STATE OF MICHIGAN

COURT OF APPEALS

BYRON J KONSCHUH,

Plaintiff/Counter-Defendant-Appellant,

v

TIM TURKELSON, JOHN MILLER, DANA MILLER, JOHN BISCOE, CAILIN WILSON, and LAPEER COUNTY,

Defendants/Counter-Plaintiffs/Third Party Plaintiffs-Appellees,

and

FACEBOOK,

Third-Party Defendant.

UNPUBLISHED
July 23, 2020

No. 349041
Lapeer County Circuit Court
LC No. 17-050850-CL(H)
Oakland County Circuit Court
LC No. 17-SC0045-SC

Before: RIORDAN, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's opinion and order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) (governmental immunity), MCR 2.116(C)(8) (failure to state a claim for relief), and MCR 2.116(C)(10) (no genuine issue of material fact). We affirm.

I. BACKGROUND

This case arises out of a political scandal-turned-legal battle in Lapeer County, locally referred to as "donut gate." The trouble began shortly after plaintiff was appointed to fill a vacancy on the Lapeer County Circuit Court in April 2013. Prior to taking the bench, plaintiff served as the county prosecutor for about 13 years. Defendant Tim Turkelson was appointed to fill plaintiff's vacated position as Lapeer County prosecutor, and Turkelson, in turn, hired defendant John Miller as Chief Prosecuting Attorney.

In November 2013, Turkelson and John Miller noticed that approximately $1,802 was missing from the BounceBack and Law Enforcement Officers Regional Training Commission ("LEORTC") programs.[1] Plaintiff was fully cognizant of how to properly claim reimbursements and did not have issues with it in the past. John Miller asked the Lapeer County Treasurer, defendant Dana Miller (John Miller's wife), if the missing money had been deposited into a Lapeer County bank account. Dana Miller contacted the bank and was informed that the checks had been deposited into plaintiff's bank account. Turkelson also reported the missing money to the County Administrator, defendant John Biscoe, and contacted the Prosecuting Attorneys Association of Michigan for advice. The association contacted the office of the Michigan Attorney General (AG) and an investigation ensued.

The AG's office appointed special prosecutor Deana Finnegan to investigate and the Michigan State Police (MSP) assigned Sergeant Mark Pendergraff as investigator. The investigators first interviewed each of the defendants. Pendergraff obtained plaintiff's bank records and discovered that plaintiff had deposited checks made out to "Lapeer County Prosecutor" or "Lapeer County Prosecuting Attorney" into his personal accounts and accounts belonging to his children. Some of those checks related to the BounceBack program and some to the LEORTC program for training that plaintiff did not do. In addition, defendant Cailin Wilson, an assistant prosecuting attorney, produced a letter signed by plaintiff in which he requested the prosecutor's office be reimbursed for Cailin Wilson teaching a LEORTC session. Plaintiff maintained that the letter was forged, but did not dispute that he received the checks and deposited the money into his personal bank account.[2]

The Lapeer County Circuit Court Chief Judge put plaintiff on paid administrative leave while the investigation progressed. In July 2014, Finnegan charged plaintiff with five counts of felony embezzlement over $50 by a public official in violation of MCL 750.175.

Finnegan and plaintiff agreed to submit the case to mediation where they reached a plea agreement. On March 8, 2016, pursuant to the agreement, Genesee County Circuit Court Judge Geoffrey Neithercut dismissed the felony charges pending against plaintiff and plaintiff pleaded no contest to one misdemeanor accounting violation, MCL 750.485. Plaintiff also signed a stipulation conceding "that there may be an interpretation of MCL 21.44 that supports the argument that [plaintiff] should have reported the collection of [the funds at issue] to the State or

[1] The BounceBack Program was a pretrial diversion type program where bad check cases were referred to BounceBack, a private company, for collection rather than prosecuting each and every one of the cases. In return for the referral, the Lapeer County Prosecutor's Office was paid $5.00 per referral. LEORTC was a training program whereby various employees of the prosecutor's office conducted training for law enforcement officers.

[2] Plaintiff testified during his deposition that he cashed the checks as reimbursement for the personal money he had spent on office expenses such as parking fees, coffee, water, donuts, flowers, and lunches for his staff—hence the name "donut gate."

other appropriate entity for accounting purposes."[3] Plaintiff was given a delayed sentence and after 90 days the charge was dismissed and he returned to the bench. He filed this suit on May 15, 2017.[4]

In his complaint, plaintiff alleges that defendants conspired to have him investigated and prosecuted in order to have him removed from the bench. Plaintiff alleges malicious prosecution pursuant to MCL 600.2907 (Count I), abuse of process (Count II), invasion of privacy (Count III), libel/slander (Count IV), tortious interference with a contract/business expectancy (Count V), gross negligence (Count VI), federal constitutional First Amendment violations (Count VII), federal constitutional equal protection violation (Count VIII), and a federal constitutional Fourth Amendment violation. Defendants filed a counterclaim alleging conversion (Count I), breach of fiduciary duty (Count II), defamation (Count III), civil conspiracy (Count IV).

