

STATE OF MICHIGAN
COURT OF APPEALS

MAVIS HUSBAND, MADIE HARVEY, COREY L.
HARVEY, and LIZZIE P. SMITH,

UNPUBLISHED
July 19, 1996

Plaintiffs–Appellants,

v

No. 179398
LC No. 93-456903

CITY OF PONTIAC, PONTIAC POLICE
DEPARTMENT, PONTIAC CHIEF OF POLICE,
PONTIAC POLICE LIEUTENANT, PONTIAC
POLICE OFFICERS,

Defendants–Appellees.

Before: Markey, P.J., and McDonald and M. J. Talbot*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court’s order granting defendants summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). We affirm in part, reverse in part and remand.

This appeal arises out of the execution of a search warrant for cocaine on November 13, 1992, at 890 Spence in Pontiac, Michigan. No drugs were recovered during the search of the residence. Two of the plaintiffs, Lizzie Smith and Corey Harvey, were outside the house at the time of the search and were arrested for obstruction of justice. Following the incident, Smith and Harvey brought suit, as did the owner of the residence, Mavis Husband, and Madie Harvey, who lived in the house and was present at the time the search warrant was executed. Plaintiffs Mavis Husband and Madie Harvey filed the initial complaint against defendants in Oakland Circuit Court on June 14, 1993. On July 6, 1993, defendants filed a Notice of Removal to the Federal District Court. On August 2, 1993, plaintiffs state law claims were remanded to the Circuit Court by the Federal District Court. On March 14, 1996, the Federal District Court granted defendants summary judgment. Plaintiffs have not appealed this decision.

Plaintiffs first argue the trial court erred in granting summary disposition as to Madie Harvey’s claim intentional infliction of emotional distress.

* Circuit judge, sitting on the Court of Appeals by assignment.

This Court reviews a grant of summary disposition de novo. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). In deciding a motion under MCR 2.116(C)(7), the court reviews the plaintiff's complaint to see whether facts have been pleaded justifying a finding that recovery in a tort cause of action is not barred by governmental immunity. *Vermilya v Dunham*, 195 Mich App 79, 81; 489 NW2d 496 (1992). In order to survive such a motion, the plaintiff must allege facts justifying application of an exception to governmental immunity. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). Upon review of a motion for summary disposition filed pursuant to MCR 2.116(C)(7), this Court accepts all of the plaintiff's well-pled factual allegations as true and construes them most favorably to the plaintiff. *Stroud v Ward*, 169 Mich App 1, 4; 425 NW2d 490 (1988).

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions which can be drawn from the facts. *Marcelletti v Bathani*, 198 Mich App 655, 658; 500 NW2d 124 (1993). However, a mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action. *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a plaintiff's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). In deciding whether summary disposition was properly granted, the reviewing court must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party. *Id.*

In order to prevail on a claim for intentional infliction of emotional distress, a plaintiff must prove four elements: "(1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress." *Duran v The Detroit News, Inc*, 200 Mich App 622, 629-630; 504 NW2d 715 (1993).

It is undisputed defendants did not knock and announce themselves before entering the residence. Madie Harvey, who was seventy-one years old and allegedly had a bad heart, was inside the residence at the time. Michigan's knock-and-announce statute, MCL 780.656; MSA 28.1259(6), requires police executing a warrant to give notice of their authority and purpose and be refused entry before they are allowed to force their way in to a residence. *People v Williams (After Remand)*, 198 Mich App 537, 545; 499 NW2d 404 (1993). However, noncompliance with the statute has been held to be excusable where the police officers have a basis to conclude evidence will be destroyed or lives will be endangered by the delay of complying with the statute, or if events indicate compliance would be useless. *Id.* In this case, testimony indicated Lizzie Smith and Corey Harvey were screaming at police outside the residence and that the evidence to be seized was packaged in small containers which could easily be disposed of or hidden. Under these circumstances, the police officers' noncompliance with the statute was excusable and could not reasonably be regarded as so extreme and outrageous as to allow

recovery for intentional infliction of emotional distress. *Sawabini v Desenberg*, 143 Mich App 373, 383; 372 NW2d 559 (1985). Therefore, the trial court did not err in granting summary disposition as to this claim.

Plaintiffs also argue the trial court erred in finding Mavis Husband, the owner of the residence searched in this case, suffered no damages because she was not present in the home at the time the search warrant was executed. However, the trial court did not make such a finding. Rather the trial court found defendants' conduct in executing the search warrant was protected by governmental immunity. Thus defendants were not liable for any damages to the residence.

