCAO memorandums. Although the SCAO provided guidance and recommendations regarding the collection of the fees under MCL 600.2529(1)(d), an advisory memorandum does not constitute a Supreme Court order.[4] Consequently, unlike the statutory provisions empowering Garrett to collect filing fees, the SCAO recommendations and memorandums do not constitute binding authority. See *Chelsea Inv Group LLC v Chelsea*, 288 Mich App 239, 260; 792 NW2d 781 (2010). The statute does not prohibit the collection of the judgment fee at the time an action or motion is filed; nor does the statute provide a specific refund mechanism. Absent such a directive from the judiciary, Garrett's collection of fees fell within the scope of her authority as set forth in MCL 600.2529 and it was within her discretion how to discharge these duties. She is therefore entitled to the immunity provided by MCL 691.1407(5), and this immunity applies to all of plaintiff's tort claims, including conversion, statutory conversion, and fraud. Thus, summary disposition was properly granted under MCR 2.116(C)(7) with respect to plaintiff's tort claims.

IV. UNJUST ENRICHMENT

Next, plaintiff argues that the trial court erred in granting summary disposition on his claim for unjust enrichment. According to plaintiff, his pleadings set forth a claim of unjust enrichment and, when viewed in a light most favorable to plaintiff, a question of fact remains regarding this issue. We disagree.

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[4] The role of the SCAO is to "supervise and examine the administrative methods and systems employed in the offices of the courts, including the offices of the clerks and other officers, and make recommendations to the Supreme Court for the improvement of the administration of the courts." MCR 8.103(1). Thus, the SCAO memorandums, which were advisory in nature, did not have the effect of an order of the Supreme Court that the chief judge and the clerk of the court must comply with. See MCR 8.110(C)(3); *Lapeer Co Clerk*, 469 Mich at 162-164.

Whether a claim for unjust enrichment can be maintained presents a question of law subject to de novo review. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006). "Unjust enrichment is defined as the unjust retention of 'money or benefits which in justice and equity belongs to another.'" *Tkachik v Mandeville*, 487 Mich 38, 47-48; 790 NW2d 260 (2010) (quotation omitted). A claim alleging unjust enrichment requires a plaintiff to establish: "(1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps*, 273 Mich App at 195. "[T]he law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Id.*

Plaintiff's claim alleging unjust enrichment arises from Wayne County Clerk Garrett's collection of the $80 fee under MCL 600.2529(1)(d)(*i*), which he alleges defendants improperly retained and converted for the County's use and benefit. However, under the statutory scheme, MCL 600.2529(4) mandates that each fee collected under MCL 600.2529(1)(d)(*i*) "shall be paid to the county treasurer and deposited by the county treasurer as provided under section 2530 to be used to fund services." MCL 600.2530(1), in turn, mandates that the county treasurer "shall deposit *all* fees collected under MCL 600.2529(1)(d)" in an interest-bearing account known as the "Friend of the Court fund." MCL 600.2530(2) mandates that the county board of commissioners must appropriate *all* sums in the Friend of the Court fund for the purposes of fulfilling the statutory obligations of the Friend of the Court as provided in the Friend of the Court Act, MCL 552.501 *et seq*. In short, under the statutory scheme, defendants Wayne County and/or Garrett could not retain any of the fees collected under MCL 600.2529(1)(d)(*i*) for their own benefit; rather, the fees collected must be used to fund the Friend of the Court, an arm of the circuit court. MCL 600.2529(4); MCL 600.2530(1) & (2). See also MCL 552.503; *Morrison v Richerson*, 198 Mich App 202, 212; 497 NW2d 506 (1992). Without evidence that defendants failed to treat funds in this manner, this mandatory statutory scheme establishes that defendants did not receive a benefit from the fees collected or retained, and it follows that defendants could not have been unjustly enriched by collecting the fees pursuant to MCL 600.2529(1)(d)(*i*).

