

STATE OF MICHIGAN
COURT OF APPEALS

TERRI PARKER, as Next Friend of MAURECE
PETERS, JR., a Minor, and MARQUESE
PETERS, a Minor,

UNPUBLISHED
April 2, 2013

Plaintiff-Appellee,

v

SCHOOL DISTRICT OF THE CITY OF
PONTIAC, TERE A LEE, and BRANDON
BOWDEN, jointly and severally,

No. 305330
Oakland Circuit Court
LC No. 2010-111081-NO

Defendants-Appellants.

Before: SAWYER, P.J., and SAAD and METER, JJ.

PER CURIAM.

Defendants, the School District of the City of Pontiac (the Pontiac School District or the school district) and Pontiac School District Police Authority (Police Authority) Officers Terea Lee and Brandon Bowden, appeal as of right from an opinion and order granting in part and denying in part their motion for summary disposition against plaintiff, Terri Parker, as next friend of Maurece Peters, Jr., a minor.¹ We reverse and remand.

A trial court's decision to grant or deny summary disposition on the basis of governmental immunity is reviewed de novo. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). "Under MCR 2.116(C)(7), the moving party is entitled to summary disposition if the plaintiff's claims are barred because of immunity granted by law." *Id.* (internal quotations omitted). In deciding a motion for summary disposition under MCR 2.116(C)(7), the trial court considers any affidavits, depositions, or other documents, that the movant may have submitted. *Id.* "The contents of the complaint are accepted as true unless contradicted by the evidence provided." *Id.* (internal quotations omitted).

This Court also reviews de novo a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10). *MEEMIC Ins v DTE Energy Co*, 292 Mich App

¹ All claims regarding Marquese Peters were dismissed by stipulation on June 29, 2011, and are not part of this appeal.

278, 280; 807 NW2d 407 (2011). Summary disposition is properly granted under MCR 2.116(C)(10) “if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Id.* In ruling on a motion for summary disposition brought under MCR 2.116(C)(10), the trial court “must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the opposing party.” *Id.*; see also MCR 2.116(G)(3).

Defendants first argue that they are all covered by governmental immunity with respect to plaintiff’s gross negligence claim, and so the trial court erred in denying their motion for summary disposition in this respect. We agree that the Pontiac School District is entitled to governmental immunity for all of plaintiff’s tort claims.

Under the Government Tort Liability Act (GTLA), MCL 691.1401 *et seq.*, a governmental agency engaged in the exercise or discharge of a governmental function is immune from tort liability. MCL 691.1407(1). A governmental function is “an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.” MCL 691.1401(b); see also *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 591; 363 NW2d 641 (1984). In determining whether a governmental agency is engaged in a governmental function, this Court considers “the general activity involved rather than the specific conduct engaged in when the alleged injury occurred.” *Ward v Mich State Univ (On Remand)*, 287 Mich App 76, 84; 782 NW2d 514 (2010). The term “governmental function” is broadly construed. *Tellin v Forsyth Twp*, 291 Mich App 692, 699; 806 NW2d 359 (2011).

There are several exceptions to the applicability of governmental immunity,² but the plaintiff “must initially plead his claims in avoidance of governmental immunity.” *Odom*, 482 Mich at 478-479. An agency engaged in ultra vires acts is not immune from tort liability because a governmental agency must be engaged in the exercise of a governmental function to qualify for immunity. *Ross*, 420 Mich at 620.

The trial court correctly dismissed plaintiff’s claims of gross negligence, assault and battery, and false arrest against the Pontiac School District. First, school districts are governmental agencies. See MCL 691.1401(a), (e). The GTLA defines a governmental agency as the state or a political subdivision. MCL 691.1401(a). The definition of political subdivisions includes school districts. MCL 691.1401(e). Second, the operation of a public school is a governmental function. *Stringwell v Ann Arbor Pub Sch Dist*, 262 Mich App 709, 712; 686 NW2d 825 (2004). Plaintiff argues that the school district was engaged in an ultra vires activity, which is not a governmental function, so the district is not entitled to immunity. To determine what constitutes a governmental function, the general activity of the governmental agency is considered, not the specific conduct that led to the injury. *Ward*, 287 Mich App at 84. In this

² The statutory exceptions to governmental immunity are (1) the highway exception, MCL 691.1402; (2) the motor-vehicle exception, MCL 691.1405; (3) the public-building exception, MCL 691.1406; (4) the proprietary-function exception, MCL 691.1413; (5) the governmental-hospital exception, MCL 691.1407(4); and (6) the sewage-disposal-system-event exception, MCL 691.1407(2) and (3). See *Odom*, 482 Mich at 478 n 62.

case, the school district was engaged in the general activity of operating a school district. Finally, plaintiff did not successfully plead any exception to governmental immunity. Therefore, the Pontiac School District is immune from tort liability. See *Odom*, 482 Mich at 478-479.