The parties submitted cross-motions for summary disposition under MCR 2.116(C)(7) (immunity granted by law), (C)(8) (failure to state a claim) and (C)(10) (no genuine issue of material fact). Defendants argued they were acting within their professional capacity or capacity as witnesses to report plaintiff's actions, and that in pleading no contest to the charges in criminal suit plaintiff waived any claim to damages in a civil suit. Plaintiff argued that his reputation was damaged due to the false accusations of embezzlement, and that defendants touted the check deposits (a routine, office-wide practice) as a crime in retaliation for plaintiff—and not Turkelson—being appointed to the bench. Plaintiff also alleges that Turkelson was further irked that plaintiff publicly criticized Turkelson's appointment of John Miller to prosecute DUIs because John Miller himself had three DUI convictions.

The trial court granted defendants' motion for summary disposition.[5] Plaintiff now appeals and argues that the trial court committed error requiring reversal when it dismissed his complaint.

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[3] MCL 21.44 sets forth the duty of county officials to make annual financial reports.

[4] In addition to this civil suit, two years after entering his plea, plaintiff filed a three-part motion seeking to withdraw his plea. In part, plaintiff sought a declaration that the funds at issue were not "public monies" within the meaning of the statute, MCL 750.175. The circuit court declined to make such a finding, and denied the motion.

Additionally, the Judicial Tenure Commission (JTC) filed a formal complaint regarding the embezzlement, plaintiff's conduct during the investigation into the embezzlement, and plaintiff's involvement in a campaign that unseated Turkelson as prosecutor. The Supreme Court appointed a master to hear the case. The master issued a report, but the JTC has not taken any action, nor has the Supreme Court. During oral arguments, the parties attempted to introduce facts contained in the master's report, which was not briefed and was not part of the lower court record. In addition to the master's findings being a preliminary determination that is not binding on this Court, the findings contained in the report are not relevant to the issues on appeal. Therefore, we will not consider the master's report.

[5] The trial court also granted plaintiff's motion for summary disposition of all the counts in defendants' counterclaim. Defendants have not appealed that ruling.

However, plaintiff expressly abandons his claims of tortious interference and abuse of process.

II. STANDARD OF REVIEW

We review de novo a trial court's decision regarding a motion for summary disposition. *City of Fraser v Almeda Univ*, 314 Mich App 79, 85; 886 NW2d 730 (2016). Summary disposition is appropriate under MCR 2.116(C)(7) if the claims are barred because of immunity granted by law. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). A motion brought pursuant to MCR 2.116(C)(7) may be supported with affidavits, depositions, admissions, or other documentary evidence, the substance of which would be admissible at trial. *Id*. The contents of the complaint are accepted as true unless contradicted by the evidence provided. *Id*.

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, and should be granted when the complaint fails to state a claim upon which relief can be granted. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). When deciding a motion brought under MCR 2.116(C)(8), we consider only the pleadings, and all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Id*.

A motion under MCR 2.116(C)(10) should be granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law after a review of all the pleadings, admissions, and other evidence submitted by the parties, viewed in the light most favorable to the nonmoving party. *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 582-583; 794 NW2d 76 (2010). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Id*.

III. ANALYSIS

Plaintiff makes several claims of error. We consider each one in turn and reject all claims.

A. FIRST AMENDMENT

Plaintiff first argues that the trial court improperly concluded that defendants[6] were entitled to qualified immunity from plaintiff's claim that defendants violated his First Amendment rights under the United States Constitution. We disagree with plaintiff.

Qualified immunity is a recognized defense against claims for damages under 42 USC

[6] The trial court dismissed plaintiff's federal claims under 42 USC 1983 against Lapeer County related to the First Amendment, equal protection, and Fourth Amendment because he did not identify a county policy or custom that violated his constitutional rights. Plaintiff does not contest this conclusion on appeal. As to plaintiff's claims of malicious prosecution (state and federal), defamation, invasion of privacy, plaintiff alleges that defendants acted intentionally and with malice. Because governmental employers cannot be held vicariously liable for the intentional tortious acts of their employees, *Payton v Detroit*, 211 Mich App 375, 393; 536 NW2d 233 (1995), Lapeer County is entitled to immunity on all counts. Therefore, "defendants" hereinafter refers only to the individuals named in the complaint.

