

STATE OF MICHIGAN
COURT OF APPEALS

GREGORY ATKINS and JEANETTE ATKINS,

Plaintiffs-Appellants,

v

TOWNSHIP OF FLINT, TOWNSHIP OF FLINT
POLICE DEPARTMENT, SARGEANT PAUL
GREEN, and OFFICER CHARLES ABDELLA,

Defendants-Appellees.

UNPUBLISHED

May 18, 2004

No. 246697

Genesee Circuit Court

LC No. 01-071307-NI

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right following the trial court's grant of summary disposition in favor of defendants, and dismissing plaintiffs' claims of assault and battery, intentional infliction of emotional distress, and gross negligence stemming from the arrest of plaintiff Gregory Atkins after police were dispatched to investigate a domestic dispute at plaintiffs' home. We affirm.

I

In the early morning hours of January 7, 2000, Flint Township police were dispatched to the home of plaintiffs Gregory and Jeanette Atkins, husband and wife, after the couple had a disagreement and Gregory dialed 911. According to Gregory, he had not intended the call to actually connect and had hung up the receiver. However, the call connected, and, as a matter of policy, the dispatcher called the Atkins' home. Police were dispatched to the home to investigate a domestic dispute.

Two Flint Township police officers and a Genesee County sheriff deputy arrived at the Atkins home. While one of the officers was questioning Jeanette in a separate room, Greg intervened in the conversation. Events thereafter are disputed, but a scuffle subsequently ensued between Greg and the two Flint Township officers. Backup officers were called, and Greg was placed under arrest.

During the scuffle, one officer sprayed Greg twice with OC spray in an attempt to subdue him. When the OC spray did not have the desired effect, the officer struck Greg in the side of the leg with three successive strikes of a collapsible baton, in a further attempt to subdue him. Eventually, after back-up officers arrived, Greg submitted to the arrest. He was placed in jail

and charged with domestic assault, assaulting a police officer, and making a false emergency telephone call. After a preliminary examination, the district court dismissed the charges.

In September 2001, plaintiffs filed this action, alleging claims of assault and battery, gross negligence, civil rights violation, and intentional infliction of emotional distress. Defendants moved for summary disposition, arguing that the officers had probable cause to arrest Greg and that the use of the OC spray and the three strikes to Greg's common peroneal nerve followed established police protocol and did not constitute gross negligence. Plaintiffs argued that the police lacked probable cause to arrest Greg because no domestic assault occurred, and even if there was probable cause, the officers used excessive force in arresting Greg. The trial court granted defendants' motion, finding that the officers' actions followed established law enforcement protocol and their actions did not constitute gross negligence.

II

This Court reviews de novo the trial court's grant of summary disposition to determine whether the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (10). The trial court did not state under which subrule it was granting defendants' motion.

Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The court considers the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Id.*

To survive a motion for summary disposition based on governmental immunity under MCR 2.116(C)(7), a plaintiff alleging a claim involving gross negligence must adduce proof of conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. *Maiden, supra* at 123. This Court considers all admissible documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. *Id.* at 119.

III

The trial court essentially granted summary disposition on the basis of governmental immunity, finding that there was probable cause for the arrest and that plaintiffs had failed to show gross negligence. The governmental immunity statute, MCL 691.1407, provides:

(1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

(2) 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.

(3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.

Plaintiffs argue that the trial court erred in granting summary disposition on the basis of governmental immunity because the conduct at issue is an intentional tort, which falls outside the statutory provisions for immunity. Defendants argue that whether, and to what extent, governmental immunity applies depends on the status of each defendant. We agree that the standards applicable to a governmental agency differ from those applicable to individual defendants. MCL 691.1407; *Sudul v City of Hamtramck*, 221 Mich App 455, 458 (Corrigan, J.), 486-487 (Murphy, J.); 562 NW2d 478 (1997). The statutory provisions for immunity of governmental agencies is set forth in subsection 1 of § 7. MCL 691.1407; *Sudul, supra* at 487. The provisions for immunity of individual employees is set forth in subsections 2 and 3 of § 7. MCL 691.1407; *Sudul, supra* at 487. The legal standards and analysis differ depending on the status of the defendant, i.e., whether the defendant is a governmental agency or an individual, and the type of action, i.e., whether the action involves a tort claim that falls outside the governmental immunity act. *Id.* at 486-488.

The trial court failed to apply the appropriate statutory provisions for governmental agencies and individual defendants in rendering its decision. Likewise, on appeal, plaintiffs fail to distinguish their arguments with respect to the status of the particular defendants and the type of action. Plaintiffs focus their arguments on the conduct of the individual defendants, i.e., the police officers, and the torts of assault and battery (and excessive force). We address plaintiffs' arguments accordingly and find no error in the grant of summary disposition.

