

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ELLEN GARBER, JASON FRENCH, and  
JOSHUA FRENCH,

Plaintiffs-Appellees,

v

MARK O’FARRELL, MARK FILICE, ROBERT  
McELMURRAY, JASON FERGUSON, and  
MATTHEW WILSON,

Defendants-Appellants.

UNPUBLISHED  
May 16, 2006

No. 264402  
04-001222-NO  
LC No. 04-001222-NO

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ELLEN GARBER, JASON FRENCH, and  
JOSHUA FRENCH,

Plaintiffs-Appellees,

v

MARK O’FARRELL, MARK FILICE, ROBERT  
McELMURRAY, JASON FERGUSON, and  
MATTHEW WILSON,

Defendants-Appellants.

No. 264403  
Ingham Circuit Court  
LC No. 04-001222-NO

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Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

In these consolidated appeals, defendants, law enforcement officers, appeal the trial court’s order denying their motion for summary disposition of plaintiffs’ claims under 42 USC 1983, alleging that defendants violated plaintiffs’ constitutional rights in arresting plaintiffs

Jason and Joshua French.<sup>1</sup> In Docket No. 264403, defendants appeal by right the denial of their motions for summary disposition on the basis of governmental immunity. In Docket No. 264402, defendants appeal by leave granted the denial of their motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). We affirm.

## I

This case stems from a September 22, 2001, police response to a complaint of a loud party at plaintiff Jason French's home in rural Dansville, which eventually culminated in a melee between the police and partygoers. Plaintiffs Jason and Joshua French (Jason's brother) and their mother, plaintiff Ellen Garber, were all at the party, which according to plaintiffs was an outdoor wedding reception for some friends, involving 50 to 70 attendees, a bonfire, a band playing in a backyard tent, and three kegs of beer. Defendants O'Farrell, Filice, and McElmurray are Ingham County Sheriff Department officers, who initially responded to the complaint. According to defendants, the party involved some 200 attendees, and after O'Farrell decided to arrest Jason, the initial officers on the scene called for back-up because of concerns about the crowd. Defendants Ferguson and Wilson are Ingham County officers who were the first officers to arrive as back-up, which eventually involved 46 officers from 11 jurisdictions.

During the encounter with plaintiffs, defendants arrested Joshua and Jason, along with five others. They were charged with various criminal offenses. Following a jury trial, both were acquitted of all charges. Plaintiffs subsequently filed this lawsuit, alleging among other claims, violations of their rights under the First, Fourth and Fourteenth Amendments of the United States Constitution, contrary to 42 USC 1983. The trial court denied defendants' motion for summary disposition, concluding that genuine issues of material fact existed regarding plaintiffs' constitutional claims, and thus defendants were not entitled to governmental immunity.

## II

This Court reviews de novo a trial court's denial of summary disposition to determine whether the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion for summary disposition under MCR 2.116(C)(7) asserts that a claim is barred by immunity granted by law; a (C)(8) motion asserts the pleading fails to state a claim on which relief can be granted, and summary disposition under (C)(10) is proper where there is no genuine issue of material fact and a party is entitled to judgment as a matter of law." *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 25; 703 NW2d 822 (2005).

A motion under MCR 2.116(C)(7) may be supported or opposed by affidavits, depositions, admissions, or other documentary evidence; however, the substance or content of the supporting proofs must be admissible in evidence. *Maiden, supra* at 119; *By Lo Oil, supra* at

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<sup>1</sup> Plaintiffs' lawsuit alleged numerous claims against defendants; however, only the § 1983 claims remain at issue.

26. The allegations of the complaint are accepted as true unless contradicted by documentary evidence submitted by the moving party. *Maiden, supra* at 119; *By Lo Oil, supra* at 26. A motion for summary disposition under MCR 2.116(C)(7) is properly granted when the undisputed facts establish that the moving party is entitled to immunity granted by law. *By Lo Oil, supra* at 26.