1983 ("§ 1983") for alleged violations of federal rights. *Morden v Grand Traverse Co*, 275 Mich App 325, 340; 738 NW2d 278 (2007). "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Holeton v City of Livonia*, 328 Mich App 88, 102; 935 NW2d 601 (2019) (internal quotation marks and citations omitted). When a defendant asserts qualified immunity, the burden is on the plaintiff to demonstrate that the defendant is not entitled to it. *Lavigne v Forshee*, 307 Mich App 530, 542; 861 NW2d 635 (2014). To defeat a claim of qualified immunity, the plaintiff must be able to establish two elements; first, that the facts as alleged make out a violation of a constitutional right and, second, that such a constitutional right was clearly established at the time of the alleged misconduct. *Holeton*, 328 Mich App at 102. To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right. *Reichle v Howards*, 566 US 658, 664; 132 S Ct 2088; 182 L Ed 2d 985 (2012). Existing precedent must have placed the statutory or constitutional question beyond debate. *Id*.

The First Amendment prohibits government officials from subjecting an individual to retaliatory actions for speaking out. *Hartman v Moore*, 547 US 250; 126 S Ct 1695, 1698; 164 L Ed 2d 441 (2006). The Petition Clause of the First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." The protections provided by the First Amendment, including the Petition Clause, have been extended to the states by the Fourteenth Amendment. *J & J Const Co v Bricklayers and Allied Craftsmen, Local 1*, 468 Mich 722, 729; 664 NW2d 728 (2003), citing *Whitehill v Elkins*, 389 US 54, 57; 88 S Ct 184; 19 L Ed 2d 228 (1967).

Plaintiff fails to cite to any existing caselaw in support of his position that he has a clearly established right to file a complaint and to be free from the threat of a countercomplaint. First Amendment protection generally does not extend to protect a frivolous lawsuit filed purely for a retaliatory purpose. *BE & K Const Co v NLRB*, 536 US 516, 528; 122 S Ct 2390; 153 L Ed 2d 499 (2002). However, this "sham litigation" exception is inapplicable here. Rather, the United States Supreme Court has noted that ill will is not uncommon in litigation, and animus alone is insufficient to find a retaliatory motive. *Id*. at 534.

> Disputes between adverse parties may generate such ill will that recourse to the courts becomes the only legal and practical means to resolve the situation. But that does not mean such disputes are not genuine. As long as a plaintiff's *purpose* is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and subjectively. [*Id*. (emphasis in original).]

Plaintiff's reliance on *Gable v Lewis*, 201 F3d 769 (CA 6, 2000), is misplaced. First, it is not binding on this Court. *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004) (state courts are bound by the decisions of the United States Supreme Court construing federal law, but there is no similar obligation with respect to decisions of the lower federal courts). Second, it is not persuasive because it considered an issue which does not arise in this case: the applicability of the "public concern" test where the plaintiff operated a towing company and alleged that a government official removed her from the state highway patrol's towing referral list in retaliation for her filing a discrimination complaint. *Gable*, 201 F3d at 773.

In this case, the issue is best framed as whether the First Amendment prohibits a countercomplaint in retaliation for filing of a complaint. As previously stated, there is no controlling caselaw indicating that countersuing is a violation of a "clearly established" constitutional right. Further, animus alone is insufficient to find a retaliatory motive. *BE & K Const Co*, 536 US at 528. Moreover, plaintiff does not argue that the allegations in the counterclaim are frivolous, but rather he claims that defendants were motivated by revenge in their otherwise legitimate filing. See *Professional Real Estate Investors, Inc v Columbia Pictures Industries, Inc*, 508 US 49, 60; 113 S Ct 1920; 123 L Ed 2d 611 (1993) (in determining whether litigation is a "sham" undeserving of First Amendment protection, "[o]nly if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation"). Thus, plaintiff's claim of error is without merit.

B. FEDERAL MALICIOUS PROSECUTION

Plaintiff next argues that his federal claim of malicious prosecution was improperly dismissed on summary disposition because the criminal charges against him were dismissed with prejudice. We disagree.

A claim of malicious prosecution under § 1983 is premised on a violation of the Fourth Amendment. *Radu v Herndon & Herndon Investigations, Inc*, 302 Mich App 363, 389; 838 NW2d 720 (2013). To sustain a claim of malicious prosecution under § 1983, a plaintiff must show that (1) defendant influenced or participated in the decision to prosecute the plaintiff; (2) there was a lack of probable cause for the criminal prosecution; (3) as a consequence of the legal proceeding, the plaintiff suffered a deprivation of liberty apart from the initial seizure; and (4) the criminal proceeding must have been resolved in the plaintiff's favor. *Id*. at 389–390, citing *Sykes v Anderson*, 625 F3d 294, 308–309 (CA 6, 2010).