MCL 691.1407(2); MSA 3.996(107)(2) grants immunity from tort liability to governmental employees while acting within the scope of their authority and while engaged in a governmental function except where their conduct amounts to gross negligence. "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. MCL 691.1407(2)(c); MSA 3.996(107)(2)(a). Execution of a facially valid search warrant constitutes a government function. *Flores v Dalman*, 199 Mich App 396, 404; 502 NW2d 725 (1993). Further, because defendants failure to comply with the knock and announce rule was excusable, it cannot be termed gross negligence. Therefore, we conclude defendants' conduct was protected from tort liability by governmental immunity.

Next, plaintiffs argue the trial court erred in granting summary disposition as to Mavis Husband's defamation claim on the basis of absolute privilege. Traditionally, the doctrine of absolute privilege is narrow and extends only to (1) proceedings of legislative bodies, (2) judicial proceedings, and (3) communications by military and naval officers. *Froling v Carpenter*, 203 Mich App 368, 371; 512 NW2d 6 (1993). Statements made during the course of judicial proceedings are absolutely privileged, so that there can be no action for defamation. *Couch v Schultz*, 193 Mich App 292, 294-295; 483 NW2d 684 (1992). This immunity extends to every step in the proceeding and covers anything that may be said in relation to the matter at issue including pleadings and affidavits. *Id.* at 295.

Because the statements complained of in this case were made in the search warrant and the affidavit in support of the search warrant, they were protected by an absolute privilege.

Plaintiffs next argue the trial court erred in failing to specifically state the court rule upon which it relied in granting summary disposition with regard to the claims of Mavis Husband and Madie Harvey. However, MCR 2.517(A)(4) specifically states findings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular court rule. Further, this Court has found the trial court need not state its findings of fact and conclusions of law in ruling on a motion for summary disposition. *Lud v Howard*, 161 Mich App 603, 614; 411 NW2d 792 (1987). Plaintiffs' argument on this issue is without merit.

Next, plaintiffs argue the trial court erred in granting summary disposition with regard to Lizzie Smith and Corey Harvey's claims of false arrest and imprisonment. A claim of false arrest or

imprisonment requires a plaintiff show that the arrest was made without probable cause. *Young v Barker*, 158 Mich App 709, 720; 405 NW2d 395 (1987). Here, the evidence indicated the arrests at issue were made prior to any actions on the part of Smith or Harvey to interfere with the police officer's execution of the search warrant. In addition, the fact Corey Harvey pled no contest to the charge of disorderly person does not have an estoppel effect on the instant action. *Lichon v American Ins Co*, 435 Mich 408, 417-418; 459 NW2d 288 (1990); *Drobczyk v Great Lakes Steel Corp*, 367 Mich 318, 323; 116 NW2d 736 (1962). We conclude there was a genuine issue of material fact regarding plaintiffs' claim of false arrest. The trial court erred in granting summary disposition as to this claim.

Plaintiffs also argue the trial court erred in granting summary disposition as to Lizzie Smith and Corey Harvey's claim of abuse of process. In order to recover upon a theory of abuse of process, plaintiffs must plead and prove that there was an ulterior purpose and that there was an act in the use of process which was improper in the regular prosecution of the pleading. *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992); *Friedman v Dozorc*, 412 Mich 1, 30-31; 312 NW2d 585 (1981). This Court has stated there must be some corroborating act demonstrating the ulterior purpose, and that a bad motive alone will not establish an abuse of process. *Bonner, supra* at 472.

In their complaint, plaintiffs failed to allege any ulterior purpose for the arrest of Smith and Harvey. On appeal, plaintiffs argue the ulterior purpose of the prosecution was to prevent them from having any cause of action in a civil lawsuit. Plaintiffs claim Harvey was informed if he did not bring a civil lawsuit, his criminal charge would be reduced and the charge against Smith, his mother, would be dropped. However, the named defendants in plaintiffs' suit were police officers, who did not have anything to do with the actual prosecution of plaintiffs. Plaintiffs' arrest by defendants occurred before the claimed bargain took place. Further, this argument was not raised before the trial court and, therefore, may not be considered in determining whether the trial court erred in granting summary disposition as to this issue. *Radtke, supra* at 374. We conclude the trial court did not err in granting summary disposition as to plaintiffs' claim of abuse of process.

