

STATE OF MICHIGAN
COURT OF APPEALS

DONALD ESTILL,

Plaintiff-Appellee,

v

ROBERT DAVIS,

Defendant-Appellant,

and

HIGHLAND PARK BOARD OF EDUCATION,

Defendant.

UNPUBLISHED

May 15, 2012

No. 302472

Wayne Circuit Court

LC No. 09-010986-CZ

Before: DONOFRIO, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Defendant¹ appeals as of right an order denying his motion for summary disposition in this defamation action. We affirm.

Defendant, a school board member, was invited onto a radio program to be interviewed about litigation (separate from this case) that he had initiated to prevent the Highland Park Board of Education from hiring plaintiff for the position of Assistant Superintendent of Finance. Defendant argues that he is absolutely immune from liability for allegedly defamatory statements he made about plaintiff during that interview. We disagree.

“This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition.” *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

¹ All claims against defendant Highland Park School Board, have been dismissed. Accordingly, we refer to defendant Robert Davis, individually, as “defendant.”

A summary disposition motion under MCR 2.116(C)(7) is properly granted where a claim is barred because of immunity granted by law. *Maiden*, 461 Mich at 119. “When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them.” *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). If documentary evidence is submitted, this Court reviews it in the light most favorable to the nonmoving party to determine whether there exists a genuine issue of material fact regarding whether immunity bars a claim. *Zwiers v Grownney*, 286 Mich App 38, 42; 778 NW2d 81 (2009). “If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court.” *Dextrom*, 287 Mich App at 429.

According to plaintiff, when defendant appeared on Mildred Gaddis’s radio show to discuss lawsuits defendant had filed to enjoin the School Board from hiring plaintiff, defendant made several defamatory statements, including that plaintiff is a thief, he stole from his previous employer, he was terminated from his previous employer, and he did not hold a degree from Cornell. The issue before this Court is whether defendant was immune from liability that may arise from the allegedly defamatory statements.

When a plaintiff sues the government itself, he or she bears the burden to plead in avoidance of immunity. *Odom v Wayne Co*, 482 Mich 459, 478-479; 760 NW2d 217 (2008). However, a government employee’s individual immunity is an affirmative defense that the employee must raise and prove. *Id.* at 479. Accordingly, it is defendant’s burden to establish that he is entitled to governmental immunity under the Governmental Tort Liability Act (GTLA). MCL 691.1401 *et seq.*

The GTLA provides that “[a] judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.” MCL 691.1407(5). “However, our Supreme Court has explicitly held that the highest executive officials of local government are not immune from tort liability for acts *not* within their executive authority.” *Brown v Mayor of Detroit*, 271 Mich App 692, 720; 723 NW2d 464 (2006), *aff’d in part, vacated in part* 478 Mich 589 (2007) (internal quotations omitted).

Whether a public official is acting within his or her 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.” *American Transmissions, Inc v Attorney Gen*, 454 Mich 135, 141; 560 NW2d 50 (1997) (*American Transmissions II*).

Here, the school board’s bylaws state, in relevant part:

[a] board member as an individual has no official authority outside of Board meetings except those explicitly delegated to them by an official action of the Board. A member cannot speak for the board and shall not make commitments to

individuals, groups, or organizations as an individual member of the Board of Education.

In other words, according to “local law defining [defendant’s] authority, and the structure and allocation of powers in the particular level of government,” a member of the Highland Park School Board only acts within his or her authority as a school board member when a) participating at a school board meeting, or b) expressly authorized by the school board to act as a school board member in a context other than a school board meeting. As it is his burden to establish his entitlement to immunity, defendant must accordingly establish that his appearance at and statements on Gaddis’s show were authorized by the school board. Defendant has produced no evidence to that end. He has not demonstrated that his appearance on Gaddis’s show was authorized by the school board. Rather, defendant baldly asserts that “at all times relevant to this lawsuit [defendant] was acting within the scope of his authority” with no evidence to establish that he was doing so. Accordingly, he was not acting within the scope of his authority when he appeared on the radio, and he is not entitled to immunity from defamation for allegedly defamatory statements he made on the show.

Defendant’s immunity argument rests principally on *American Transmissions II*, which defendant describes as analogous to the facts of this case. In *American Transmissions II*, the Supreme Court held that MCL 691.1407(5) did not contain a “malevolent-heart exception” for governmental immunity. *American Transmissions II*, 454 Mich at 143. The Supreme Court held that the Attorney General was immune for defamatory statements he made regarding an ongoing criminal investigation at a press conference. *Id.* at 144. In so holding, the Supreme Court reversed this Court’s rationale that “assuming that defendant [Attorney General] had authority to participate in the interview to address an investigation conducted by his office, he nevertheless did not have authority to participate in the interview for the purpose of disseminating false information regarding plaintiffs.” *American Transmissions, Inc v Attorney Gen*, 216 Mich App 119, 121; 548 NW2d 665, 666 (1996), rev’d 454 Mich 135 (1997) (*American Transmissions I*). The Supreme Court reversed this Court, holding that “[o]n these facts, the Attorney General clearly is immune from tort liability because he was acting within the scope of [his] executive authority” under MCL 691.1407(5). *American Transmissions II*, 454 Mich at 144.

In other words, the Supreme Court held that, because participating in press conferences was within the scope of the Attorney General’s authority, he was immune from liability for the defamatory statements he made at that press conference. Therefore, defendant’s assertion that *American Transmissions II* held that “public statements to the press fall within a public official’s scope of authority and are shielded from defamation claims” is misplaced. Rather, the Court held that if it is within the scope of a public official’s authority to make public statements, the public official is shielded from defamation claims.

Here, Section 1040 of the Highland Park School Board’s bylaws expressly states that “[a] board member as an individual has no official authority outside of Board meetings except those explicitly delegated to them by an official action of the Board.” In *American Transmissions II*, there was no analogous limitation on the Attorney General’s ability to speak. Defendant has offered no proof to overcome the presumption raised by Section 1040 that he was acting outside his authority when he appeared on the radio, and it is his burden to do so. *Odom*, 482 Mich at 479. Accordingly, when defendant appeared on Gaddis’s show, he was not acting within the

scope of his authority as a school board member, but as a private citizen, and is not shielded from liability by the GTLA.

Defendant also argues that his “actions were compelled by the Michigan Revised School Code.” Defendant’s use of the word “actions” is misleading, because it conflates defendant’s litigation with his appearance on Gaddis’s show. Defendant notes that, because he believed that plaintiff did not possess the requisite academic qualifications outlined in the Michigan Revised School Code, and because plaintiff had not yet undergone a criminal background check at the time the school board voted to initially hire him, the Michigan Revised School Code compelled defendant to initiate litigation to enjoin the school district from hiring plaintiff. Whether the Michigan Revised School Code compelled defendant’s litigation is not a question before this Court. However, even if the Michigan Revised School Code imposed a duty on defendant to sue in order to prevent plaintiff’s hiring, defendant has offered no evidence that he was statutorily compelled to appear on a radio show, and accordingly, has offered no evidence that he is immune from liability if he, in fact, made defamatory statements on the show.

Affirmed.

/s/ Pat M. Donofrio

/s/ Kathleen Jansen

/s/ Douglas B. Shapiro