Similarly, the tort of malicious prosecution under state law requires a showing that (1) the defendant initiated a criminal prosecution against the plaintiff, (2) the criminal proceeding was resolved in the plaintiff's favor, (3) the person who maintained the prosecution lacked probable cause, and (4) "the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice." *Matthews v Blue Cross & Blue Shield of Mich*, 456 Mich 365, 378; 572 NW2d 603 (1998). Thus, Michigan law includes a malice element not included in a malicious prosecution claim under § 1983. Notably, a plaintiff is required to present some evidence that the impact of a defendant's misstatements and falsehoods in their investigation extended beyond the plaintiff's initial arrest and ultimately influenced the plaintiff's continued detention. *Sykes*, 625 F3d at 316.

In his second amended complaint, plaintiff alleges a claim of malicious prosecution pursuant to MCL 600.2907 in Count I.[7] In Count IX, plaintiff alleges a Fourth Amendment

[7] Plaintiff's state law claim fails because there was no genuine issue of material fact regarding probable cause. Plaintiff challenges the dismissal of that claim on appeal, but fails to properly brief the issue, and therefore, he has abandoned it. See *infra*, Issue VII.

Violation "by perpetrating the malicious prosecution," but fails to mention § 1983, "which is the exclusive remedy for alleged federal constitutional violations, including those pertaining to the deprivation of due process under the Fourteenth Amendment[.]" *Khan v City of Flint*, 490 Mich 851; 800 NW2d 600 (2011). Here, the trial court correctly concluded that there was no evidence to support the elements of the claim, as required by MCR 2.116(C)(10).

First, plaintiff cannot show that defendants influenced or participated in the decision to prosecute him. The criminal charges were brought pursuant to an investigation by the MSP and AG. There is no evidence that Finnegan relied on the allegedly false evidence supplied by defendants rather than evidence gathered during the course of the independent investigation. *Walsh v Taylor*, 263 Mich App 618, 634 n 10; 689 NW2d 506 (2004) ("the prosecutor's exercise of his independent discretion in initiating and maintaining a prosecution is a complete defense to an action for malicious prosecution"); *Matthews*, 456 Mich at 385 ("Unless the information furnished [to the prosecutor] was known by the giver to be false and *was the information on which the prosecutor acted*, the private person has not procured the prosecution.") (emphasis in original).[8] Finnegan testified at her deposition that she decided to charge plaintiff with five felonies after Sergeant Pendergraff gave her volumes of information related to his investigation. Finnegan further testified that she did not speak to any of the defendants prior to filing the charges or rely on information from them in any way when deciding to charge plaintiff, and that her decision to prosecute plaintiff was based entirely on her belief that plaintiff embezzled public money.

Second, plaintiff cannot show that there was a lack of probable cause. Want of probable cause is a question of law to be determined by the court. *Matthews*, 456 Mich at 381. Probable cause is an objective standard which is met if a reasonable mind would believe in the guilt of the accused. *Id.* at 387-389. In the criminal proceedings, plaintiff stipulated that the monies at issue could be interpreted to be "public monies" such that his failure to report the funds at issue violated his obligations under MCL 21.44. Specifically, plaintiff stipulated that there may be an interpretation of MCL 21.44 that "supports the argument that he should have reported the collection of [the] funds to the State or other appropriate entity . . . ." Plaintiff argues that we must now reject that definition and apply an alternative interpretation of "public monies." When plaintiff was bound over on the felony charges, the district court found that there was probable cause to conclude that plaintiff violated MCL 750.175 because the funds at issue were "public

[8] Plaintiff contends that *Bunkley v City of Detroit*, 902 F3d 552 (CA 6, 2018), which states that defendants "initiated" a criminal prosecution if they provided false facts, or omitted key facts, that the prosecuting attorney relied upon to initiate the prosecution is controlling case law. In *Bunkley*, the plaintiff brought a claim for malicious prosecution after he was wrongly convicted of attempted murder. He was convicted despite having a strong alibi which was disregarded after a police investigator lied to the prosecutor and gave false testimony at trial. The plaintiff petitioned for post-conviction relief and submitted evidence confirming his alibi. The court granted the petition after plaintiff had served two years of his sentence. 902 F3d 552. However, that decision is not binding on this Court, *Abela*, 469 Mich 606, and it is unpersuasive because it considered a police investigator's qualified immunity from a claim of malicious prosecution—not the elements of a malicious prosecution claim. *Bunkley*, 902 F3d at 563.

monies." Plaintiff's argument on appeal is merely an invitation for us to review the trial court's statutory interpretation of the relevant provisions and make a contrary finding. Plaintiff's earlier attempt to unwind his plea was rejected by the circuit court, and there is no reason for us to reconsider the issue in this appeal.