A motion under MCR 2.116(C)(8) tests the factual sufficiency of the complaint on the basis of the pleadings alone. *Maiden, supra* at 119; *By Lo Oil, supra* at 26. All well-pleaded allegations must be accepted as true and construed in a light most favorable to the nonmoving party. *Maiden, supra* at 119. The motion must be granted if no factual development could possibly justify recovery. *Id.*; *By Lo Oil, supra* at 26.

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.* The moving party must specifically identify the undisputed factual issues and has the initial burden of supporting its position with documentary evidence. *Id.* at 455; *By Lo Oil, supra* at 26. The responding party must then present substantively admissible evidence to demonstrate that a genuine issue of material fact remains for trial. *Smith, supra* at 455 n 2; *Maiden, supra* at 121.

### III

Defendants argue that the trial court erred in denying their motion for summary disposition. We disagree.

“Section 1983 provides a civil remedy to persons deprived of constitutional rights by individuals acting under color of state law.”<sup>2</sup> *Dowork v Oxford Charter Twp*, 233 Mich App 62, 74; 592 NW2d 724 (1999), quoting *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 65-66, 445 NW2d 61 (1989). A claim under § 1983 requires a party to show that (1) the complained-of conduct was committed by a person acting under color of state law, and (2) the conduct deprived the party of rights, privileges, or immunities secured by the United States Constitution. *Dowork, supra* at 74. However, in an action under § 1983, a government official performing discretionary functions is entitled to qualified immunity if his actions do not violate clearly established

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<sup>2</sup> 42 USC 1983 provides in relevant part:

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 . . . .

statutory or constitutional rights of which a reasonable person would have known. *Guider v Smith*, 431 Mich 559, 565, 568; 431 NW2d 810 (1988); *Thomas McGinnis*, 239 Mich App 636, 644; 609 NW2d 222 (2000).

In addressing whether there is qualified immunity, a court must consider: 1) whether the alleged conduct establishes a constitutional violation, and 2) whether the constitutional standard was clearly established at the time in question. *Guider, supra* at 568. “If the undisputed facts show that the defendant's conduct violated no clearly established constitutional standards, qualified immunity applies as a matter of law.” *Id.* However, if there was a violation of a clearly established constitutional right, the next inquiry is whether a reasonable person in the defendant's position could have believed his actions were consistent with the law. *Id.* at 569-570; *Thomas, supra* at 644-645. If so, the defendant is entitled to qualified immunity.

“The threshold test of a clearly established violation is one of law and always will be an issue for the court to decide.” *Guider, supra* at 573. If there is a factual dispute involving an issue on which immunity turns, such that it cannot be determined before trial what the defendants' acts were, the reasonableness of the act, or whether exceptional circumstances existed, the case will proceed to trial. *Id.* at 572; *Alexander v Riccinto*, 192 Mich App 65, 72-73; 481 NW2d 6 (1991). Immunity is not available to a defendant who knew or should have known that his actions would violate the plaintiff's constitutional rights or who acted with malicious intent. *Thomas, supra* at 645.

The key dispute in this case centers on the encounter between the police and Jason, and his eventual arrest, which ultimately led to confrontations between the police, and Garber and Joshua. The trial court denied defendants' motion for summary disposition, essentially on the basis that the underlying facts were disputed, and whether the officers' conduct was reasonable was a matter for the jury. We find no error.

Although each plaintiff asserts distinct constitutional violations premised on independent factual circumstances, the arguments and law overlap. Argument at the hearing on defendants' motion focused on the excessive force claims, as did the ruling by the trial court. Our analysis addresses the claims and arguments as presented.<sup>3</sup>

#### Plaintiff Jason French

Jason asserted a claim of a violation of his Fourth Amendment rights with respect to excessive force in his arrest, against defendants O'Farrell, McElmurray, Ferguson, Wilson, and Filice. He also asserted a claim under the First Amendment for retaliation against O'Farrell.