MCL 691.1407(2) applies to negligence tort immunity for governmental employees:

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 . . . 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 . . . 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.

The statute defines gross negligence as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a). Generally, whether a governmental employee's conduct constituted gross negligence that was the proximate cause of the plaintiff's injury is a question of fact. *Briggs v Oakland Co*, 276 Mich App 369, 374; 742 NW2d 136 (2007). However, if reasonable minds could not differ on this issue, then summary disposition is appropriate. *Id.*

As discussed above, the Pontiac School District, a governmental agency, was engaged in the exercise or discharge of a governmental function—operating a school district—when this incident occurred. See MCL 691.1401(a) and (e); *Stringwell*, 262 Mich App at 712. No questions of fact exist as to whether Officers Lee and Bowden were acting or reasonably believed that they were acting within the scope of their authority and whether their actions were grossly negligent.

The Police Authority Officer Program Operations Manual provides that the use of force may be necessary to maintain order or protect students. The manual states:

Members of the School District of the City of Pontiac Security Department shall use only the amount of force that is reasonably necessary to conduct law enforcement activities. “Reasonableness” of the force used must be judged from the perspective of any objectively reasonable officer on the scene at the time of the incident.

When evaluating the “reasonableness” of a particular level of force, the following facts should be taken into consideration.

1. The conduct of the individual being confronted (as reasonably perceived by the officer at the time).

2. Officer/subject factors (age, size, relative strength, skill level, injury/exhaustion, number of officers vs. subjects).

* * *

5. Seriousness of the suspected offense of [sic] reason for contact with the individual.

6. Officer's training and experience.

7. Potential for injury to bystanders, officers and suspects.

8. Risk of escape.

9. Other exigent circumstances.

The parties disagree about what Maurece did when he was confronted by Officer Lee. Officer Lee claims that Maurece was yelling, swearing, clenching his fists, and failing to comply with her verbal orders. Maurece alleges that he did not say anything derogatory to Officer Lee or the other officers. He claims that he was being escorted by his teacher, Kathy King, to his gym class and that he was going with her voluntarily. The security video from the hallway where this incident occurred lacks sound, so it is impossible to ascertain what was said between Maurece and Officer Lee. It does appear that few words were exchanged when Officer Lee pushed Maurece against the wall for the first time.

Maurece was 14 years old at the time of this incident. He was approximately five feet, one inch tall, and weighed about 110 pounds. Officer Lee was about five feet, seven inches tall, and weighed about 140 pounds. There were far more students in the hallway than officers and teachers. In addition, a serious fight had just occurred, so Officer Lee and the other officers were trying to restore order and ensure student safety by having the students stand against the wall. The circumstances themselves were serious; one of the students involved in the fight was seriously injured and there was blood "everywhere." Further, Maurece disobeyed Officer Lee's commands to move against the wall.

Finally, the record does not support that Officer Lee used unreasonable force against Maurece. Maurece alleges that Officer Lee threw him against the wall four times, which resulted in a broken acromion in his shoulder that ultimately required surgery. Officer Lee denied touching Maurece and then said that Maurece walked into her open hands. Maurece said that he was in pain, but the video recording does not show Maurece falling to the ground, complaining of pain, or being unable to function normally. Therefore, we conclude that there is not a question of fact whether Officer Lee used *reasonable* force against Maurece and whether her conduct was grossly negligent, or "so reckless as to demonstrate a substantial lack of concern for whether an injury results." See MCL 691.1407(7)(a). The Police Authority manual permits the use of *reasonable* physical force. Therefore, no questions of fact exist as to whether Officer Lee was acting, or reasonably believed she was acting, within the scope of her authority.

