# STATE OF MICHIGAN

# COURT OF APPEALS

VIJAY PARAKH,

Plaintiff-Appellant,

v

HARRISON TOWNSHIP, SHARON EINEMAN, JAMES ULINSKI, MICHAEL RICE, and ROBERT GARVIN,

Defendants-Appellees.

UNPUBLISHED
December 17, 2013

No. 306053
Macomb Circuit Court
LC No. 2009-000458-CZ

Before: K. F. KELLY, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Plaintiff, Vijay Parakh, appeals as of right the trial court order granting summary disposition to defendants, Harrison Township, Sharon Eineman, James Ulinski, Michael Rice, and Robert Garvin. We affirm in part, reverse in part, and remand for further proceedings.

## I. FACTUAL BACKGROUND

Plaintiff, a building official for Harrison Township, initiated this instant litigation against the township and defendants Eineman, Ulinski, Rice, and Garvin, all trustees on the township board. According to plaintiff, several incidents give rise to this litigation. First, in 2005, he saw defendant Eineman and a resident use plaintiff's workstation computer to alter information in the township database. Plaintiff requested that they stop, and reported the incident to the township supervisor. Plaintiff claimed that not only did defendant Garvin publicly read the complaint to embarrass plaintiff, defendant Eineman falsely accused the building department of performing special favors for the township supervisor.

Next, two incidents relating to the removal of trees arose in 2007. First, defendants Rice and Ulinski raised concerns that there were trees being removed on Joy Boulevard in Harrison Township. An investigative committee was formed. Allegations arose that plaintiff was not cooperating with the investigation and merely claimed that the township supervisor would not let him investigate the situation promptly. Next, there were allegations regarding removing a tree at the request of Macomb Circuit Court Judge Mary Chrzanowski at a dilapidated residence on Crocker Boulevard. According to Ulinski, this occurred in the context of some litigation not related to the instant matter in front of Judge Chrzanowski. Allegedly, the judge requested that a tree next to her property be removed in a quid pro quo exchange for a favorable ruling in the

litigation. While there was an unrelated court order regarding the removal of the tree, at the board meeting where this issue was discussed, defendant Ulinski raised concerns that the demolition was done before the court order, and the township had awarded a demolition contract for the removal to a bidder for $3,000 higher than the lowest bidder.

On July 28, 2008, the board voted to suspend plaintiff with pay, and to form an investigative committee "regarding the removal of trees on private property." Plaintiff filed two grievances and was eventually reinstated. He subsequently filed a complaint, asserting the following counts: (I) a violation of the Civil Rights Act (CRA), MCL 37.2101, *et seq.*; (II) a violation of the Whistleblowers' Protection Act (WPA), MCL 15.361, *et seq.*; (III) tortious interference with a business opportunity; (IV) defamation; (V) abuse of process; (VI) concert of action; (VII) civil conspiracy; and (VIII) intentional infliction of emotional distress. Plaintiff contended that he was acting pursuant to a court order when he removed the tree next to Judge Chrzanowski's residence. He also claimed that he was falsely accused of violating township policy, and that defendant trustees made false and defamatory statements against him for his role in removing the tree.

Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10). The trial court granted the motion, finding that plaintiff's failure to exhaust his administrative remedies was dispositive under MCR 2.116(C)(7). The trial court also denied plaintiff's two motions to amend his complaint. Plaintiff now appeals on several grounds.

## II. EXHAUSTION OF ADMINISTRATIVE REMEDIES

### A. STANDARD OF REVIEW

Plaintiff first argues that the trial court erred in ruling that he had failed to exhaust administrative remedies in the Collective Bargaining Agreement (CBA). We review a motion for summary disposition de novo, and in the context of MCR 2.116(C)(7), "we consider all documentary evidence and accept the complaint as factually accurate unless affidavits or other documents presented specifically contradict it." *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010).