Next, plaintiff cannot show that as a consequence of the legal proceeding, he suffered a deprivation of liberty apart from the initial seizure on the charges. The trial court made no finding on this element, and plaintiff does not raise it on appeal. The complaint only alleges a "seizure" of plaintiff's bank account information. Plaintiff does not allege any deprivation beyond this initial seizure, and therefore, he has not met his burden to establish this element. *Radu*, 302 Mich App at 391.

Plaintiff also cannot show that the criminal proceedings terminated in his favor when he entered a plea of no contest. See *Cox v Williams*, 233 Mich App 388, 392; 593 NW2d 173 (1999) (whether a proceeding terminated in favor of the plaintiff is a mixed question of law and fact; a proceeding is terminated in favor of an accused when its final disposition suggests that the accused is innocent). Plaintiff contends that his no contest plea is the equivalent to a plea of "not guilty." Although a no-contest plea is not treated as an admission of guilt in Michigan, *Lichon v American Universal Ins Co*, 435 Mich 408, 428; 459 NW2d 288 (1990), it does not suggest innocence. Moreover, plaintiff's no-contest plea was entered pursuant to an agreement, and therefore, it does not amount to a favorable termination. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 21; 672 NW2d 351 (2003) (a "dispositive stipulation" dismissing criminal charges is not a favorable termination of proceedings for a claim of malicious prosecution).

Accordingly, the trial court properly granted summary disposition in favor of defendants and dismissed plaintiff's claim of federal malicious prosecution.

C. EQUAL PROTECTION

Plaintiff argues that the trial court improperly granted summary disposition in favor of defendants and dismissed his claim that defendants violated his federal constitutional right to equal protection. We disagree.

We review de novo constitutional questions such as whether a party was denied equal protection under the law. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). The equal protection clause of the United States constitution provides that no person shall be denied the equal protection of the law, and requires that all persons similarly situated be treated alike under the law. *Lima Twp v Bateson*, 302 Mich App 483, 503; 838 NW2d 898 (2013); US Const, Am XIV. "To be considered similarly situated, the challenger and his comparators must be prima facie identical in all relevant respects or directly comparable in all material respects." *Lima*, 302 Mich App at 503 (cleaned up). "A 'class of one' may initiate an equal protection claim by alleging that he or she 'has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.' " *Id.* quoting *Village of Willowbrook v Olech*, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000). The rational-basis inquiry is highly deferential, and a challenger must negate every conceivable reason for the government's actions or show that the actions were motivated by

animus or ill-will. *People v James*, 326 Mich App 98, 106–07; 931 NW2d 50 (2018).[9] However, in cases of "selective enforcement" of criminal laws, a plaintiff must show that he was singled out for prosecution while others similarly situated were not prosecuted for the same conduct, and that the discriminatory selection was based on an impermissible ground such as race, sex, religion, or the exercise of a fundamental right. *In re Hawley*, 238 Mich App 509, 513; 606 NW2d 50 (1999), citing *People v Ford*, 417 Mich 66, 102; 331 NW2d 878 (1982).

Plaintiff alleges that he was singled out for prosecution, while other, similarly situated county employees and public officials in the Lapeer County Prosecutor's Office embezzled public monies and were not reported, investigated, or prosecuted. However, plaintiff does not allege or provide evidence that this disparate treatment was discriminatory selection based on an impermissible ground. Rather, he alleges that the criminal prosecution was intended "just to destroy him and/or get him off the bench, including [sic] so that [Turkelson] could become judge." Thus, plaintiff's claim was properly dismissed.

D. DEFAMATION

Plaintiff argues that defendants defamed him under MCL 600.2911(1), and that the trial court committed error requiring reversal when it concluded that the alleged defamatory statements were either substantially true or nonactionable opinions. We disagree.

Whether a statement is actually capable of defamatory meaning is a preliminary question of law for the court to decide. *Ghanam v Does*, 303 Mich App 522, 544; 845 NW2d 128 (2014). The elements required for a defamation claim are: "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Lakin v Rund*, 318 Mich App 127, 133; 896 NW2d 76 (2016), citing *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005). If the plaintiff is a public official or public figure, then the plaintiff must prove by clear and convincing evidence that the defendant made the statement with actual malice. *Ghanam*, 303 Mich App at 544.

Plaintiff alleges that John Miller wrote a letter to the editor of the Lapeer County Press on August 13, 2017, and falsely accused plaintiff of embezzlement stating:

> Had I been the prosecutor who charged Konschuh with five counts of felony embezzlement I would have convicted him at trial. And that would have resolved this whole mess over a year ago. Konschuh expensed doughnuts, lunches and even $3 parking receipts. Taxpayers already paid for those minor luxuries yet he now tries to mislead the public into thinking he took the money to pay himself back?!? YOU DON'T NEED A LAW DEGREE TO UNDERSTAND THAT KIND OF

[9] Rational-basis scrutiny applies because the disparate treatment of criminal offenders does not impinge on an individual's fundamental rights. *People v Sadows*, 283 Mich App 65, 65; 768 NW2d 93 (2009).