In response to defendants' motion for summary disposition, plaintiff did not set forth any specific facts or present any evidence to dispute that Garrett acted according to the statutory mandates or otherwise to establish that she benefited from the fees collected. To the contrary, the only evidence on this point is the sworn affidavit of the supervisor of accounting of the Wayne County Clerk's office, who processes the filing fees collected under MCL 600.2529(1). The supervisor indicated that the fees collected are transmitted to the circuit court in accordance with the statutory mandates of MCL 600.2529(4) and MCL 600.2530 and are not retained by the County Clerk. Rather than present documentary evidence to the contrary, plaintiff's argument in response to this evidence rests on the unsupported allegation that the benefit to defendants is "obvious." However, in response to a motion for summary disposition, plaintiff's mere allegations of this nature are insufficient to defeat a motion for summary disposition. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Given the statutory scheme and the complete dearth of evidence supporting plaintiff's position, plaintiff has not shown the existence of a material question of fact with respect to defendants' receipt of a benefit from these

funds.[5] Viewing the evidence in the light most favorable to plaintiff, there is no factual dispute and defendants are entitled to summary disposition under MCR 2.116(C)(10).

V. DUE PROCESS VIOLATIONS

Finally, plaintiff argues that the trial court erred by granting summary disposition to defendants with respect to plaintiff's claims of due process violations. Specifically, plaintiff claims that MCL 600.2529 creates a substantive due process right to the return of fees and that defendants failed to establish a meaningful mechanism for refund of the fees in question thereby violating plaintiff's procedural due process rights. We disagree.

With regard to plaintiff's substantive due process argument, "[t]he underlying purpose of substantive due process is to secure the individual from the arbitrary exercise of governmental power."' *Cummins v Robinson Twp*, 283 Mich App 677, 700; 770 NW2d 421 (2009) (citation omitted). "In the context of individual government actions or actors . . . to establish a substantive due process violation, the governmental conduct must be so arbitrary and capricious as to shock the conscience." *Id.* at 701 (quotation and citation omitted). "The Due Process Clause is not a guarantee against incorrect or ill-advised [governmental] decisions." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 206; 761 NW2d 293 (2008) (citation omitted). Rather, under this standard, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Id.* at 197.

In the present case, even if incorrect or ill-advised, Garrett's collection of the fees and defendants' failure to devise a specific process for refunds does not rise to the level of arbitrary and capricious conduct as to shock the conscience. MCL 600.2529(1)(d)(*i*) authorizes the collection of fees in custody matters, meaning that there was some basis for Garrett's collection

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[5] On appeal, plaintiff contends that the trial court's summary dismissal of his claim, without allowing plaintiff additional discovery to remedy the prejudice caused by the late filing of defendants' affidavits, constitutes reversible error. Plaintiff failed to properly present this issue for our review because he did not separately identify it as a question presented, meaning that the issue need not be considered. See MCR 7.212(C)(5); *Michigan's Adventure, Inc v Dalton Twp*, 290 Mich App 328, 337 n 3; 802 NW2d 353 (2010). Additionally, plaintiff does not cite any law to support his position, and this failure to properly brief the claim of error constitutes abandonment of the issue. *Houghton*, 256 Mich App at 339-340. In any event, we find no abuse of discretion in the court's consideration of the late-filed affidavits given that the affidavits assisted in the determination of the motion and were not unfairly prejudicial to plaintiff, particularly in light of the statutes mandating the transmittal of the collected fees. See *Prussing v Gen Motors Corp*, 403 Mich 366, 370; 269 NW2d 181 (1978). Moreover, contrary to plaintiff's argument, he could not have been unduly surprised by the affidavits because defendants submitted a similar affidavit from the former supervisor of accounting in other recent litigation between the parties. Ultimately, while plaintiff claims additional discovery was warranted, we see no basis for concluding that further discovery would have benefited plaintiff's position. See *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). The trial court did not err by granting summary disposition without allowing further discovery.

of the fees in question. Although the SCAO recommended the imposition of procedures for refunding the fee under certain circumstances, MCL 600.2529(1)(d)(*i*) provides no specific refund procedures or mechanisms. Moreover, the undisputed evidence shows that defendants provided a refund of the fees in question to any litigant who requested such a refund.[6] Even if imperfect, the collection of fees and the payment of refunds upon request does not rise to the level of arbitrary and capricious conduct giving rise to a substantive due process claim.

With regard to plaintiff's claim of procedural due process, "[t]he United States and Michigan Constitutions preclude the government from depriving a person of life, liberty, or property without due process of law." *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 605-606; 683 NW2d 759 (2004), citing US Const, Amend XIV; Const 1963, art 1, § 17. "Procedural due process serves as a limitation on governmental action and requires a government to institute safeguards in proceedings that might result in a deprivation of life, liberty, or property." *Mettler Walloon, LLC*, 281 Mich App at 213. "'A procedural due process analysis requires a dual inquiry: (1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient.'" *Hinky Dinky*, 261 Mich App at 606 (citation omitted). Generally, due process requires notice and a meaningful opportunity to be heard before an impartial decision-maker. *Id.* In certain circumstances, a meaningful postdeprivation remedy may satisfy due process. See, e.g., *DaimlerChrysler Corp v Mich Dep't of Treasury*, 268 Mich App 528, 540; 708 NW2d 461 (2005); *Am States Ins Co v State Dep't of Treasury*, 220 Mich App 586, 590; 560 NW2d 644 (1996).

The actual owner of money has a property interest protected by due process. See *Dow v State,* 396 Mich 192, 204; 240 NW2d 450 (1976). Thus, in this case, plaintiff has an interest in his $80. In particular, given the plain language of MCL 600.2529 and the SCAO memoranda, plaintiff arguably had a legitimate claim of entitlement to the return of this $80. Nevertheless, we conclude that plaintiff cannot maintain his claim that defendants' conduct denied him the right to procedural due process. Defendants' failure to establish a mechanism for an automatic refund did not interfere with, or deprive plaintiff of, his right to a refund of the fees or a meaningful opportunity to be heard on the issue because plaintiff could have sought a refund of the allegedly erroneously charged fee. Because there was an adequate remedy available, the trial court properly dismissed plaintiff's due process claim.[7]

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[6] Defendants' undisputed evidence indicated that refunds of the $80 judgment fee have been issued when requested and there has been no litigant who has sought a refund of their final judgment fee that has been denied.

[7] Our opinion today addresses the claims raised by plaintiff in his complaint in the trial court, i.e., conversion, fraud, statutory conversion, unjust enrichment, and due process. However, we note that a claim to recover fees paid to the state in excess of the amount allowed under applicable law is properly filed as an action in assumpsit for money had and received. *Yellow Freight Sys Inc v State of Mich*, 231 Mich App 194, 203; 585 NW2d 762 (1998), rev'd on other grounds *Yellow Freight Sys, Inc v State*, 464 Mich 21; 627 NW2d 236 (2001), rev'd 537 US 36

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Joel P. Hoekstra

(2002). See also *Serv Coal Co v Mich Unemployment Comp Comm*, 333 Mich 526, 531; 53 NW2d 362 (1952). Thus, when there has been an illegal or excessive collection of fees, it may be possible to maintain a class "action of assumpsit to recover back the amount of the illegal exaction." *Bond v Pub Sch of Ann Arbor Sch Dist*, 383 Mich 693, 704; 178 NW2d 484 (1970). But, plaintiff did not frame his complaint in this way, and "as a court of review that is principally charged with the duty of correcting errors," we think it inappropriate to rewrite plaintiff's complaint or address unpreserved claims. See *Burns v Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002). Consequently, we confine our review to the claims pleaded in plaintiff's complaint, and we offer no opinion on the legality of the fees collected or whether plaintiff should receive a refund of those amounts under MCL 600.2529.