### B. ANALYSIS

Plaintiff first argues that defendants failed to raise the exhaustion of administrative remedies defense as an affirmative defense, and this waiver precluded the trial court from granting summary disposition on this ground. Defendants concede that they did not raise the failure to exhaust administrative remedies as a defense in their first responsive pleadings. They also did not seek to amend their pleadings to add this defense. MCR 2.111(F)(2) provides that "[a] defense not asserted in the responsive pleading or by motion as provided by these rules is waived[;]" see also *Campbell v St John Hosp*, 434 Mich 608, 617; 455 NW2d 695 (1990).[1]

[1] While the trial court stated that there was no waiver of this defense because the burden was on plaintiff to seek arbitration, the issue was not who should initiate arbitration, but whether

Nevertheless, defendants argue that this Court's decision in *Meridian Mut Ins Co v Mason-Dixon Lines, Inc*, 242 Mich App 645; 620 NW2d 310 (2000), entitles them to assert the defense in their summary disposition motion. In *Meridian Mut Ins Co*, we held that even though the defendant failed to raise the defense of release in its first responsive pleading, it was entitled to summary disposition because the defendant only "discovered the existence of the release during the course of discovery and thereafter moved for summary disposition" and "no indication exists that plaintiffs suffered any unfair prejudice[.]" *Id.* at 648.

Unlike the defendant in *Meridian Mut Ins Co*, the defendants here do not even suggest they discovered the exhaustion of administrative remedies defense shortly before they first raised it in the lower court. Because defendants failed to raise the exhaustion of administrative remedies defense in their affirmative defenses, failed to amend their affirmative defenses, and failed to demonstrate their discovery of the defense shortly before asserting it in the circuit court, they have waived it. The trial court incorrectly granted summary disposition on this basis.

Additionally, the record reveals genuine issues of material fact regarding whether plaintiff had effectively exhausted his administrative remedies. Plaintiff's union filed two grievances in August 2008 on his behalf. Plaintiff introduced affidavits demonstrating that the grievances achieved their desired results—clearing him of any wrongdoing and restoring his benefits and wages. The affiants attested that because the grievances granted plaintiff all the relief to which he was entitled, and he had returned to work, the post-grievance arbitration step outlined in the CBA was not implicated. In other words, because plaintiff pursued his administrative remedies until he achieved full satisfaction, there was no longer any administrative dispute left to pursue.

Therefore, the trial court erred in granting summary disposition to defendants based on MCR 2.116(C)(7).[2]

## III. CIVIL RIGHTS ACT

### A. STANDARD OF REVIEW

Plaintiff next argues that the trial court erred in granting summary disposition on his CRA claim. When reviewing a motion for summary disposition under MCR 2.116(C)(10), we view the evidence "in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621;

---

defendants were required to assert it as an affirmative defense in order to rely on it for dismissal. MCR 2.111(F)(2).

[2] While the trial court determined that failure to exhaust administrative remedies was dispositive, it also addressed other grounds justifying summary disposition for the CRA claim, WPA claim, and intentional infliction of emotional distress claim. We will address these alternate grounds for reversal, as "this Court may affirm a trial court's grant of summary disposition for reasons different than relied on by the trial court." *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 86; 592 NW2d 112 (1999).

689 NW2d 506 (2004).[3] "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).

## B. ANALYSIS

MCL 37.2202(1)(a) provides that an employer shall not "[f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status." When a plaintiff offers no direct evidence of racial discrimination, he may proceed under a pretextual theory, which requires showing a prima facie case that: (1) he belongs to a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001). "Circumstances give rise to an inference of discrimination when the plaintiff was treated differently than persons of a different class for the same or similar conduct." *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 361; 597 NW2d 250 (1999) (quotation marks and citation omitted).

"When the plaintiff has sufficiently established a prima facie case, a presumption of discrimination arises." *Hazle*, 464 Mich at 463 (quotation marks and citation omitted). However, this does not necessarily preclude summary disposition in favor of defendants. *Id.* at 463-464. Rather, defendants then are afforded "the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case." *Id.* at 464. This includes the burden of producing evidence to support its arguments. *Id.* In order to survive a motion for summary disposition at this point, the plaintiff must demonstrate that such reasons are pretextual.[4] *Id.* at 465-466. However, "disproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action." *Lytle v Malady*, 458 Mich 153, 175; 579 NW2d 906 (1998); see also *Hazle*, 464 Mich at 465-466. In other words, "a plaintiff 'must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful] discrimination.'" *Hazle*, 464 Mich at 465-466, quoting *Lytle*, 458 Mich at 175-176.