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<sup>3</sup> Plaintiffs' § 1983 claims, other than the excessive force claims, were not set forth in specific terms in their complaint, and the issues presented on appeal are nonspecific with regard to the constitutional claims of each plaintiff. Various claims are alleged against only certain defendants given the distinct factual context applying to each plaintiff. The net result is a confusion of claims and arguments, particularly in light of the dismissal of certain claims after these appeals were filed.

A

The trial court denied defendants' motion for summary disposition of Jason's claim of excessive force on the ground that their actions were reasonable. The court did not disagree with defendants' assertion that the reasonableness standard pertaining to excessive force recognizes that law enforcement officers must make split-second decisions that should not be judged in hindsight. The court nonetheless noted that the reasonableness standard was one to be applied by the jury and that plaintiffs had established genuine issues of fact on this issue. Further, although defendant cited federal case law that held as a matter of law that the use of pepper spray was not excessive force, the court noted that the cases cited were factually distinguishable because there was a clear basis for the use of the pepper spray. However, in this case, the facts concerning defendants' and plaintiffs' actions giving rise to the use of force were in dispute, precluding a determination as a matter of law that the force used was or was not reasonable.

The trial court properly denied summary disposition on the ground that the material facts were in dispute. In § 1983 actions, claims that a law enforcement officer used excessive force in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness standard." *Alexander, supra* at 72. Reasonableness must be judged from the perspective of a reasonable officer on the scene, rather than in hindsight. *Id.*

[A] police officer making a lawful arrest may use that force that is reasonable in self-defense circumstances and is not required to retreat before a display of force by the adversary, unlike a private citizen in similar circumstances. Like a private citizen, though, the officer must have a reasonable belief of great danger before responding with the appropriate amount of force to foreclose the threat.

We believe that what constitutes a reasonable belief of great danger is to be determined by the jury on the basis of all the facts and circumstances as they appeared to the party at the time of the incident. [*Id.* at 69.]<sup>4</sup>

Thus, while the defense of qualified immunity is available against a claim of excessive force by a law enforcement officer in effectuating an arrest, a defendant's entitlement to the defense can ordinarily be determined only after a factfinder decides the threshold disputed question of whether the use of force was reasonable. *Id.* at 72-73. Here, the defendant officers

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<sup>4</sup> To determine whether the force used to effect an arrest is "reasonable" under the Fourth Amendment, this Court must consider the facts and circumstances surrounding the seizure including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." An objective standard must be used to determine the reasonableness of the particular force used in light of the facts and circumstances confronting a reasonable officer on the scene. *Graham v Connor*, 490 US 386, 396-397; 109 S Ct 1865; 104 L Ed 2d 443 (1989); see also *People v Hanna*, 459 Mich 1005; 595 NW2d 827 (1999).

claimed that the level of force used was necessary. However, plaintiffs presented documentary evidence creating a triable issue of fact whether Jason assaulted a police officer, whether his conduct was combative or threatening, and indicating that defendants continued to beat Jason even after he was subdued. There was evidence that Jason sustained considerable injuries. The disputed facts regarding the aggressive nature of Jason's acts and the reasonableness of defendants' alleged belief that they were in danger require submission to the factfinder.

## B

With regard to Jason's retaliation claim, the same underlying analysis and reasoning apply to preclude summary disposition. This claim was not specifically addressed in the arguments below. To the extent that Jason alleged retaliation by O'Farrell in violation of § 1983 based on his First Amendment rights, this claim was premised on an allegation that defendants used excessive force in retaliation for Jason's exercise of his First Amendment right to free speech, i.e., to criticize defendants regarding the performance of their law enforcement duties.

On appeal, defendants argue that Jason failed to present sufficient evidence linking his speech to defendants' adverse action to permit a reasonable factfinder to conclude that the speech, at least in part, motivated the adverse action, *Cockrel v Shelby Co School Dist*, 270 F3d 1036, 1055 (CA 6, 2001). See *Crawford-El v Britton*, 523 US 574, 588-589; 118 S Ct 1584; 140 L Ed 2d 759 (1998); *Thaddeus-X v Blatter*, 175 F3d 378, 394, 399 (en banc) (CA 6, 1999).<sup>5</sup> Plaintiffs acknowledge that their retaliation claim requires a showing that defendants acted with an ulterior motive, i.e., that the adverse action was motivated by plaintiff's protected conduct.

Viewing the evidence and all reasonable inferences in favor of plaintiffs, the trial court properly denied defendants' motion for summary disposition. As noted above, according to Jason's deposition testimony, using highly offensive language, he told O'Farrell to get off his property, but never touched O'Farrell, following which a confrontation ensued, and O'Farrell decided to arrest Jason for assaulting a police officer. A reasonable factfinder could infer that Jason's arrest and the alleged use of excessive force was motivated at least in part by Jason's language and comments, and therefore defendants were not entitled to judgment as a matter of law. *Smith, supra* at 454; *Bertrand v Alan Ford, Inc*, 449 Mich 606, 618; 537 NW2d 185 (1995).

## C

Defendants further argue that plaintiffs failed to present admissible evidence to rebut defendants' affidavits and deposition testimony that Jason's arrest was not motivated by plaintiffs' speech. The key events and ample factual support for plaintiffs' claims are provided within the depositions, affidavits, and other evidence submitted by plaintiffs. To the extent that

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<sup>5</sup> "A retaliation claim essentially entails three elements: (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by the plaintiff's protected conduct." *Thaddeus-X, supra* at 394.

defendants argue that the excerpts from the transcripts of the criminal trial are inadmissible hearsay evidence of non-party witnesses and cannot be relied on to rebut defendants' affidavits and deposition testimony, we disagree. Defendants cite no authority supporting their contention, other than citation to MCR 2.116(G)(6)<sup>6</sup> and the general rules of evidence. An appellant may not merely give issues cursory treatment with little or no citation of supporting authority. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).

As plaintiff notes, "the *substance or content* of the supporting proofs must be admissible in evidence." *Maiden, supra* at 119 (emphasis added); see also MCR 2.116(G)(6). Defendants' argument is without merit.

#### Plaintiff Joshua French

Joshua asserted a retaliation claim under the First Amendment and a substantive due process claim under the Fourteenth Amendment. These claims were apparently alleged against O'Farrell and McElmurray.

#### A

Joshua's claim is based on the same legal principals as Jason's retaliation claim. Plaintiffs alleged that defendants retaliated against Joshua for criticizing the police for assaulting and injuring Jason. Defendants contend that the trial court improperly relied on the inadmissible hearsay evidence of the "wedding guests." As discussed above, defendants' argument is without merit. Plaintiffs submitted affidavits and other testimonial evidence stating that Joshua never touched or interfered with the police, although he was arrested for allegedly assaulting a police officer, specifically, McElmurray. Joshua stated in his deposition testimony that he maintained a distance of three feet from his brother and the officers. There was also witness testimony that Joshua was yelling at defendants to get off of Jason and was questioning their conduct toward Jason. Joshua was subsequently pepper sprayed and arrested. Viewing the evidence and all reasonable inferences in favor of plaintiffs, the trial court properly denied defendants' motion for summary disposition.

#### B

Because Joshua's claim of excessive force does not concern his arrest, but instead relates to actions taken in the course of Jason's arrest, the standard for evaluating Joshua's claim differs from that applicable to Jason's excessive force claim. "[C]onstitutional tort claims asserted by persons collaterally injured by police conduct who were not intended targets of an attempted official 'seizure' are adjudged according to substantive due process norms." *Claybrook v Birchwell*, 199 F3d 350, 359 (CA 6, 2000).

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<sup>6</sup> 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."

The substantive due process rights of the Fourteenth Amendment protect citizens from the arbitrary exercise of governmental power. *Sacramento Co v Lewis*, 523 US 833, 845; 118 S Ct 1708; 140 L Ed 2d 1043 (1998). The parties agree that Joshua's claim is governed by the standard in *Lewis*, i.e., the question is whether the alleged conduct "shocks the conscience." *Id.* at 846-847. The standard for culpability depends on the factual context in which the police are acting:

In situations wherein the implicated state, county, or municipal agent(s) are afforded a reasonable opportunity to deliberate various alternatives prior to electing a course of action (such as, for example, most occasions whereby corrections officials ignore an inmate's serious medical needs), their actions will be deemed conscience-shocking if they were taken with "deliberate indifference" towards the plaintiff's federally protected rights. In contradistinction, in a rapidly evolving, fluid, and dangerous predicament which precludes the luxury of calm and reflective pre-response deliberation (such as, for example, a prison riot), public servants' reflexive actions "shock the conscience" only if they involved force employed "maliciously and sadistically for the very purpose of causing harm" rather than "in a good faith effort to maintain or restore discipline[.]"<sup>12</sup>

n 12 As aptly observed by the *Lewis* Court:

"The police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance." [*Claybrook, supra* at 359 (citations omitted).]

Defendants argue that applying the "shocks the conscience test" to Joshua's excessive force claim mandates a conclusion that defendants are entitled to qualified immunity. Defendants contend that they were confronted by an unruly, hostile crowd and that McElmurray only used the pepper spray in an attempt to keep the crowd away from the struggle accompanying Jason's arrest.

Plaintiffs argue that regardless of the standard applied, the trial court properly denied defendants' motion for summary disposition. As plaintiffs point out, witnesses' accounts indicated that the police actions were not justified by any disturbance or interference from onlookers during Jason's arrest. For instance, the affidavit of Allen Baker states that O'Farrell pulled out his pepper spray and began spraying people who were just standing and watching; O'Farrell pepper sprayed Joshua although he was not interfering in any way with any police officer; and he never saw anyone, including Joshua, touch or interfere with any police officer. Other witnesses testified similarly in the prior criminal proceedings. There was repeated testimony that, in essence, Jason and Joshua were polite in response to the police, that O'Farrell was swearing and offensive at the outset, for no reason, and that the police instigated the confrontation and the crowd only reacted when the police began beating Jason.

Viewing the facts in a light most favorable to plaintiffs, and drawing all reasonable inferences therefrom, reasonable minds could differ concerning whether the police conduct violated Joshua's substantive due process rights.

Plaintiff Ellen Garber

Garber asserted claims under the First and Fourteenth Amendments, on the same basis as Joshua, however, against only Ferguson. The same legal principles apply, and given the analogous factual context, the trial court properly denied defendants' motion for summary disposition.

A

The retaliation claim and analysis with respect to Garber are the same as those for Joshua. As discussed above, plaintiffs submitted evidence indicating generally that Garber did nothing to justify the police action toward her. In her affidavit, Garber also averred that she was 8 to 12 feet away from the struggle with Jason; she yelled at the officers concerning their unjustified treatment of Jason, and then Ferguson came from behind her and hit her with a maglite, severely bruising her leg. Viewing the evidence and all reasonable inferences in favor of plaintiffs, the trial court properly denied defendants' motion.

B

Garber's substantive due process claims rests on the same principles and general facts as that of Joshua. As noted above, Garber also submitted an affidavit in which she indicated that Ferguson came from behind her and hit her with a maglite, severely bruising her leg, for no apparent reason, other than her objections to defendants' treatment of Jason. Viewing the evidence and all reasonable inferences in favor of plaintiffs, the trial court properly denied defendants' motion.

With regard to Garber's claims, defendants argue that her claims must fail because her identification of Ferguson is merely assumption or conjecture because she admitted that she did not see Ferguson strike her leg. Accordingly, Garber failed to come forth with any admissible evidence that Ferguson struck her. The trial court rejected this argument as do we. Given the facts presented, that someone struck Garber from behind, that she turned around and saw Ferguson, who was the only person nearby, a factfinder could reasonably infer that Ferguson was the person who struck Garber.

The trial court did not err in denying defendants' motion for summary disposition with respect to plaintiffs' claim that defendants violated plaintiffs' constitutional rights under 42 USC 1983.

Affirmed.

/s/ Janet T. Neff  
/s/ Henry William Saad  
/s/ Richard A. Bandstra