Similarly, no questions of fact exist as to whether Officer Bowden was acting, or reasonably believed he was acting, within the scope of his authority and whether his conduct was grossly negligent. Officer Bowden testified that when he arrived in the hallway, he saw Maurece disobeying Officer Lee's orders and using inappropriate language. Officer Lee then handed Maurece over to Officer Bowden. The video recording shows that Officer Bowden and Maurece began walking down the hall and then stopped; Officer Bowden then placed or pushed Maurece against the wall and handcuffed him. Given Maurece's conduct observed by Officer Bowden and the surrounding exigent circumstances, a jury could not conclude that Officer Bowden used unreasonable force and therefore acted outside the scope of his authority.

Maurece also claims that he was left in the security office, handcuffed, for all of his first hour and most of his second hour classes. Terri Parker, Maurece's mother, said that she was not called until about 10:00 a.m. that morning; the fight occurred at approximately 7:45 a.m. But Officers Bowden and Lee testified that Maurece was only handcuffed for five minutes. Further, Maurece was handcuffed because of his own disruptive behavior during a violent school fight that Officers Bowden and Lee were trying to control. Therefore, a jury could not conclude that Officer Bowden's conduct was grossly negligent and outside the scope of his authority.

Finally, defendants argue that their conduct was not *the* proximate cause of Maurece's injuries. They claim that if Maurece had complied with their orders to stand against the wall, he never would have been injured. Proximate cause includes both cause in fact and legal cause. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 218; 761 NW2d 293 (2008). "Cause in fact requires the plaintiff to show that but for the defendant's actions, the injury would not have occurred, while legal or proximate cause normally involves examining the foreseeability of consequences." *Id.* Maurece injured his shoulder when he was pushed or placed against the wall by Officers Lee and Bowden. But it was Maurece's defiance that was the proximate cause of his injury, not the Officers' conduct. Officers Lee and Bowden pushed or placed Maurece against the wall only after his refusal to comply with their requests. Therefore, there are no questions of fact regarding whether Officers Lee and Bowden acted with gross negligence or unreasonable force. See *Love v Detroit*, 270 Mich App 563, 573; 716 NW2d 604 (2006).

Second, defendants claim that Officer Lee is entitled to governmental immunity with respect to plaintiff's intentional tort claims. We agree.

The GTLA provides that "the law of *intentional torts* as it existed before July 7, 1986" was not altered by the Legislature's enactment of the GTLA. MCL 691.1407(3) (emphasis added). Therefore, the common-law test from *Ross*, 420 Mich at 567, continues to apply with respect to intentional torts. *Odom*, 482 Mich at 472-473. But this test provides that lower level governmental employees are immune from intentional tort liability when they are "1) acting within the scope of their employment and acting, or reasonably believe they are acting, within the scope of their authority; 2) acting in good faith or without malice; and 3) performing discretionary, as opposed to ministerial acts." *Ross*, 420 Mich at 633-634 (footnotes omitted); see also *Odom*, 482 Mich at 473.

As discussed above, there are no questions of fact regarding whether Officer Lee was acting within the scope of her authority or whether Officer Lee was acting in good faith. This question requires a subjective analysis. *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 578; 808 NW2d 578 (2011). Acting in good faith requires acting without malice. *Odom*,

482 Mich at 474. Malice is “[t]he intent, without justification or excuse, to commit a wrongful act.” Black’s Law Dictionary (9th ed). The video recording shows Maurece coming into contact with the wall several times. It appears that Officer Lee is pushing Maurece against the wall but it is difficult to discern how much force is used. Officer Lee first tried to ensure the safety of Maurece and the other students during a violent fight at the school by asking them to stand against the wall. But Maurece refused to comply with Officer Lee’s requests. Instead, Maurece used profanity and clenched his fists at Officer Lee. Thus, the record does not create a question of fact whether Officer Lee intentionally and unjustifiably used force against Maurece that caused a harmful or offensive contact. See Black’s Law Dictionary (9th ed) (battery).

Finally, there is no question of fact that Officer Lee was performing discretionary, rather than ministerial, acts during her encounter with Maurece. “A police officer’s decisions regarding how to respond to a citizen, how to safely defuse a situation, and how to effectuate the lawful arrest of a citizen who resists are . . . clearly discretionary.” *Norris*, 292 Mich App at 579. Officer Lee was working as a police officer in Pontiac Middle School and using her discretion to determine what actions to take. She was not merely following directions or set procedures; no one was directing her on how to proceed in response to the fight, crowd of students, or Maurece’s behavior.

Third, defendants contend that plaintiff’s gross negligence claim should be dismissed because it is fully premised on her intentional tort claims. We agree.

“Elements of intentional torts may not be transformed into gross negligence claims.” *Norris*, 292 Mich App at 582, citing *VanVorous v Burmeister*, 262 Mich App 467, 483; 687 NW2d 132 (2004). If a plaintiff’s claim of gross negligence is “fully premised” on a claim of excessive force, then the gross negligence claim should be dismissed. See *VanVorous*, 262 Mich App at 483-484. A plaintiff seeking to recover civil damages for assault and battery or false arrest must show that the defendant acted intentionally or willfully. See *id.* at 482-483. On the other hand, a plaintiff seeking to recover for gross negligence must show that the defendant acted with “a substantial lack of concern for whether an injury results.” See MCL 691.1407(7)(a).

In her complaint, plaintiff does not specify what duties defendants breached that give rise to a claim for gross negligence. Instead, her claim of gross negligence is based on her allegations that Officers Lee and Bowden threw Maurece against a wall of lockers, handcuffed him, and left him in handcuffs for several hours. Plaintiff claims that this conduct demonstrated “a substantial lack of concern” for whether Maurece would be injured. In her response to defendants’ motion for summary disposition, plaintiff further explains that defendants’ conduct was “extreme and reckless.” On January 28, 2010, Maurece weighed 110 pounds and was about five feet tall. Consequently, “there was no need for the Defendant to throw him into a wall several times, nor was there a need for Defendant Bowden, a former MDOC employee, who was 6’3” and 250 lbs., to handcuff him and leave him in custody for two hours.”

Consequently, it does appear that plaintiff’s gross negligence and intentional tort claims are based on the same factual allegations—that Officers Lee and Bowden used excessive force against Maurece and arrested him without probable cause. Plaintiff further blurs her allegations for these claims with respect to intent. Based on the same factual allegations, plaintiff claims both that (1) defendant (the complaint does not specify Officer Lee, Officer Bowden, or both) willfully and intentionally threw Maurece against the wall and then intentionally used physical

force to arrest him and detain him without probable cause and (2) defendants acted recklessly in detaining Maurece, such that they demonstrated a substantial lack of concern for whether he was injured. Therefore, plaintiff's claim of gross negligence is "fully premised" on a claim of excessive force and should be dismissed.

Fourth, defendants allege that there are no genuine issues of material fact with respect to plaintiff's § 1983³ claim against the Pontiac School District. We agree.

Section 1983 provides an avenue for seeking redress of constitutional violations. See *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 30; 703 NW2d 822 (2005). It states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [42 USC 1983.]

Section 1983 "is not itself an independent source of substantive rights; rather it merely provides a remedy for the violation of rights guaranteed by the federal constitution or federal statutes." *By Lo Oil*, 267 Mich App at 30. A local government is not liable under § 1983 for the tortious acts of its employees merely by virtue of the employer-employee relationship, or a theory of respondeat superior. *Monell v Dep't of Social Servs of the City of New York*, 436 US 658, 691; 98 S Ct 2018; 56 L Ed 2d 611 (1978). However, a body of local government may be sued directly under § 1983 "if it is alleged to have caused a constitutional tort through 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.'" *City of St Louis v Praprotnik*, 485 US 112, 121; 108 S Ct 915; 99 L Ed 2d 107 (1988), quoting *Monell*, 436 US at 690.

A local governmental body may also be sued pursuant to § 1983 "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking [sic] channels." *Praprotnik*, 485 US at 121, quoting *Monell*, 436 US at 690-691. A plaintiff may be able to demonstrate such a custom exists by showing that a practice is "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Praprotnik*, 485 US at 127, quoting *Adickes v SH Kress & Co*, 398 US 144, 167-168; 90 S Ct 1598; 26 L Ed 2d 142 (1970). One instance of unconstitutional activity is not enough to impose liability pursuant to § 1983, unless that instance was the result of an existing, unconstitutional policy. *Oklahoma City v Tuttle*, 471 US 808, 841; 105 S Ct 2427; 85 L Ed 2d 791 (1985).