---

[3] In discussing plaintiff's CRA claim, the trial court did not specifically cite to MCR 2.116(C)(10) but referenced evidence beyond the complaint. Therefore, we will review this as a grant under MCR 2.116(C)(10).

[4] "A mere pretext may be proved (1) by showing that the reason(s) had no basis in fact, (2) if the reason(s) had a basis in fact, by showing that they were not actual factors motivating the decision, or (3) if the reason(s) were motivating factors, by showing that they were jointly insufficient to justify the decision." *Meagher v Wayne State Univ*, 222 Mich App 700, 711-712; 565 NW2d 401 (1997) (quotation marks omitted).

Assuming, *arguendo*, that plaintiff demonstrated a prima facie case in the instant matter, summary disposition was still proper. Defendants contend that their legitimate, nondiscriminatory reason for temporarily suspending plaintiff was because of the ongoing investigation into the Joy Boulevard and Crocker Boulevard demolition files. While plaintiff submitted evidence that his behavior in these matters was defensible, as our Supreme Court admonished, "a plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful] discrimination.'" *Hazle*, 464 Mich at 465-466. While defendants' decision to suspend plaintiff, temporarily, with pay, may have been injudicious, plaintiff simply proffered no evidence that "discriminatory animus was a motivating factor underlying the employer's adverse action." *Lytle*, 458 Mich at 175.[5] In fact, plaintiff arguments on appeal suggest that the motivating factor behind defendants' behavior was plaintiff's refusal to cooperate with their vendetta against the township supervisor. Having proffered no evidence that discriminatory animus was a motivating factor, summary disposition was properly granted on plaintiff's CRA claim.

## IV. WHISTLEBLOWERS' PROTECTION ACT

### A. STANDARD OF REVIEW

Next, plaintiff contends that the trial court erred in dismissing his WPA claim.[6] As noted above, we review a motion for summary disposition under MCR 2.116(C)(7) de novo. *Shay*, 487 Mich at 656. "Absent a disputed question of fact, the determination whether a cause of action is barred by a statute of limitation is a question of law that this Court reviews de novo." *Anzaldua v Neogen Corp*, 292 Mich App 626, 629-630; 808 NW2d 804 (2011) (quotation marks and citation omitted).

### B. ANALYSIS

The trial court properly dismissed plaintiff's WPA claim. "To establish a prima facie case under the WPA, a plaintiff need only show that (1) he or she was engaged in protected activity as defined by the act, (2) he or she suffered an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse employment action."

---

[5] Plaintiff cites evidence that a couple of times defendant Rice referred to African-Americans in derogatory terms. Plaintiff also testified that he heard from another person that defendant Rice said he did not like "this Indian" and referred to "that damn Indian." However, "[s]tatements that are made outside the immediate adverse action context, generally referred to as 'stray remarks,' and that the plaintiff alleges to be direct evidence of bias, must be examined for relevancy" with a focus on factors like when the disputed remarks were made and whether they were part of a pattern of biased comments. *Shaw v Ecorse*, 283 Mich App 1, 25; 770 NW2d 31 (2009). The record does not substantiate when or where the remarks occurred and does not demonstrate that a pattern of biased comments existed. *Id*.

[6] The trial court relied on the statute of limitations, which is a basis for summary disposition under MCR 2.116(C)(7). Thus, we will review this issue under MCR 2.116(C)(7).

*Whitman v City of Burton*, 493 Mich 303, 313; 831 NW2d 223 (2013). However, the WPA contains a 90-day limitations period. *Anzaldua*, 292 Mich App at 631.[7] The period begins with the occurrence of an alleged violation of the act. *Joliet v Pitoniak*, 475 Mich 30, 40; 715 NW2d 60 (2006).

The adverse employment action, plaintiff's suspension, occurred on July 28, 2008. Plaintiff did not file suit until January 29, 2009, more than 90 days after this event. Nevertheless, plaintiff claims that between 2005 and January 2009, the trustee defendants directed a continuous pattern of retaliatory conduct toward him on the basis of his reports of misconduct and other protected activity. Thus, plaintiff contends that his WPA claim is within the limitations period because of the continuing violations doctrine in *Phinney v Perlmutter*, 222 Mich App 513, 543-548; 564 NW2d 532 (1997), which was derived from *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986).

This argument ignores our Supreme Court's decision in *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 266; 696 NW2d 646, 650 (2005), which overruled "the 'continuing violations' doctrine of *Sumner, supra*" as inconsistent with the applicable statute of limitations in that case. Likewise in this case, the continuing violations doctrine is inconsistent with the plain language of MCL 15.363(1), which provides that a WPA claimant may initiate litigation "within 90 days after the occurrence of the alleged violation of this act." Because plaintiff has not alleged "an adverse employment action" within the 90-day statute of limitations period, we agree with the trial court that plaintiff's claim under the WPA is barred. *Whitman*, 493 Mich at 313.

In the context of his exhaustion of administrative remedies argument, plaintiff also contends that the 90-day limitation period was tolled while he pursued his grievances, citing to *AFSCME v Highland Park Bd of Ed*, 457 Mich 74, 89-91; 577 NW2d 79 (1998). Assuming plaintiff was referring to his WPA claim, the Court in *AFSCME* held "that where the parties have expressly agreed that a particular grievance procedure 'shall' be the method of resolving disputes," there is an equitable tolling of the period of limitation for as long as the mandatory provisions of the grievance procedure occur. *Id.* However, the portions of the CBA that plaintiff supplied in opposition to defendants' motions for summary disposition envision that while employees "shall" discuss grievances with the township supervisor, the three additional steps of the grievance procedure remain discretionary. Further, even plaintiff acknowledged that the township made him an offer to return to work on September 19, 2008, again outside of the WPA limitations period, but he did not return until months later due to his medical conditions.[8]

[7] While plaintiff claims that defendants did not assert the statute of limitations as a defense, ¶ 9 of their affirmative defenses alleged that MCL 15.363(1) barred plaintiff's claim, which is the statute of limitations for the WPA.

[8] Because the trial court properly dismissed the WPA claim based on the statute of limitations, we decline to address whether there was a genuine issue of material fact, as that issue is moot.

## V. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

### A. STANDARD OF REVIEW

When reviewing a motion for summary disposition under MCR 2.116(C)(10), we view the evidence "in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621.[9] "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*, 469 Mich at 183.

### B. ANALYSIS

"To establish a prima facie claim of intentional infliction of emotional distress, the plaintiff must present evidence of (1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff." *Walsh*, 263 Mich App at 634. "The threshold for showing extreme and outrageous conduct is high," and "[n]o cause of action will necessarily lie even where a defendant acts with tortious or even criminal intent." *VanVorous v Burmeister*, 262 Mich App 467, 481; 687 NW2d 132 (2004). Instead, "liability is imposed only where 'the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Id.* at 481-482, quoting *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 603; 374 NW2d 905 (1985).

The test for "whether a person's conduct was extreme and outrageous is whether recitation of the facts of the case to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Lewis v LeGrow*, 258 Mich App 175, 196; 670 NW2d 675 (2003) (quotation marks and citations omitted). In reviewing a claim of intentional infliction of emotional distress, it is the trial court's "duty to determine whether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." *Id.* at 197. "But where reasonable individuals may differ, it is for the jury to determine if the conduct was so extreme and outrageous as to permit recovery." *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004).

The trial court properly dismissed this claim. None of the conduct in this case rises to the level of atrocious, beyond all possible bounds of decency, or utterly intolerable in a civilized community. *VanVorous*, 262 Mich App at 481. Further, as the trial court noted, plaintiff produced no evidence of severe emotional distress. While plaintiff may have been embarrassed or depressed, his claim simply does not rise to the level of intentional infliction of emotional distress.

[9] Because the court referenced material outside of the pleadings when discussing intentional infliction of emotional distress, we will review the trial court's ruling under MCR 2.116(C)(10).

