STATE OF MICHIGAN

COURT OF APPEALS

JIMMIE L. MURRY, JR.,

Plaintiff-Appellant,

v

B. J. YUCHASZ and JILL KULHANEK,

Defendants-Appellees,

and

JANE DOE,

Defendant.

UNPUBLISHED
October 31, 2006

No. 268909
Washtenaw Circuit Court
LC No. 04-000900-NI

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition to defendants on plaintiff's civil rights and assault claims. We reverse and remand.

Plaintiff alleges that, following an arrest in 2002 by the Ypsilanti police, he was assaulted by members of the Ypsilanti police following his arrest and before being lodged in the county jail. Plaintiff alleges that he did not resist arrest or otherwise give cause to the officers to use the level force employed. Specifically, plaintiff claims that, at the Ypsilanti city lock-up, the officers "slammed him to the ground and stripped him of clothing." Plaintiff further claims that when he was thereafter transferred to the Washtenaw County Jail, defendant Yuchasz employed a wrist lock on him unnecessarily and, as a result, plaintiff suffered a broken wrist.

Although defendants do not deny that they used physical force against plaintiff, they argue that plaintiff did resist the officers and that the amount of force employed was reasonable under the circumstances. Defendants also dispute whether the wrist lock employed during the transfer to the county jail resulted in plaintiff's wrist fracture.

We review a grant of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In evaluating a motion under MCR 2.116(C)(10), the court considers pleadings, affidavits, admissions, depositions and other evidence in the light most

favorable to the nonmoving party. If the proffered evidence fails to establish a genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

Plaintiff first argues that the trial court erred in granting summary disposition to defendants under MCR 2.116(C)(10) (no genuine issue of material fact) on plaintiff's civil rights claim under 42 USC 1983 on the basis of qualified immunity. The United States Supreme Court reviewed the principle of qualified immunity in *Brosseau v Haugen*, 543 US 194, 197; 125 S Ct 596; 160 L Ed 2d 583 (2004):

> When confronted with a claim of qualified immunity, a court must ask first the following question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v Katz*, 533 US [194, 201]; 121 S Ct 2151; 150 L Ed 2d 272 [(2001)]. As the Court of Appeals recognized, the constitutional question in this case is governed by the principles enunciated in *Tennessee v Garner*, 471 US 1; 105 S Ct 1694; 85 L Ed 2d 1 (1985), and *Graham v Connor*, 490 US 386; 109 S Ct 1865; 104 L Ed 2d 443 (1989). These cases establish that claims of excessive force are to be judged under the Fourth Amendment's " 'objective reasonableness' " standard. *Id.* at 388.

Brosseau, supra at 198, went on to explain:

> Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted. *Saucier* [*supra* at 206] (qualified immunity operates "to protect officers from the sometimes 'hazy border between excessive and acceptable force' "). Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.

Defendants argue that they are entitled to qualified immunity because there is no established precedent declaring the use of a wrist-lock "in any situation or for any length of time" to be impermissible. Defendants, however, misapprehend the nature of qualified immunity, as well as overlook the fact that plaintiff complains of more than just the use of the wrist-lock technique. Defendants' argument might have merit if plaintiff was arguing that the use of a wrist lock was always unconstitutional. But the issue here is not the appropriateness of a particular restraint technique. Rather, the issue is whether, regardless of the technique used, was an excessive amount of force utilized.

A police officer is authorized to use the amount of force reasonable to effectuate a detention. *Muehler v Mena*, 544 US 93, 98-99; 125 S Ct 1465; 161 L Ed 2d 299 (2005); *Graham, supra* at 396-397. As the Court noted in *Graham, id.* at 396, not every push and shove necessarily results in a violation of the Fourth Amendment. Some deference must be accorded to the officer who needs to immediately react to a situation and make a split-second decision regarding the amount of force necessary under the circumstances. *Id.* In determining whether

the force employed is excessive, we must inquire whether the officer's actions were objectively reasonable under the circumstances. *Id.* at 397.

