

STATE OF MICHIGAN
COURT OF APPEALS

MARJORIE ONDO,

Plaintiff-Appellant,

v

JOE WILSON, ARTHUR BUSCH and
FRANK YIANNATJI,

Defendants-Appellees.

UNPUBLISHED

August 19, 1997

No. 193123

Genesee Circuit Court

LC No. 95-034171-NZ

Before: Wahls, P.J., and Taylor and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition of her claims of defamation and intentional infliction of emotional distress, pursuant to MCR 2.116(C)(7) (governmental immunity). Plaintiff also appeals the trial court's order denying her motion to amend her complaint. We affirm.

A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. This Court reviews a summary disposition determination de novo as a question of law. *Turner v Mercy Hosp*, 210 Mich App 345, 348; 533 NW2d 365 (1995).

Plaintiff argues that she has presented a material question of fact regarding whether defendants, a sheriff, prosecutor, and chief assistant prosecutor, were acting outside the scope of their authority when they called a press conference regarding possible criminal charges against plaintiff before any investigation of her had even begun. Plaintiff contends that defendants retaliated against her because she filed a complaint against a person who made a campaign contribution to defendant Frank Yiannatji.

MCL 691.1407(5); MSA 3.996(107)(5) provides:

Judges, legislators, and the elective or highest appointive executive officials of all levels of government are immune from tort liability for injuries to persons or damages to property whenever they are acting within the scope of their judicial, legislative, or executive authority.

Plaintiff alleged in her complaint that defendants were at all times acting in their official capacities when they held a press conference at which they discussed a criminal probe involving plaintiff. Under MCL 691.1407(5); MSA 3.996(107)(5), it is evident that if defendants were acting within the scope of their executive authority when conducting the acts alleged by plaintiff, then they are absolutely immune from liability for their actions, and the trial court committed no error in granting summary disposition to defendants. Plaintiff even acknowledged in her brief on appeal that if defendants are found to have been acting within the scope of their executive authority, as her complaint alleged, defendants are entitled to absolute immunity for their alleged conduct.

However, in contrast to her complaint, plaintiff now contends that defendants were not acting within the scope of their executive authority. Plaintiff initially raised this argument below in her answer and brief in response to defendants' motion for summary disposition. The trial court ruled that defendants were acting in their official capacities and within the scope of their authority as sheriff, prosecutor, and chief assistant prosecutor, respectively.

In *Marrocco v Randlett*, 431 Mich 700, 707-708; 433 NW2d 68 (1988), the Michigan Supreme Court stated that the intentional use or misuse of a badge of governmental authority for a purpose unauthorized by law is not the exercise of a governmental function. The Court further stated:

We hold that the highest executive officials of local government are not immune from tort liability for acts not within their executive authority. 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 710-711.]

The Michigan Supreme Court recently held in a unanimous opinion that the intent of a government executive is not a factor in determining whether the act was within the scope of his or her executive authority. *American Transmissions v Attorney General*, 454 Mich 135, 143; 560 NW2d 50 (1997). The Court stated it need not consider whether a malevolent-heart exception to governmental immunity is workable because the Legislature did not provide such a test. *Id.* In addition, the Court noted that its opinion in *Marrocco* did not explicitly adopt an intent exception to governmental immunity. *Id.*

We find that defendants are entitled to governmental immunity. The only significant difference is that, unlike in *American Transmissions*, here there was no pending or closed investigation when defendants held their press conference regarding plaintiff. However, even assuming defendants intentionally held their press conference before an actual investigation of plaintiff to retaliate against her for filing a complaint against Robert Eastman, we find that the trial court did not err in ruling that a press

conference was within the scope of defendants' executive authority as sheriff, prosecutor, and chief assistant prosecutor. Considering the factors under *Marrocco*, the nature of the act alleged was a press conference at which defendants discussed a criminal investigation. This is not the type of act that is outside the scope of defendants' authority to perform. The positions held by defendants primarily involve law enforcement and provide the inherent authority to hold press conferences regarding a criminal investigation. Plaintiff has not referred to any charters, ordinances, or other local law restricting this authority. In addition, the Court in *American Transmissions* held that intent of a government executive is not a motive in determining whether an act was within the scope of his or her executive authority. Therefore, there is no factual development that could lead to plaintiff's recovery on the theory that defendants were not acting within the scope of their executive authority. Accordingly, the trial court properly granted summary disposition in favor of defendants.

Plaintiff also argues that the trial court abused its discretion in denying leave to amend her complaint to remove allegations that defendants were acting within the scope of their executive authority. We disagree.

This Court reviews grants and denials of motions for leave to amend pleadings for an abuse of discretion. *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). A trial court should freely grant leave to amend if justice so requires. *Id.* Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile. *Id.*

The trial court denied plaintiff's motion to amend because it would have been futile. An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face. *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991). Plaintiff wanted to amend her complaint to remove references to allegations that defendants were acting within their executive authority, thereby alleging that defendants were not acting within their executive authority. The trial court denied the motion because it had already ruled that there was no evidence indicating that defendants were acting outside the scope of their authority.

We find that the trial court did not abuse its discretion in denying leave to amend. According to plaintiff's motion below, if the court would have granted leave to amend, plaintiff would have alleged in her complaint that defendants were acting outside the scope of their executive authority because they were seeking to punish plaintiff in retaliation for a complaint she filed against their political supporter. However, motive is not a factor to be considered in determining whether an act is beyond a government executive's authority. *American Transmissions*, *supra* at 143. Therefore, plaintiff's amendment would have been futile. Accordingly, the trial court did not abuse its discretion in denying plaintiff's motion.

Affirmed.

/s/ Myron H. Wahls
/s/ Clifford W. Taylor
/s/ Joel P. Hoekstra