## VI. GOVERNMENTAL IMMUNITY

### A. STANDARD OF REVIEW

Plaintiff further submits that the trial court erred in ruling that the trustee defendants had legislative immunity for their conduct. Summary disposition is proper under MCR 2.116(C)(7) for "immunity granted by law." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

### B. BACKGROUND LAW

The trial court found that summary disposition of plaintiff's remaining tort claims—concert of action, civil conspiracy, abuse of process, tortious interference with a business opportunity, and defamation—was alternatively justified based on governmental immunity, MCL 691.1407.[10] As the Michigan Supreme Court has recognized, under MCL 691.1407(5), a legislator may be entitled to absolute immunity. *Odom v Wayne Co*, 482 Mich 459, 479; 760 NW2d 217 (2008). MCL 691.1407(5) provides that a legislator 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 . . . legislative . . . authority." Our Supreme Court has described this language as a "grant of immunity . . . written with utter clarity." *American Transmissions, Inc v Attorney Gen*, 454 Mich 135, 143; 560 NW2d 50 (1997). The Court further stated that:

> . . . 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 141 (quotation marks and citation omitted); see also *Petipren v Jaskowski*, 494 Mich 190, 206; 833 NW2d 247 (2013).]

This list of factors is not exhaustive, and does not involve "an inquiry into a person's subjective state of mind." *American Transmissions, Inc*, 454 Mich at 143 n 10.

The parties do not dispute that Harrison Township is a charter township subject to the Charter Township Act, MCL 42.1, *et seq*. Except as otherwise provided in the act, "all legislative authority and powers of each charter township shall be vested in and shall be exercised and determined by a township board of 7 members composed of the supervisor, the township clerk, the township treasurer, and 4 trustees who shall be electors in the township." MCL 42.5(1). The township board must hold at least one regular meeting each month, and on the written request of the supervisor or two members of the board, it may call a special meeting. MCL 42.7.

[10] Neither party disputes that MCL 691.1407(5) is the applicable statute in this case.

## C. BOARD MEETINGS

Plaintiff first cites numerous instances wherein trustee defendants discussed plaintiff and the demolition incidents. However, the trustee defendants acted within their legislative authority pursuant to MCL 42.5 and MCL 42.7 when, during board meetings they discussed and voted on township business properly before the board, and when they undertook investigations of alleged township employee misconduct pursuant to votes at public meetings. See *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 575-576, 588-596; 640 NW2d 321 (2001) (holding that the township board members acted within their legislative authority under MCL 42.9 when voting to eliminate funding for a position).[11]

Plaintiff also maintains that the trustee defendants cannot claim immunity for their false accusations that plaintiff failed to cooperate with investigative committees, or their statements that plaintiff reportedly took no action on the Joy Boulevard tree-cutting incident because the township supervisor had so instructed. However, such comments occurred at board meetings, in the investigatory committee's report, and at the township offices. We conclude that plaintiff has failed to create a genuine issue of material fact regarding whether the trustee defendants' statements and conduct in investigating the tree cutting, including the interview of plaintiff at the township offices and their conduct at board meetings, were outside the scope of their legislative authority. MCL 691.1407(5); MCL 42.5; MCL 42.7. The circuit court properly dismissed plaintiff's contentions.[12]

## D. SUSPENSION OF PLAINTIFF

Concerning the trustee defendants' vote to suspend plaintiff on July 28, 2008, we agree with the trial court that defendants were acting within the scope of their legislative authority and were entitled to immunity. MCL 691.1407(5). The relevant portion of the July 28th board meeting minutes reflect an announcement by defendant Ulinski that he filed a complaint with the Michigan Judicial Tenure Commission and other law enforcement agencies regarding the removal of the tree next to Judge Chrzanowski's house. Defendant Ulinski moved to convene an investigative committee to review the facts of the case and produce recommendations to prevent future abuses of authority by any township official, and to suspend the plaintiff without pay. A vote was taken, resulting in plaintiff's suspension with pay.

---

[11] Plaintiff asserts that many discussions occurred privately, citing York's testimony where he recalled private discussions regarding the tree removal. However, York's deposition offers no factual context for such conversations, and it remains entirely unclear whether this conversation or others occurred in the workplace or in the course of defendants' efforts to gather information to present at a board meeting. Therefore, plaintiff has failed to establish a genuine issue of material fact regarding whether such conversations occurred beyond the scope of legislative authority. MCL 691.1407(5).

[12] We note that plaintiff's arguments, based on an unpublished case involving the township, that there is no governmental immunity for 42 USC § 1983 claims is not relevant for this appeal, as plaintiff did not assert a § 1983 claim in his initial complaint.

Plaintiff's suspension occurred by virtue of a vote at a board meeting, which is directly within the township board's authority. See MCL 42.7 (delineating voting procedures for the township board); *American Transmissions, Inc*, 454 Mich at 141 (one factor to consider is "the nature of the specific acts alleged"). Plaintiff, however, relies on MCL 42.10(n), which states that the township supervisor has the authority "[t]o assume all the duties and responsibilities as personnel director of all township employees or delegate such duties to some other officer or employee." Yet, nowhere does the Charter Township Act specifically vest the township supervisor with the sole authority to fire an employee, without board approval.[13] While the township supervisor is the executive officer, MCL 42.5(2) does not grant him special voting powers, but provides that he shall have an "equal voice and vote in the proceedings of the board."

Further, the Charter Township Act frequently vests personnel decisions in the township board. See e.g., MCL 42.11a ("in addition to the supervisor, the charter township board may provide for the appointment of assessors[.]"); MCL 42.10 ("[t]he township board in each charter township shall have power to appoint a township superintendent[.]"). MCL 42.15 also grants the township board the broad authority to "enact such ordinances as may be deemed necessary to provide for the public peace and health and for the safety of persons and property therein[.]" See *American Transmissions, Inc*, 454 Mich at 141 (the "structure and allocation of powers" is a relevant consideration when determining whether particular acts are within the actor's authority). Moreover, though addressing permanent removal of a position, this Court recognized in *Armstrong*, 248 Mich App at 590, that "it is manifest that M.C.L. § 42.9 allows a township board to abolish a position within township government as long as the position is not the clerk or the treasurer."

Plaintiff's reliance on the CBA likewise is unavailing. The CBA states that "[t]he Employer agrees that all disciplinary action . . . will be taken on the basis of just cause." As the township supervisor is referred to specifically, employer refers to the township. While the CBA also refers to the township supervisor meeting with an employee to determine whether the employee violated established rules of conduct, the qualifying language is if the township supervisor "requires a meeting," making it a discretionary action that does not appear to limit the power of the board.[14] Thus, we agree with the trial court that defendants were acting within the scope of their authority when voting to suspend plaintiff.

---

[13] We also take note of an attorney general opinion, which states that "a township supervisor, in the absence of a township ordinance or delegation of authority of the township board, may not unilaterally terminate the employment of a township employee without the prior approval of the township board." OAG, 1981-1982, No 5939, pp 277-278 (August 3, 1981). "[O]pinions of the Attorney General are not binding on courts as precedent." *Danse Corp v City of Madison Hts*, 466 Mich 175, 182 n 6; 644 NW2d 721 (2002).

[14] We note that plaintiff refers to pages in York's deposition that were not admitted in the lower court nor attached on appeal.

## E. *The Macomb Daily* ARTICLE & JTC COMPLAINT

Plaintiff next avers that the trustee defendants did not enjoy immunity when submitting defamatory information to third-parties, namely the submission of information to *The Macomb Daily*. *The Macomb Daily* published an article on July 29, 2008, mentioning that a "Harrison Township elected official has filed a complaint" with the JTC "accusing a Macomb County Circuit Court judge with misconduct, including abuse of power, bribery and conflict of interest," and "[i]n a related move, the township's Board of Trustees on Monday night voted 4-3 to immediately suspend their building department director for actions he took involving complaints relating to the judge and her property." In another article on August 28, 2008, the newspaper stated that the JTC "has opened an investigation into allegations of misconduct" filed against the judge, and at a township board meeting "township officials were discussing the suspension of their building director, who is involved in the controversy."

Plaintiff presented deposition testimony of defendant Ulinski, who admitted that before the board meeting on July 28, 2008, he visited the offices of *The Macomb Daily* to provide copies of the JTC complaint to a reporter. Unlike *American Transmissions*, 454 Mich at 144, the record does not establish that this reporter solicited such information or that defendants were responding to media inquiries. The township board also did not vote to prepare the JTC complaint nor authorize the submission of this information to the newspaper. We find no statutory support, or other relevant ordinances or laws, to suggest this behavior was "within the scope of . . . legislative . . . authority." MCL 691.1407(5). While defendants were free to report stories for the newspapers, they did so in this case as private citizens, not within their official capacity as township board members. We agree with plaintiff that there exists a genuine issue of material fact regarding whether the submission of the JTC complaint and affidavits to *The Macomb Daily* amounted to a defamatory act outside of the scope of legislative immunity. *American Transmissions, Inc*, 454 Mich at 141.[15]

## F. NEWSLETTERS

Plaintiff also argues that the trustee defendants were not acting within their legislative authority when they circulated and funded private newsletters within the township. Plaintiff submitted two copies of *The Harrison Township Newsletter*, which were "Paid for and Published by Citizens for Responsive and Ethical Government" (CREG), an independent political action committee founded by defendant Ulinski. The two newsletters detail allegations against the

[15] Plaintiff further argues that defendant Ulinski does not possess immunity for comments regarding plaintiff's insubordination, which appeared in "the *Journal*" on August 31, 2005. As plaintiff did not attach the article in response to defendant's motion for summary disposition, we cannot engage in a detailed analysis of this claim. Even assuming that the behavior was not privileged, such comments were made outside the one-year limitations period for an action charging libel or slander, MCL 600.5805(9), and the three-year period applicable to plaintiff's other tort claims. MCL 600.5805(10).

township supervisor, including that he instructed township employees not to investigate the cutting of trees and destruction of wetland on Joy Boulevard.

Plaintiff has established a genuine issue of material fact regarding whether defendants acted within their legislative authority in contributing to the publication of these newsletters. The trustee defendants have not shown that the publication of the newsletters pertained to their legislative duties or were in response to media inquiries. *American Transmissions*, 454 Mich at 144.[16] Consequently, we agree with plaintiff that there is a question of fact regarding whether defendants were acting within their legislative authority in any contributions to such newsletters. MCL 691.1407(5).

## VII. MOTIONS TO AMEND COMPLAINT

### A. STANDARD OF REVIEW

Plaintiff also challenges the circuit court's denial of two motions to amend his complaint. "The grant or denial of a motion for leave to amend pleadings is reviewed for an abuse of discretion." *Titan Ins v North Pointe Ins*, 270 Mich App 339, 346; 715 NW2d 324 (2006). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

### B. ANALYSIS

Generally, a motion to amend a complaint "should be denied only for the following particularized reasons: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the amendment." *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). "An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Id.*

Plaintiff initially filed his 16-page complaint on January 29, 2009. He asserted the following eight claims: (I) violation of the CRA; (II) violation of the WPA; (III) tortious interference with a business opportunity; (IV) defamation; (V) abuse of process; (VI) concert of action; (VII) civil conspiracy; and (VIII) intentional infliction of emotional distress.

Approximately 17 months later, plaintiff filed a motion to amend the complaint under MCR 2.118, proposing an 83-page complaint. Significant factual allegations were added and plaintiff no longer asserted intentional infliction of emotional distress, but added a claim of invasion of privacy. While plaintiff claimed that he wished to add theories of liability, including 42 USC § 1983, he only mentioned that statute one time in the fact section of the proposed amended complaint, and did not assert it as a separate count. Defendants responded that the

[16] There is no allegation or indication that these newsletters were being published pursuant to MCL 42.8.

amendments would be futile, as they were not liable under these theories. They also contended that they would experience prejudice, as the case would have to be resubmitted to case evaluation and they would have to conduct further discovery.

On September 16, 2010, over 19 months after the initial complaint was filed and after defendants filed an answer to plaintiff's motion to amend the complaint, plaintiff filed a supplemental brief in support of his motion to amend the complaint. He claimed that he had "mistakenly attached a draft of the proposed complaint to the original motion." He then attached a 106-page complaint, which no longer alleged concert of action but included a claim under 42 USC § 1983. This new complaint also omitted a claim for intentional infliction of emotional distress. In denying defendant's motion to amend the complaint, the court found that because this case was from 2009 and had already gone through case evaluation, the motion to amend was denied.