EMBEZZLEMENT.

Plaintiff further alleges that Turkelson falsely stated in his campaign literature that plaintiff was "prosecuted for stealing money" and that he "took 53 checks from [Lapeer County]."

Defendants' statements were substantially true, particularly in light of plaintiff's nolo contendere plea. Minor inaccuracies of expression are not determinative as long as the allegedly defamatory statement is true in substance. *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 258; 487 NW2d 205 (1992). Plaintiff was charged with five felony counts of embezzlement for receiving 42 separate checks which totaled $1,022. He pleaded no-contest to a single misdemeanor accounting violation, and testified in his deposition that some of the funds he received were reimbursements for parking fees, and purchases of donuts and lunches for his staff. To the extent that plaintiff contends the statements constituted accusations of criminal activity, those "accusations" were based substantially on facts that had already been alleged and which he pleaded to in a criminal action.

The remainder is nonactionable opinion. To be considered defamatory, statements must assert facts that are "provable as false." *Ghanam*, 303 Mich App at 545. Moreover, the context and forum in which statements appear also affect whether a reasonable reader would interpret the statements as asserting provable facts, and "[i]nternet message boards and similar communication platforms are generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact." *Sarkar v Doe*, 318 Mich App 156, 179; 897 NW2d 207 (2016), quoting *Ghanam*, 303 Mich App at 545. John Miller's comments were submitted to the Lapeer County Press' online Reader Feedback portion of the paper's opinion section, and further commented on the instant complaint. Thus, given the context and forum, a reasonable reader would interpret John Miller's comments as acerbic, critical comments by a defendant in response to the instant lawsuit, based on facts that were already public knowledge. *Id.* at 550.

Plaintiff takes issue with the trial court's statement that expressions of opinion are not actionable. Plaintiff argues that we have previously rejected the rule that statements of opinion are never actionable, and correctly notes that a statement must be "provable as false" to be actionable. *Ireland v Edwards*, 230 Mich App 607, 614; 584 NW2d 632 (1998). However, plaintiff misconstrues the trial court's statement, which was not that statements of opinion are *never* actionable. Rather, the trial court correctly considered the speculative nature of John Miller's comment, and determined that it was not "provable as false." *Id.*

Plaintiff further contends that the trial court failed to draw reasonable inferences in his favor because it relied on Turkelson's "false and phony story." Plaintiff does not elaborate, and therefore, he has abandoned this argument on appeal. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("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.").

Plaintiff contends the trial court misinterpreted the criminal proceedings by concluding that the criminal court had already determined that the funds at issue were public monies. Plaintiff points to the equivocation in his stipulation as support for his argument that no such finding or

statutory construction had been rendered. However, plaintiff's criminal case was remanded to the district court "for clarification and for a citation of the statutory basis for the Court's determination that the embezzlement funds were public monies." The opinion entered on December 19, 2014, by the district court judge analyses the pertinent statute, MCL 750.175, and concludes that the funds at issue were public monies with the meaning of the statute. Plaintiff does not dispute this interpretation on appeal with regard to this claim of error, but merely argues that it never occurred. Because the record belies this assertion, we disagree.

The trial court did not commit error requiring reversal when it granted summary disposition in favor of defendants and dismissed plaintiff's defamation claim.

E. INVASION OF PRIVACY

A claim for false-light invasion of privacy requires that (1) the plaintiff receive publicity, and (2) that the comments made are unreasonable and highly objectionable because they attribute to the plaintiff characteristics, conduct, or beliefs that are false and place the plaintiff in a false position. *Puetz v Spectrum Health Hosps*, 324 Mich App 51, 73; 919 NW2d 439 (2018) (citation omitted). If the plaintiff is a public figure, malice must be established by clear and convincing evidence. *Battaglieri v Mackinac Ctr For Pub Policy*, 261 Mich App 296, 304; 680 NW2d 915 (2004).

In addition to John Miller's letter described *supra*, plaintiff contends that he was placed in a false light by statements made by John Miller and Dana Miller during an interview with the Lapeer County Press which was published on August 27, 2017:

> "I believe they got to [Finnegan] politically," John Miller said.
>
> * * *
>
> Dana Miller says she is willing to testify under oath that she called the Shiawassee County Clerk's office and spoke to the deputy clerk about the filing.
>
> "I called, asked if I need to FOIA, she said, 'Oh I don't think so, hold on let me talk to the clerk,' "Dana Miller said. "She comes back on and say, 'No you don't need a FOIA, it's public record, here's his name, yep, he filed and withdrew on this date.' "
>
> "I said, 'Oh my God,' " Dana Miller said. "We couldn't believe that it was true."

John Miller and Dana Miller further stated that they believed plaintiff arranged for one of his associates to run against Finnegan who was up for reelection and needed to retain her position as an elected prosecuting attorney in order for her pension to vest. The Millers believe that this political pressure resulted in Finnegan offering plaintiff a plea deal, which he accepted, and a few days later, Finnegan's political opponent dropped out of the race against Finnegan.

A claim for false-light invasion of privacy is subject to the same limitations on actionability as defamation claims. *Ireland*, 230 Mich App at 624. Accordingly, plaintiff's arguments regarding John Miller's statements in his letter fail for the same reasons as discussed above.

The trial court concluded that the statements made were speculative statements and expressions of opinion because both Millers conditioned their statements with the use of the word "believe." As previously stated, a "defamatory statement must be provable as false to be actionable." *Kevorkian v Am Med Ass'n*, 237 Mich App 1, 5; 602 NW2d 233 (1999).[10]

Here, the Millers' insinuation that plaintiff extorted Finnegan to leverage a more beneficial plea deal crosses the line into the accusation of a crime. The fact that the Millers conditioned their respective statements with the disclaimer that it was merely their "belief" that plaintiff pressured Finnegan is unavailing, particularly when that belief was stated with enough certainty that Dana Miller offered to testify against plaintiff. Nor can the statements be understood as merely "rhetorical hyperbole" such that a reasonable reader would understand them to express strong disapproval rather than an accusation of a crime or actual misconduct. *Hope-Jackson v Washington*, 311 Mich App 602, 623; 877 NW2d 736 (2015). Moreover, under MCL 600.2911(1), statements imputing the commission of a crime constitute defamation per se and are actionable even in the absence of an ability to prove actual or special damages. *Id*. at 620–21.

However, "our caselaw makes clear, the First Amendment provides 'maximum protection to public speech about public figures with a special solicitude for speech of public concern.' " *Edwards v Detroit News, Inc*, 322 Mich App 1, 13; 910 NW2d 394 (2017). Moreover, a plaintiff who is a public official may only prevail in a defamation action if he or she establishes that the alleged defamatory statements were made with actual malice. *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 114; 793 NW2d 533 (2010) (citations omitted); see also MCL 600.2911(6). Actual malice is defined as knowledge that the published statement was false or as reckless disregard as to whether the statement was false; ill will, spite, or even hatred, standing alone, do not amount to actual malice. *Mino v Clio Sch Dist*, 255 Mich App 60, 73; 661 NW2d 586 (2003). Whether the evidence presented is sufficient to show actual malice is a question of law to be decided by the courts. *Ghanam*, 303 Mich App at 531–533. When a plaintiff who is a public official cannot show actual malice by clear and convincing evidence, the defendant is entitled to summary disposition. *Id.*

Plaintiff submits no evidence that the Millers knew their statements were false when they were published. Plaintiff alleges that a "simple look at the dates in which the [plea deal] was made and when a Mr. Doug Corwin filed and withdrew from the race for Shiawassee County Prosecutor would show that [d]efendants made this story up." Plaintiff points out that Finnegan testified in her deposition that she was not threatened, and further stated:

if the research had been done, [plaintiff] entered his plea on March 8th of 2016.

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[10] By way of example, compare the actionable statement, "In my opinion Mayor Jones is a liar," from the nonactionable statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin." *Ireland*, 320 Mich App at 616, citing *Milkovich v Lorain Journal Co*, 497 US 1; 110 S Ct 2695; 111 L Ed 2d 1 (1990). Direct accusations or inferences of criminal conduct are not protected and therefore are actionable. *Kevorkian*, 237 Mich App at 8. "Language that accuses or strongly implies that someone is involved in illegal conduct crosses the line dividing strongly worded opinion from accusation of a crime." *Id.*

> Doug Corwin announced he was running against me I think the first week of April of 2016 and then then realized - the county clerk called me and said that he had filed, but that he was not a qualified elector in our county for 30 days prior to the -- 30 days prior to his filing. Local attorney talked to him and said, "Doug, you're in a lot of trouble if you go through with this," and so he withdrew.

Indeed, the record indicates that pursuant to the plea agreement, at the March 8, 2016 hearing Finnegan dismissed the five counts of felony embezzlement and plaintiff entered his nolo contender plea to violating MCL 750.485. Other than Finnegan's deposition testimony detailing the timeline of events, the record contains no other evidence of her political opponent's announcement and withdrawal from the race. Plaintiff contends that such evidence is easily verifiable with a call to the Shiawassee County Clerk's Office, but has not provided any such evidence himself and relies solely on Finnegan's deposition testimony. However, Finnigan approximated the timeline, stating that her political opponent "announced he was running against me *I think* the first week of April of 2016." (Emphasis added.) According to Finnegan's approximation, the relevant events occurred within the span of three or four weeks. This does not amount to the requisite standard of clear and convincing evidence of malice. Moreover, the complaint alleges that the individual defendants "did what they did, in part at least, for their own personal reasons." (Emphasis in the complaint.) "Personal reasons," like ill will, spite, or even hatred, standing alone, do not amount to actual malice. *Mino*, 255 Mich App at 73.

Although the trial court incorrectly concluded that the statements the Millers made in their interview were merely opinion, it nonetheless reached the correct conclusion that the statements were nonactionable. "A trial court's ruling which reaches the right result, although for the wrong reason, may be upheld on appeal." *Mulholland v DEC Int'l Corp*, 432 Mich 395, 411, n 10; 443 NW2d 340 (1989). Accordingly, reversal is not required.

F. GROSS NEGLIGENCE

Plaintiff next argues that the trial court incorrectly concluded that defendants are protected by governmental immunity under MCL 691.1407 for their "gross negligence." We disagree.

Gross negligence is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). Under the governmental tort liability act (GTLA), MCL 691.1401 *et. seq*., high-ranking government officials acting within the scope of their authority are entitled to absolute immunity from tort liability and low-ranking governmental employees acting within the scope of their duties are entitled to immunity from tort liability unless their conduct constitutes gross negligence that is the proximate cause of the alleged injury. MCL 691.1407; *Odom*, 482 Mich at 479.

Plaintiff first claims that defendants are not entitled to immunity because they were not acting within the scope of their employment. However, the complaint alleges that defendants were "acting within their course and scope of said employment and/or agency by reason of the facts hereinabove stated." The contents of the complaint are accepted as true unless contradicted by the evidence provided. *Id.* at 466. Here, the evidence demonstrated that defendants reported the mismanagement of county money and cooperated with an independent investigator. In doing so, defendants were acting within the scope of their authority and in the exercise or discharge of a

government function. MCL 691.1407. As the trial court properly noted, Turkelson's statements made during his campaign were not within the scope of his employment and were not covered by governmental immunity, but were not actionable anyway.

Plaintiff next argues that the issue of gross negligence should have been submitted to a jury because there is a subjective component to the test for immunity. To be entitled to immunity, a government employee's actions must not have been malicious or executed with a wanton or reckless disregard of the rights or harm to another. *Id.* at 474-475. Plaintiff alleges in his complaint that defendants "did what they did, in part at least, for their own personal reasons," and that they breached their duty of care when they "intentionally and maliciously" stated that plaintiff stole public monies. (emphasis in complaint.) The trial court noted that there were genuine issues of material fact as to whether defendants acted in good faith and without malice. However, the trial court was not required to submit the issue to a jury because, as the trial court correctly concluded, plaintiff was not able to demonstrate that defendants' conduct was grossly negligent or that it was the proximate cause of plaintiff's injuries. Plaintiff does not challenge those conclusions on appeal, and therefore, he fails to establish that the trial court's dismissal of this claim should be reversed. See MCR 2.116(C)(10) (the trial court is required to dismiss a claim if the plaintiff is unable to establish an essential element of an otherwise proper claim).

G. STATE MALICIOUS PROSECUTION

This argument merely is a cross-reference to plaintiff's arguments regarding his federal claim for malicious prosecution. Plaintiff has not briefed the issue. Therefore, he has abandoned it. *Tyra v Organ Procurement Agency of Michigan*, 498 Mich 68, 88; 869 NW2d 213 (2015) (a failure to sufficiently brief an issue constitutes abandonment on appeal). Nonetheless, even absent the immunity the trial court correctly concluded applied to all defendants but Cailin Wilson and John Miller, plaintiff's state claim was properly dismissed because, like his federal claim for malicious prosecution, he cannot establish the elements of his state claim. "If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

IV. CONCLUSION

Plaintiff has not established a First Amendment violation because he does not have a "clearly established" constitutional right to be free from a countercomplaint, and even so, animus alone is insufficient to find a retaliatory motive. Plaintiff failed to cite § 1983 and cannot establish any of the elements for a federal claim of malicious prosecution. Under his equal protection claim, plaintiff does not allege or provide evidence to support a claim that he was singled out for prosecution based on an impermissible ground. Plaintiff's claim of alleged defamation was substantially true and nonactionable opinion, and therefore, was properly dismissed on summary disposition. Although the trial court incorrectly concluded that the statements the Millers made in their interview were merely opinion, it nonetheless reached the correct conclusion that the statements were nonactionable and reversal is not required for the plaintiff's claim of invasion of privacy. The trial court was not required to submit to a jury the plaintiff's claim of gross negligence. Finally, the plaintiff abandoned the issue of state malicious prosecution on appeal.

Accordingly, we affirm.

/s/ Michael J. Riordan
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause