STATE OF MICHIGAN

COURT OF APPEALS

THOMAS SALMON, Plaintiff-Appellant,	UNPUBLISHED July 19, 2002
v	No. 229173 St. Joseph Circuit Court
GLEN WILKERSON and THEODORE TUCKER, JR., Defendants-Appellees.	LC No. 98-000574-CZ

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants summary disposition. We affirm.

After successfully defending against a township ordinance violation, plaintiff brought suit under 42 USC 1983 against the township attorney, Theodore Tucker, and the township ordinance investigator, Glen Wilkerson, alleging trespass and prosecution of plaintiff "without any basis in law or common sense." Plaintiff also asserted a state law claim alleging malicious prosecution. The trial court found defendants to be immune from suit and granted summary disposition in their favor pursuant to MCR 2.116(C)(7). On appeal, plaintiff argues that the trial court erred in finding that defendants were entitled to immunity. We disagree.

An order granting summary disposition under MCR 2.116(C)(7) on the basis of governmental immunity is reviewed de novo on appeal. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82-83; 635 NW2d 323 (2001). In reviewing the order, we must give consideration to the affidavits, depositions, admissions, and other documentary evidence filed by the parties, and determine whether they indicate that the defendant is in fact entitled to immunity. *Id*.

We first consider whether summary disposition of plaintiff's federal claims against Tucker, brought under 42 USC 1983, was proper. Tucker asserts that federal prosecutorial immunity bars such a suit against him. We agree. The United States Supreme Court, in *Imbler v Pachtman*, 424 US 409, 422-423, 427; 96 S Ct 984; 47 L Ed 2d 128 (1976), held that a prosecutor who acts in his judicial, as opposed to administrative or investigatory role, is absolutely immune from a suit brought under 42 USC 1983. This is so, the Court stated, because the same considerations that underlie the immunity afforded a judge and grand jurors apply to prosecutors. *Id.* at 422-423. These considerations include a concern that harassment by

meritless litigation would deflect a prosecutor from performing his public duties, as well as a concern that the possibility of a lawsuit may affect the independence of judgment required by the public trust. *Id*. at 423.

Citing the public policy concerns underlying absolute prosecutorial immunity, the Sixth Circuit Court of Appeals has extended the holding in *Imbler* to include city attorneys acting to enforce a city ordinance. See *Shoultes v Laidlaw*, 886 F2d 114, 118 (CA 6, 1989) We find that these same considerations warrant extending such immunity to township attorneys who, as here, act to enforce a township ordinance.

Plaintiff, however, asserts that because the federal claims stemming from the alleged trespass on his property stem from Tucker serving in an investigatory role, the immunity provided prosecutors in their role as advocates does not apply. Again, we disagree. The United States Supreme Court has stated that acts undertaken by a prosecutor in preparation for the initiation of judicial proceedings are attributable to the prosecutor's role as an advocate for the people and are, therefore, protected under prosecutorial immunity. *Buckley v Fitzsimmons*, 509 US 259, 273; 113 S Ct 2606; 125 L Ed 2d 209 (1993). Here, the conduct complained of by plaintiff is clearly attributable to the judicial proceedings instituted against him. Accordingly, we find that summary disposition of plaintiff's federal claims against Tucker was proper.

Consideration of plaintiff's state claims against Tucker ultimately requires the same conclusion. Unlike federal prosecutorial immunity, which is derived from case law, state immunity for alleged prosecutorial misconduct derives from MCL 691.1407(5), which provides that "[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." Plaintiff asserts that MCL 691.1407(2), which concerns qualified immunity, controls. However, we regard it more appropriate to first resolve whether the absolute immunity provision of MCL 691.1407(5) applies. Only if we determine that subsection (5) does not apply need we consider whether qualified immunity under subsection (2) applies.