In this case, plaintiff alleges that the Pontiac School District "has a practice and custom of handcuffing students, i.e. placing them under arrest without probable cause to do so, thereby

³ See 42 USC § 1983.

depriving him or her of their Fourth Amendment right to be free from illegal search and seizure” In support of this allegation, plaintiff points to statements made by the Officers. First, Officer Lee stated that “[c]lenched fists at an Officer consists of a disorderly person, which will immediately have you cuffed.” Second, Officer Lee stated that a second student was handcuffed because he was “being defiant,” “did not want to cooperate,” and was using profanity. Finally, Officer Bowden testified that Police Authority officers can detain students when they are upset, “before the situation goes to the point to where you have to physically take a kid down, it would probably be best to put him in handcuffs.” Plaintiff alleges that this testimony demonstrates a custom of handcuffing or arresting children without “reasonable and articulable suspicion to believe that they have committed a crime,” presumably because clenching one’s fists does not constitute disorderly conduct.

Plaintiff also cited to the Police Authority Operations Manual’s policies on the use of force. But plaintiff does not explain how these policies violated Maurece’s, or anyone’s, constitutional rights; the policies provide that officers may only use “injuring force” when lower levels of force do not work to gain compliance or appear to be inappropriate.

But the Officers’ testimony does not demonstrate that the practice of “handcuffing students for disorderly conduct when their fists are clenched” is so permanent and well settled as to constitute “custom or usage” with the force of law. Consequently, there is no evidence to support plaintiff’s claim that a policy exists and no questions of fact regarding whether the Pontiac School District has a practice or custom of handcuffing students without probable cause to arrest them.

Fifth, defendants contend that there are no genuine issues of material fact with respect to plaintiff’s § 1983 claim against Officers Lee and Bowden. We agree.

To sustain a cause of action under § 1983 against an individual defendant, “[a] plaintiff must demonstrate that the defendants, acting under color of state law, deprived [him] of a right secured by the constitution or the laws of the United States.” *Mettler Walloon*, 281 Mich App at 195. An individual is usually acting under color of state law when “the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.” *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 214; 755 NW2d 686 (2008), quoting *Nat’l Collegiate Athletic Ass’n v Tarkanian*, 488 US 179, 192; 109 S Ct 454; 102 L Ed 2d 469 (1988).

Officers Lee and Bowden were acting under color of state law. Officers Lee and Bowden were both working as Police Authority officers in Pontiac Middle School when the incident with Maurece occurred. The Pontiac School District and Pontiac Police Department provided their authority to maintain order and command students.

But there is not a question of fact as to whether the conduct of Officers Lee and Bowden deprived Maurece of a constitutional right. Plaintiff alleges that Maurece’s Fourth and Fourteenth Amendment rights were violated. The Fourth Amendment of the United States Constitution gives individuals the right to be free from unreasonable searches and seizures. US Const, Am IV; see also *Corr*, 287 Mich App at 506. “[T]he test for what constitutes a seizure is whether, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *Corr*, 287 Mich App at 506. A claim of excessive force that arises in the context of an arrest or investigatory stop “is most properly characterized

as one invoking the protections of the Fourth Amendment, which guarantees citizens the right ‘to be secure in their persons . . . against unreasonable . . . seizures’ of the person.” *Graham v Connor*, 490 US 386, 394; 109 S Ct 1865; 104 L Ed 2d 443 (1989). Such a claim invokes Fourth Amendment rights because the Fourth Amendment’s requirement of “reasonableness” applies not only to *when* a seizure is carried out, but also *how* it is carried out. See *id.* at 395.

“The reasonableness of a Fourth Amendment seizure balances the governmental interest that justifies the intrusion against an individual’s right to be free of arbitrary police interference.” *People v Faucett*, 442 Mich 153, 158; 499 NW2d 764 (1993), citing *Terry v Ohio*, 392 US 1, 20-21; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Generally, seizures are reasonable only if they are based on probable cause. *People v Lewis*, 251 Mich App 58, 69; 649 NW2d 792 (2002). However, when the police have a “reasonable, articulable suspicion that the person has committed or is about to commit a crime,” they may detain an individual in an investigatory stop. *Id.* (internal quotations omitted). With respect to claims of excessive force, the proper inquiry is whether a police officer’s actions were objectively reasonable “in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” *Graham*, 490 US at 397.

In this case, there are two types of conduct that potentially give rise to a claim of a Fourth Amendment violation. First, Maurece alleges that he was pushed into the wall by Officer Lee and Officer Bowden. Second, Maurece alleges that he was handcuffed and then left in handcuffs. But this is not enough to show a question of fact whether Maurece’s Fourth Amendment rights were violated by the officers’ use of excessive force. As discussed above, a jury could not conclude that the force used by Officers Lee and Bowden against Maurece was unreasonable “in light of the facts and circumstances confronting them.” See *Graham*, 490 US at 397.

There is also not a question of fact whether Maurece was seized without probable cause when he was placed in handcuffs. By being handcuffed, Maurece was “seized” as a reasonable person would not believe he is free to leave when he is handcuffed by a police officer because his movement is restricted until the officer removes the handcuffs. See *Corr*, 287 Mich App at 506. But the Officers had a “reasonable, articulable suspicion that [Maurece] was about to commit a crime” on two grounds. First, Maurece was defiant during a violent school fight. Second, Maurece clenched his fists at an Officer.

Therefore, Maurece’s seizure was reasonable because there was probable cause to believe he had committed or was about to commit a crime. See *Lewis*, 251 Mich App at 69. While Maurece claims he was doing nothing wrong, Officers Lee and Bowden testified that Maurece was arrested because he was clenching his fists and using profanity. Officer Lee stated that when a student clenches his fists, that constitutes disorderly conduct and the student is handcuffed. As discussed above, there is not a question of fact whether there was probable cause to arrest Maurece.

Finally, defendants claim that Officers Lee and Bowden are entitled to qualified immunity with respect to plaintiff’s § 1983 claim. We agree.

Whether a defendant is entitled to qualified immunity is a question of law that this Court reviews de novo. *Morden v Grand Traverse Co*, 275 Mich App 325, 340; 738 NW2d 278 (2007).

Generally, governmental employees performing discretionary functions are shielded from liability “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Morden*, 275 Mich App at 340, quoting *Harlow v Fitzgerald*, 457 US 800, 818; 102 S Ct 2727; 73 L Ed 2d 396 (1982). The employee’s conduct should be examined using an objective standard, without regard to the employee’s state of mind. *Morden*, 275 Mich App at 340. Qualified immunity provides broad protection for governmental employees. *Id.* at 340-341. An employee is not entitled to qualified immunity only when his conduct violates a right that is “sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Id.* at 341, quoting *Brosseau v Haugen*, 543 US 194, 198; 125 S Ct 596; 160 L Ed 2d 583 (2004).

In determining whether a governmental employee is entitled to qualified immunity, it may be helpful to consider the two-step approach provided by *Saucier v Katz*, 533 US 194; 121 S Ct 2151; 150 L Ed 2d 272 (2001), overruled by *Pearson v Callahan*, 555 US 223, 236; 129 S Ct 808; 172 L Ed 2d 565 (2009). However, this test is no longer mandatory and it is not necessary to analyze both prongs when a claim fails with respect to one. *Id.* at 236. The United States Supreme Court in *Pearson*, 555 US at 815-816, described the now-optional *Saucier* test:

First, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was “clearly established” at the time of defendant’s alleged misconduct. Qualified immunity is applicable unless the official’s conduct violated a clearly established constitutional right. [Internal citations omitted.]

Plaintiff has not created a question of fact whether Officers Lee and Bowden are entitled to qualified immunity for plaintiff’s § 1983 claim. As discussed above, there is not a question of fact as to whether Maurece’s constitutional right to be free from unreasonable seizure was violated. Therefore, there is no need to proceed to the second prong of the test.

Plaintiff also argues that Officers Lee and Bowden were performing ministerial acts and so are not entitled to qualified immunity for her § 1983 claim. But this argument is without merit. “A police officer’s decisions regarding how to respond to a citizen, how to safely defuse a situation, and how to effectuate the lawful arrest of a citizen who resists are . . . clearly discretionary.” *Norris*, 292 Mich App at 579.

The order of the trial court denying in part defendants’ motion for summary disposition is reversed. The matter is remanded to the trial court with instructions to enter an order of summary disposition on all issues in favor of defendants. We do not retain jurisdiction. Defendants may tax costs.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Patrick M. Meter