A

Plaintiffs first argue that defendants may not rely on the defense of governmental immunity because defendants are guilty of an intentional malicious act. Plaintiffs assert that assault and battery, and excessive force during an arrest, are intentional torts, which are recognized exceptions to governmental immunity.

This Court has expressly held that an individual employee's intentional torts are not shielded by the governmental immunity statute. *Sudul, supra* at 458, 480. Subsection 3 of § 7 of the governmental immunity statute provides that the law of intentional torts as it existed before July 7, 1986, remains unaltered with respect to individual government employees. The intentional torts of assault and battery (and excessive force) by individual police officers were recognized exceptions to governmental immunity in Michigan before July 7, 1986, and are viable claims. *Id.* at 458, 481, 484. We agree with plaintiffs that the governmental immunity statute does not shield the defendant officers from plaintiffs' claims of intentional torts. However, we disagree that plaintiffs established a triable issue of material fact regarding whether the officers are liable for the alleged intentional torts in arresting Greg.

Plaintiffs assert that Greg was assaulted by the officers and that his arrest resulted from maliciousness and resentment on the part of the officers after Greg requested that the officers leave his home. Plaintiffs contend that evidence established that the police misconduct was intentional and malicious because there was evidence that the police remained at the Atkins' home despite the fact that the 911 call had been made in error and there was no actual domestic dispute, and despite the Atkins' persistent and reasonable requests that the officers leave.

It is undisputed that plaintiffs had an argument and that Greg placed a call to 911. The trial court noted that under those circumstances, the police officers' response and investigation of the 911 call was within established law enforcement protocol, as was the separate interview of Jeanette outside Greg's presence. Plaintiffs do not challenge these findings. Although the officers' versions of the scuffle with Greg differs from plaintiffs' version of events, it is also undisputed that while Jeanette was being interviewed by Officer Abdella, Greg came into the room and intervened in the conversation. He made a gesture toward Jeanette, raising his hand.¹ After that point, a confrontation between Greg and the officers ensued, and it is undisputed that Greg resisted the officers' attempts to physically subdue him and resisted arrest, which resulted in the alleged injuries.

Under these circumstances, the trial court did not err in dismissing plaintiffs' claim of assault and battery. A police officer may use substantial but necessary force to subdue a suspect, resulting in injury to the suspect. *Id.* at 458, 485-486. In this case, the use of force by the police was not unreasonable given the circumstances, and thus there was no tort. *Id.* at 488. There is no dispute that the officers were trying to subdue Greg and he refused to submit because he

¹ Although the officers and plaintiffs disagree on Greg's purpose in raising his hand, and whether Greg was attempting to assault Jeanette, Jeanette stated in her deposition that when Greg came into the room, his hand was raised.

believed they were wrong in their actions. When the officers attempted to handcuff Greg, he would not submit to being handcuffed. Regardless of what precipitated the scuffle with the officers, once the physical altercation began, the use of force to overcome Greg's resistance was justified. Plaintiffs do not dispute that the use of OC spray and three successive strikes to the common peroneal nerve in the leg are consistent with the police officers' training to subdue a suspect and within established law enforcement protocol.

Further, the court did not err in concluding that the police had probable cause to arrest Greg on the basis of his conduct in intervening in the officer's interview with Jeanette and raising his hand as he came toward them, which supports an arrest on the basis of assault, particularly given that this was a domestic dispute investigation. "Probable cause to arrest exists where the facts and circumstances within an 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). "[A] police officer may use reasonable force when making an arrest." *Brewer v Perrin*, 132 Mich App 520, 528; 349 NW2d 198 (1984). For the reasons discussed above, the use of force in this case was reasonable. *Id.*; *Bell v Fox*, 206 Mich App 522, 525; 522 NW2d 869 (1994).

Plaintiffs have failed to show that the defendant officers were grossly negligent in arresting Greg, thereby placing defendants' conduct within the gross negligence exception to governmental immunity. *Id.* Summary disposition of plaintiffs' gross negligence claim was proper under MCR 2.116(C)(7) on the basis of governmental immunity.

B

Plaintiffs argue that the trial court erred in granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) because there was conflicting sworn testimony and disputed facts surrounding the conduct of the police while in plaintiffs' home. As discussed above, although plaintiffs' version of events differed from the officers' version of events, the key facts underlying Greg's arrest are undisputed. Reasonable minds could not differ that Greg intervened in the interview with Jeanette and that he resisted the officers' attempts to subdue him and place him under arrest. If reasonable minds could not differ, the issue may be determined by summary disposition. *Stanton v Battle Creek*, 237 Mich App 366, 375; 603 NW2d 285 (1999), *aff'd* 466 Mich 611; 647 NW2d 508 (2002).

Affirmed.

/s/ Christopher M. Murray

/s/ Janet T. Neff

/s/ Pat M. Donofrio