While we would have no difficulty accepting the proposition that the officers' actions were objectively reasonable if the circumstances were as they describe, we cannot base our ruling on defendants' description of the events. Because this is a motion for summary disposition, we must accept as true plaintiff's claims that he did not resist arrest and that he gave the officers no cause to throw him to the floor before being transported to the county jail, nor in being subjected to a wrist-lock when being walked from the patrol car into the county jail.[1] Indeed, the closest plaintiff comes to admitting a cause for the wrist-lock is that he attributes his exclaiming "that's bullshit" when being pushed up against the wall at the jail as the reason for the officer employing the wrist lock. Similarly, plaintiff's deposition testimony suggests that he may have refused to submit to fingerprinting at the Ypsilanti jail before being pushed to the ground, but his deposition does not indicate either that he physically resisted the officers during any such refusal nor, for that matter, that the officer's actions in pushing him to the ground and forcibly removing his clothing was in any way connected to an effort to obtain fingerprints. Indeed, with these exceptions, plaintiff testified in his deposition that he fully cooperated with the police from the time of arrest until being lodged in the county jail and that he did not resist arrest.

In short, to agree with defendants and the trial court that defendants are protected by qualified immunity in this case, we would have to say that it is unclear that it is a constitutional violation to routinely "slam to the floor" a cooperative arrestee or to routinely employ a wrist lock when moving a suspect from the patrol car to the jail cell, and to do so with sufficient force to cause a wrist fracture. We are unwilling to reach such a conclusion. Rather, it is clear under the law that the only force that is permissible is the amount that is objectively reasonable under the circumstances. Indeed, the Supreme Court in *Muehler, supra* at 100, indicates that the use of handcuffs to detain a suspect constitutes a use of force that must be reasonable under the circumstances.

Defendants also argue that because plaintiff's complaint does not establish that they are being sued in their individual capacities rather than their official capacities, they are entitled to summary disposition on the 42 USC 1983 claim. We decline to address this argument, however, because this did not form the basis of the trial court's decision.

Plaintiff next argues that the trial court erred in granting summary disposition on his state-law claim of assault and battery. We agree. The trial court's decision provides little guidance on why summary disposition was granted. After granting summary disposition on the federal claim on the basis of qualified immunity, the trial court then stated "that, obviously, disposes of the intentional tort, that is the assault and battery claim as well." We do not find it so obvious as we are not aware of any case which applies qualified immunity outside of the context

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[1] This is the flaw in the dissent's reasoning—it overlooks the fact that this matter is at the summary disposition stage, and the dissent improperly looks to which side has the more credible version of events.

of 42 USC 1983 claims and to state-law intentional tort claims. Defendants certainly do not argue on appeal that qualified immunity applies to the assault and battery claim. Rather, defendant argues that they were entitled to summary disposition on the assault and battery claim on the basis of governmental immunity.[2] But governmental immunity does not apply to intentional torts. *Subdul v Hamtramck*, 221 Mich App 455, 458; 562 NW2d 478 (1997).

Defendants rely on this Court's decision in *Brewer v Perrin*, 132 Mich App 520; 349 NW2d 198 (1984). In *Brewer, supra* at 528, this Court, after noting that intentional torts are not protected by governmental immunity, made the following statement:

> Governmental actions which would normally constitute intentional torts are protected by governmental immunity if those actions are justified. Conversely, if the actions are not justified, they are not protected by governmental immunity.

To the extent that *Brewer* creates a "justified intentional tort" exception to governmental immunity, we disagree with *Brewer* and decline to follow it. *Brewer's* mistake is in concluding that justified actions are torts that are covered by governmental immunity. Rather, justified actions are not tortious conduct at all. As *Brewer* noted, a tort is a civil wrong. *Id.* Therefore, the concept of a "justified tort" is an oxymoron. If conduct is justified, it is not wrong. And in such a case the defendant prevails not because his wrongful conduct was shielded by immunity, but because there was no wrongful conduct to begin with.

The use of force by a police officer may be justified. Specifically, the law permits a police officer to use the amount of force reasonably necessary to make an arrest. *VanVorous v Burmeister*, 262 Mich App 467, 480-481; 687 NW2d 132 (2004). Thus, the use of force by an officer is not an assault and battery if the force used was objectively reasonable under the circumstances. *Id.* at 483. But this means that no tort occurred, not that a tort occurred but it is shielded by immunity.[3]

Thus, the inquiry is not whether defendants are protected by governmental immunity on the assault and battery claim. They are not because plaintiff has pled a claim in avoidance of immunity. Instead, the inquiry is whether plaintiff can support that claim; that is, whether

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[2] Defendants also argued governmental immunity in the trial court with respect to the state law claim. Thus, while the trial court's decision suggests that it was applying qualified immunity to the state-law claim as well, it may be that the trial court was merely indicating that it was applying the same analysis to conclude that the state-law claim was barred by governmental (rather than qualified) immunity. Accordingly, we will analyze the state-law claim under defendants' governmental immunity argument.

[3] Although this point was not explicitly discussed in *VanVorous*, that panel implicitly acknowledged the problem with *Brewer's* formulation of a "justified intentional tort." Specifically, *VanVorous, supra* at 480, cites *Brewer* for the proposition that "if the acts that are purportedly intentional torts were justified, governmental immunity applies." The use of the word "purportedly" reflects, we think, our view that justified actions are not torts at all.

defendants' use of force was objectively reasonable under the circumstances. If it was, then defendants did not commit assault and battery. The question at this stage of the proceedings then is whether there is a genuine issue of material fact whether the use of force was objectively reasonable. The analysis of this question is the same as it was for the 42 USC 1983 claim: taking the evidence in the light most favorable to plaintiff, a genuine issue of material fact exists. That is, if the jury were to believe that the events occurred as described by plaintiff, the jury could conclude that the use of force was unjustified and, therefore, find for plaintiff. On the other hand, if the jury believes that the events unfolded as described by defendants, then the jury will likely find for defendants.

Defendants also endeavor to recast plaintiff's claim as one of negligence and therefore barred by governmental immunity because it does not rise to the level of gross negligence. Plaintiff certainly could have pled a negligence claim. He could have advanced the claim that, even if the use of force was justified, the wrist lock was applied in a negligent manner resulting in the breaking of plaintiff's wrist. Defendants might well be right that such a claim does not rise to the level of gross negligence and, therefore, such a claim would be barred by immunity. But plaintiff does not plead negligence, he pleads assault and battery. And as *Subdul* points out, assault and battery is not a form of negligence. It is an intentional tort which is not shielded by governmental immunity. *Id.* In short, we need not determine whether plaintiff could plead a negligence claim in avoidance of immunity because plaintiff has not attempted to do so.

Defendants also argue that they were entitled to summary disposition because plaintiff is unable to show any injuries resulting from the use of force. We decline to affirm on this basis. First, the trial court's decision was not based upon any conclusion that plaintiff is unable to show injury. We would prefer that such a question first be addressed by the trial court. Second, while we recognize that because plaintiff's fracture was not immediately diagnosed following the employment of the wrist lock, plaintiff does present evidence from which a jury could potentially conclude that the wrist lock did cause the fracture. Third, defendants cite no authority for the proposition that there must be a physical injury, such as a broken bone, in order for plaintiff to recover.

The ultimate flaw in defendants' argument and the trial court's decision is that it is dependent upon a finding that defendants' version of events is more credible than plaintiff's. While that may very well be the case, that is not a finding that may be made at the summary disposition stage. Were this matter before us following a bench trial in which the trial court found defendants' testimony more credible than plaintiff's testimony and concluded that the use of force was justified and reasonable, we would have no difficulty in affirming the trial court. But such a determination by the trial court was inappropriate on a motion for summary disposition. Summary disposition should have been denied and the matter should proceed to trial. While it would seem likely that defendants will prevail at trial, plaintiff is entitled to the opportunity the convince the jury that events occurred as he describes them and that the use of force was unreasonable under the circumstances.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff may tax costs.

/s/ David H. Sawyer
/s/ Deborah A. Servitto