Tucker asserts that, as the township attorney, he is the highest executive official and is therefore protected by absolute immunity. The test to determine what officials are the "highest executive officials" within the meaning of MCL 691.1407(5) considers whether the person has broad-based jurisdiction or extensive authority similar to that of a judge or legislator. *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 451; 487 NW2d 799 (1992); *Chivas v Koehler*, 182 Mich App 467, 471; 453 NW2d 264 (1990). Here, as township attorney Tucker had broad authority to file and prosecute ordinance violations. See, e.g., *People v Williams*, 186 Mich App 606, 609; 465 NW2d 376 (1990) (a prosecutor has broad discretion in determining which charges to bring and when to bring them); see also *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 384; 572 NW2d 603 (1998) (prosecutor's exercise of his independent discretion in initiating and maintaining a prosecution is a complete defense to an action for malicious prosecution). Accordingly, we conclude that although the charges at issue here were civil as opposed to criminal, Tucker had sufficiently broad discretion regarding whether to charge plaintiff with the ordinance violation to render Tucker the highest executive official within the meaning of MCL 691.1407(5).

This conclusion does not, however, end our inquiry. In addition to determining whether the official is the highest executive official, application of the immunity set forth in MCL 691.1407(5) requires a determination whether the governmental official was acting within the scope of his authority. MCL 691.1407(5). Such a determination "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." *Marrocco v Randlet*, 431 Mich 700, 711; 433 NW2d 68 (1988). Here, it is clear that the filing of a complaint is squarely within the authority of a prosecutor. *Williams*, *supra*; *Matthews*, *supra*. Accordingly, we conclude that summary disposition of plaintiff's state law claim against Tucker was also proper.

Next, we turn our attention to plaintiff's claims against Wilkerson. In his argument on appeal, plaintiff takes issue only with the trial court's grant of summary disposition of his claims against Wilkerson arising from the alleged malicious prosecution. With respect to these claims, however, plaintiff has failed to set forth any argument as to why summary disposition in favor of defendant Wilkerson was not proper. A party may not leave it to this Court to search for authority to sustain or reject its position. *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 95; 572 NW2d 246 (1997).

In any event, considering the merits of plaintiff's malicious prosecution claim, we are satisfied that summary disposition was properly granted. The elements of an action for malicious prosecution are: (1) a criminal proceeding instituted or continued *by the defendant* against the plaintiff; (2) termination of the proceeding in favor of the accused; (3) absence of probable cause for the proceeding; and (4) "malice" or a primary purpose other than that of bringing the offender to justice. *Wilson v Yono*, 65 Mich App 441, 443; 237 NW2d 494 (1975). As plaintiff acknowledges in his complaint, Wilkerson did not prosecute defendant - Tucker did. Moreover, plaintiff does not allege that Wilkerson knowingly presented false facts against plaintiff in connection with the prosecution. See *Matthews*, *supra* at 379, 389-91. Summary disposition, therefore, was proper because plaintiff failed to state a claim. MCR 2.116(C)(8).

Plaintiff next takes issue with the trial court's assessment of defendants' attorney fees and costs, awarded on the ground that plaintiff's suit was frivolous. A trial court's finding that a claim is frivolous is reviewed for clear error. *In re Attorney Fees &* Costs, 233 Mich App 694, 701; 593 NW2d 589 (1999). A decision is "clearly erroneous" if the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*.

Pursuant to MCR 2.114(D) and MCR 2.625(A)(2), a party who files a lawsuit that is frivolous or vindictive is subject to taxation of the defendant's costs and attorney fees, as well as sanctions. Here, the trial court found that there was no merit to plaintiff's suit, which the court found to have been inspired by "malice and vindication" and initiated solely "to retaliate against [defendants'] because they had taken [plaintiff] to court." Given the circumstances presented here, and considering that plaintiff has presented nothing to indicate a contrary intention or purpose in the filing of this suit, we find no clear error in the trial court's award of costs and

attorney fees. See MCL 600.2591(3)(a); *Kitchen v Kitchen*, 465 Mich 645, 662; 641 NW2d 245 (2002).

We affirm.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra