

STATE OF MICHIGAN
COURT OF APPEALS

FREDDIE L. SMITH and ELIZABETH
WIGGINS SMITH,

UNPUBLISHED
August 21, 2003

Plaintiffs-Appellants,

v

CITY OF DETROIT, MARTIN E. LAWRENCE
JEFFREY K. LAW, JAMES STOINSKI, and
MARSHA DRESLINSKI, a/k/a MARSHA
DEESWINSKI,

No. 238927
Wayne Circuit Court
LC No. 00-008533-NO

Defendants-Appellees.

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants' motion for summary disposition. We affirm.

I

Plaintiffs Freddie Smith and Elizabeth Smith, husband and wife, filed this action against the Detroit Police Department and several police officers after Freddie's vehicle was stopped and he was arrested in response to a "be on the lookout bulletin" of a suspect in an abduction and attempted sexual assault of a high school student. Defendant spent several hours in custody. He was never charged in the alleged crime. He sought damages on several counts, claiming that the officers were grossly negligent in arresting him.

II

Plaintiffs first argue that the trial court erred in granting defendants' motion for summary disposition because the court relied on inadmissible evidence and unsupported claims. We disagree.

A

Defendants moved for summary disposition under three alternative subrules, MCR 2.116(C)(7), (8), and (10). The trial court did not state under which subrule it was granting

defendants' motion. Nonetheless, it is clear from the record that the trial court granted summary disposition pursuant to subrule (C)(7) because the court examined documents outside of the pleadings and granted the motion on the basis of immunity under law. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001).

We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(7). *Pusakulich, supra* at 83. To survive a motion for summary disposition based on governmental immunity, the plaintiff must allege facts giving rise to an exception to governmental immunity. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). This Court considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. *Id.*; *Pusakulich, supra* at 82.

B

Plaintiffs contend that defendants supported the motion for summary disposition with inadmissible evidence, contrary to MCR 2.116(G)(6), and that the trial court erroneously considered this evidence in granting defendants' motion. Plaintiffs' argument fails because it is based on a misapplication of the court rule. MCR 2.116(G)(6) provides:

Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)–(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.

Under its plain language, the rule merely requires that the court consider only that evidence that would be admissible *to establish or deny the grounds stated in the particular motion brought*.

At issue in the present case, was whether defendants were grossly negligent in stopping and arresting Freddie Smith, thereby placing defendants' conduct within the gross negligence exception to governmental immunity. *Bell v Fox*, 206 Mich App 522, 525; 522 NW2d 869 (1994). MCL 691.1407(2) provides:

Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's employee's member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Plaintiffs argued that defendants' actions constituted gross negligence because the police lacked probable cause to arrest Freddie Smith. Defendants countered with documentary evidence purporting to show that defendants had, in fact, probable cause to arrest Smith. Police officers acting on probable cause to arrest a person are immune from tort liability in a claim of mistaken arrest. *Bell, supra*. Thus, the relevant evidentiary standard was that required to prove the existence or absence of probable cause.

Probable cause to arrest exists where the facts and circumstances within a police officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). Accordingly, "in reviewing a claim that a police officer lacked probable cause to arrest, the reviewing court must determine whether facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected person had committed a felony." *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983) (citations omitted). In determining whether there is probable cause to arrest, a police officer is entitled to rely on the representations of his fellow officers. *Whiteley v Warden, Wyoming State Penitentiary*, 401 US 560; 91 S Ct 1031; 28 L Ed 2d 306 (1971).

Plaintiffs contend that in establishing probable cause, defendants relied on inadmissible evidence, such as police reports, which are not substantively inadmissible unless the officers personally observed each and every fact that is contained in those reports. Further, defendants failed to provide the court with admissible evidence to prove that the alleged abduction and assault actually occurred. Finally, defendants made numerous unsupported assertions, such as references to customary police practices, which they failed to support with any evidence. We find plaintiffs' arguments without merit.

This is not a case where the testimony of police officers determines a principal issue such as fault for a collision, as in *Miller v Hensley*, 244 Mich App 528, 530-531; 624 NW2d 582 (2001), cited by plaintiffs, where the officers' testimony concerning fault was based not on their own perceptions, but the perceptions of witnesses to the accident. On the contrary, the content of the police reports properly formed the basis of the probable cause to arrest.

In rendering its decision, the trial court stated:

The Defendants received a complaint from an alleged victim of a crime. They issued a "be on the lookout bulletin". The bulletin gave the description of a male allegedly involved in the attempted rape and a description of the vehicle allegedly involved in the incident. Given this description, the Plaintiff was pulled over and arrested by the Defendants. This is surely within the scope of their duties as police officers and doesn't amount to gross negligence.