Plaintiffs next argue the trial court erred in granting summary disposition as to Lizzie Smith and Corey Harvey's claim of malicious prosecution. The elements of a claim of malicious prosecution include (1) a criminal proceeding instituted or continued by the defendant, (2) which terminated in favor of the accused, (3) absence of probable cause for the proceeding, and (4) "malice" or a primary purpose other than that of bringing the offender to justice. *Abdul-Mujeeb v Sears Roebuck*, 154 Mich App 249, 254; 397 NW2d 193 (1986). Where a police officer submits a matter to the prosecutor to investigate and bring charges as he or she sees fit, the police officer did not "cause" the prosecution so long as the officer fully and fairly disclosed everything within his knowledge which would tend to cause or exclude belief in the plaintiff's guilt. *Koski v Vohs*, 137 Mich App 491, 509-510; 358 NW2d 620 (1984), rev'd on other grounds 426 Mich 424 (1986). In this case, plaintiffs did not allege any facts indicating that defendants concealed any material facts, thereby improperly inducing the prosecutor to institute proceedings. *Id.* The trial court did not err in granting summary disposition as to the claim of malicious prosecution.

Plaintiffs Lizzie Smith and Corey Harvey argue that the trial court erred in granting summary disposition with regard to their claims of assault and battery. An assault is any intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact. *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991). A battery is the willful and harmful or offensive touching of another person which results from an act intended to cause such a contact. *Id.*

Plaintiffs in this case alleged defendants hit Corey Harvey in the head with a flashlight three times, threatened to shoot him and placed him in a choke hold. Smith stated one of the defendants told her he was going to kill her son, Corey Harvey. Smith stated her hands were placed behind her back and she was handcuffed. Smith and Harvey were both arrested for obstruction of justice. Absent some privilege or immunity on the part of defendants, plaintiffs have alleged a prima facie case of assault and battery. *Id.* As noted above, there was a genuine issue of material fact as to whether the arrests of Corey Harvey and Lizzie Smith were lawful because it is not clear that there was probable cause for the arrests at the time they were made. *Bell v Fox*, 206 Mich App 522, 525; 522 NW2d 869 (1994); *Young, supra* at 720. Therefore, there is a genuine issue of material fact as to whether defendants committed the tort of assault and battery on plaintiffs Corey Harvey and Lizzie Smith. We conclude the trial court erred in granting summary disposition as to this claim.

Plaintiffs Lizzie Smith and Corey Harvey next claim the trial court erred in granting summary disposition on their claim of intentional infliction of emotional distress. Harvey testified in his deposition that he was hit in the head with a flashlight and told “Don’t move. I’ll blow your f...ing head off.” Smith testified she observed a police officer holding her son, Harvey, in a choke hold and that the officer told her he was going to kill Harvey. The trial court erred in finding defendants’ conduct could not reasonably be regarded as so extreme and outrageous as to allow recovery for intentional infliction of emotional distress. *Sawabini, supra* at 382-383. In addition, there is a genuine issue of material fact as to the remaining factors of a cause of action for intentional infliction of emotional distress because the actions complained of were intentional, and Smith testified she was extremely upset by the incident. *Duran, supra* at 629-630. We conclude that the trial court erred granting summary disposition as to Lizzie Smith and Corey Harvey’s claims of intentional infliction of emotional distress.

Finally, plaintiffs argue the trial court erred in refusing to compel production of defendants’ confidential informant. A trial court’s decision regarding whether to compel production of a confidential informant is reviewed on appeal for an abuse of discretion. *People v Howey*, 118 Mich App 431, 436-437; 325 NW2d 451 (1982); *People v Poindexter*, 90 Mich App 599, 608; 282 NW2d 411 (1979). In *Poindexter*, a criminal case, this Court held where the disclosure of an informant’s identity is relevant or helpful to the defense of an accused, or is essential to a fair determination of a case, the informant’s privilege must give way. *Id.* at 607. However, the informant’s privilege is more likely to give way in a criminal case, where a person’s freedom is at issue, than in a civil case such as this one. *Holman v Cayce*, 873 F2d 944, 946-947 (CA 6, 1989). The *Poindexter* Court noted that it is not mandatory to produce the informant whenever a defendant makes a bald statement that no informant

exists. *Id.* at 610. In addition, this Court in *Poindexter* cited *People v Stander*, 73 Mich App 617, 621-623; 251 NW2d 258 (1976), which stated that the procedural vehicle generally recognized as being the most useful for helping a trial court strike a balance between the competing interests in the “in-camera” hearing. *Poindexter, supra* at 607. In this case, the trial court met in-camera with the confidential informant relied upon by defendants in obtaining the search warrant for 890 Spence. The trial court stated it determined the information obtained from the informant was sufficient for defendants to have relied upon to seek and obtain a search warrant. We conclude the trial court did not abuse its discretion in denying plaintiffs’ request to compel production of the confidential informant.

In sum, we reverse the trial court’s grant of summary disposition as to plaintiffs Lizzie Smith and Corey Harvey’s claims of false arrest and imprisonment, assault and battery, and intentional infliction of emotional distress, and affirm the trial court’s grant of summary disposition as to the remaining claims. Accordingly, we affirm in part, reverse in part and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs to either party.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ Michael J. Talbot