While the trial court's reasons are consistent with a finding of undue delay, "delay, alone, does not warrant denial of a motion to amend." *Decker v Rochowiak*, 287 Mich App 666, 682; 791 NW2d 507 (2010) (quotation marks, brackets, and citation omitted). Delay justifies denying a motion to amend "if the delay was in bad faith or if the opposing party suffered actual prejudice as a result." *Weymers v Khera*, 454 Mich 639, 659; 563 NW2d 647 (1997). The trial court made no specific findings regarding bad faith or any prejudice defendants would suffer by virtue of an amendment, and we have recognized that a "trial court should specifically state its reason for denying a motion to amend on the record." *Franchino v Franchino*, 263 Mich App 172, 190; 687 NW2d 620 (2004). Thus, we remand for the trial court to specify its findings regarding prejudice or bad faith.[17]

However, the trial court did not abuse its discretion in denying plaintiff's second motion to amend the complaint. On February 11, 2011, plaintiff filed a motion to amend the complaint relying on MCR 2.116(I)(5).[18] Plaintiff reintroduced his claim for intentional infliction of

[17] Regardless of the trial court's ruling on remand, plaintiff's claims under the CRA, the WPA, and intentional infliction of emotional distress are dismissed. In regard to concert of action, abuse of process, conspiracy, and tortious interference with a business opportunity, the trial court made statements indicative of a finding that plaintiff failed to state a claim contrary to MCR 2.116(C)(8). Because the trial court's decision regarding whether to allow the amended complaint would render any analysis of MCR 2.116(C)(8) premature, we decline to address this alternative basis for dismissal.

[18] Plaintiff states that the standard under MCR 2.116(I)(5) is "much stronger and favorable" to the moving party than the standard under MCR 2.118, as MCR 2.116(I)(5) states the court: "shall give the parties the opportunity to amend." However, he omits the full language of MCR 2.116(I)(5), which states: "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." We have recognized that denial based undue delay and prejudice is likewise applicable to MCR 2.116(I)(5). See *Boylan v Fifty Eight LLC*, 289 Mich App 709, 727-728; 808 NW2d 277 (2010). Plaintiff also provided no support for his conclusory

emotional distress. Consistent with his first motion to amend the complaint, he also proposed claims for invasion of privacy and a violation of 42 USC § 1983. Plaintiff, for the first time, proposed new claims of a violation of the Open Meetings Act, MCL 15.261 *et seq.*, and gross negligence. In denying plaintiff's motion, the trial court held as follows:

> The Court finds Plaintiff's request to amend is appropriately denied on the basis of undue delay, prejudice against Defendants, and futility. The prejudice that would result if the Court were to allow an amendment is significant: discovery would have to be reopened, Case Evaluation has already occurred, the parties participated in a court-ordered Facilitation at the Resolution Center, and motions for summary disposition have been filed and argued. . . .

The trial court's ruling was not outside the range of principled and reasonable outcomes. *Smith*, 481 Mich at 526. As the trial court found, plaintiff attempted to assert new claims on the basis of the same set of facts, after discovery had closed, after case evaluation and facilitation, and after summary disposition motions had been heard. See *Weymers*, 454 Mich at 659-660 (factors like whether the plaintiff is seeking "to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial," support a finding of prejudice). Thus, the trial court did not abuse its discretion in denying plaintiff's motion to amend because of undue delay and the prejudice defendants would have experienced.

## VIII. VICARIOUS LIABILITY

Lastly, we note that plaintiff has raised no specific challenge to the dismissal of the township from the lawsuit, and fails to even mention vicarious liability or any arguments in support. Accordingly, plaintiff has waived this issue for purposes of appeal. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) ("It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court.").

## IX. CONCLUSION

While the trial court erred in granting summary disposition based on failure to exhaust administrative remedies, it properly dismissed plaintiff's CRA, WPA, and intentional infliction of emotional distress claims. Further, while governmental immunity protected the trustee defendants' actions at board meetings and the suspension of plaintiff, it did not apply to submission of information to *The Macomb Daily* or newsletters. Because the trial court failed to make specific findings regarding prejudice based on plaintiff's first motion to amend the complaint, remanding is necessary. Lastly, plaintiff has abandoned any challenge to the township's dismissal from this lawsuit.

---

assertion that defendants' late filing of the motion for summary disposition triggered the automatic right to amend.

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

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray
/s/ Michael J. Riordan