The documentary evidence attached to defendants' motion and supporting brief included the police reports prepared in connection with the investigation of the alleged attempted abduction and Freddie Smith's own deposition testimony regarding what defendants told him at the time of his stop and arrest. The police reports provide documentary evidence to support the court's findings that an initial report was made to the police, and that a "be on the lookout" bulletin was circulated containing a description of the alleged perpetrator and vehicle wanted in connection with the incident.¹ The court properly considered this evidence in determining whether there was a triable issue of fact regarding whether defendants had probable cause to arrest Freddie Smith.

III

Plaintiffs next argue that summary disposition was improper because the issue whether defendants lacked probable cause to arrest Freddie Smith, and thus were grossly negligent, was a question of fact for the jury. Plaintiffs point to various discrepancies between the description of the suspect and Freddie Smith's physical characteristics, and between the suspect vehicle and Smith's truck, to argue that because the facts were disputed, probable cause was a question for the jury. Again, we disagree.

If reasonable jurors could honestly reach different conclusions as to whether conduct constitutes gross negligence under MCL 691.1407(2)(c), the issue is a factual question for the jury. However, if reasonable minds could not differ, the issue may be determined by summary disposition. *Stanton v Battle Creek*, 466 Mich 611, 620-621; 647 NW2d 508 (2002); *Jackson v Saginaw Co*, 458 Mich 141, 146-147; 580 NW2d 870 (1998).

The standard to be applied in determining whether defendants were immune for purposes of a MCR 2.116(C)(7) motion is that provided in MCL 691.1407(2).² Viewing plaintiffs' complaint and the supplemental papers filed by both parties in connection with this motion, and accepting as true the contents of the complaint except as affidavits or other appropriate documents specifically contradict them, *Fane, supra* at 74, we find that plaintiffs failed to allege facts sufficient to show that defendants were grossly negligent in the performance of their duties.

Plaintiffs asserted that no probable cause existed for Freddie Smith's arrest because the descriptions of the alleged perpetrator and the alleged perpetrator's truck were too vague and

¹ Moreover, the arrest reports, together with Freddie Smith's testimony, provide documentary support for the fact that defendants stopped and arrested Freddie Smith based on their awareness of the details contained in those reports and bulletins.

² Plaintiffs incorrectly assert that lower level governmental employees are immune from tort liability only when they are acting during the course of their employment and are acting, or reasonably believe they are acting, within the scope of their authority, when they are acting in good faith, and when they are performing discretionary acts, citing *Fiones v Dalman*, 199 Mich App 396, 401; 502 NW2d 725 (1993). However, because the incident at issue in this case occurred on or after July 1, 1986 the proper standard is that set out in MCL 691.1407(2). *Abraham v Jackson*, 189 Mich App 367, 369-370; 473 NW2d 699 (1991).

because plaintiff and his vehicle did not closely enough match the description of the perpetrator given by the victim. Specifically, plaintiffs argued that Freddie Smith weighed only 220 to 225 lbs. while the alleged perpetrator was described as weighing 250 to 260 lbs., that while Smith looked good for his age, he was sixty years old while the alleged perpetrator was described as being 45 to 50 years of age, that the perpetrator was described as wearing glasses with thick lenses while it was disputed whether the lenses of Smith's glasses were thick, that plaintiff had a mustache at the time he was arrested while no mention was made of facial hair in regard to the perpetrator, that Smith was wearing a blue hat at the time he was arrested while the perpetrator was described as wearing a black hat, and that Smith's truck had red sports markings on it while the perpetrator's vehicle was described as having silver strips. Even accepting these assertions as true, we nonetheless find that the plaintiffs have not shown that defendants' conduct in arresting Freddie Smith was "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c).

Comparing Freddie Smith's physical characteristics at the time of his arrest and the details of the truck he was driving to the descriptions contained in the police reports, even taking into consideration the fact that Freddie Smith had a mustache at the time of his arrest, while no facial hair was ascribed to the perpetrator, it is clear that a substantial number of similarities did exist between Freddie Smith and the person wanted in connection with the alleged attempted abduction. Accordingly, we find no error in the court's determination that defendants had probable cause to arrest Freddie Smith, and therefore, plaintiffs failed to show that defendants were grossly negligent.

Accordingly, because plaintiffs failed to allege facts justifying the application of an exception to governmental immunity, the trial court correctly granted defendants' motion for summary disposition under MCR 2.116(C)(7). Plaintiffs are not entitled to reversal or remand.

IV

Plaintiffs' final argument is that on remand this case should be resubmitted to case evaluation. However, because plaintiffs are not entitled to remand, this issue is moot.³

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly

³ To the extent that plaintiffs argued additional claims pertaining to false imprisonment or intentional torts, plaintiffs have failed to properly present these claims for appeal. Because plaintiffs did not raise these issues in their questions presented and failed to brief the merits of these issues, they are abandoned. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).