

STATE OF MICHIGAN  
COURT OF APPEALS

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TROY ORLANDO BRASSELL,  
Plaintiff-Appellee,

UNPUBLISHED  
March 28, 2006

v

No. 252749  
Wayne Circuit Court  
LC No. 02-242387-NI

OFFICER DARRIN LABAN,

Defendant-Appellant,

and

CITY OF TAYLOR and OFFICER TED  
MICHOWSKI,

Defendants.

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Before: Whitbeck, C.J., and Saad and O’Connell, JJ.

PER CURIAM.

Defendant, Officer Darrin Laban, appeals the trial court’s order that partially denied his motion for summary disposition.<sup>1</sup> We reverse in part, affirm in part and remand for further proceedings.

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<sup>1</sup> Officer Laban moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10). “This Court reviews de novo a trial court’s decision to grant summary disposition.” *Diamond v Witherspoon*, 265 Mich App 673, 680; 696 NW2d 770 (2005). A motion under MCR 2.116(C)(7) should be granted if a claim is barred because of immunity granted by law. Further, as the *Diamond* Court explained:

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a plaintiff’s claim. *Maiden v Rozwood*, 461 Mich 109, 120, 597 NW2d 817 (1999). The trial court must consider the submitted evidence in the light most favorable to the nonmoving party. *Id.*; MCR 2.116(G)(5). If the proffered evidence fails to establish that a disputed material issue of fact remains for trial, summary disposition is properly granted to the party so entitled as a matter of law. MCR 2.116(C)(10), (G)(4), and (I)(1); *Maiden, supra* at 120, 597 NW2d 817.

On April 15, 2002, Taylor police officers Darrin Laban and Ted Michowski received a dispatch that alerted them to a theft at a K-Mart store in Taylor. Plaintiff concedes that he drove his uncle to the store, that his uncle stole electronic equipment, and that plaintiff fled from the police officers who were following his vehicle. A high-speed chase ensued, during which plaintiff collided with three vehicles, including the patrol car driven by Officer Laban. Plaintiff's vehicle eventually came to a stop and plaintiff and his uncle got out of the car and began to run. According to Officer Michowski, plaintiff was running parallel to the patrol car driven by Officer Laban and, as the patrol car was coming to a stop, plaintiff "cut to the right" and ran into the front left quarter panel of the patrol car. Plaintiff testified that, when he got out of the car, he tried to run and the patrol car "clipped" him from behind and he hit "the front left quarter panel and the bumper." Though plaintiff testified that he does not know exactly how the accident occurred, he maintains that Officer Laban should be held liable for assault and battery because he "intentionally" struck plaintiff with the patrol car.

We hold that plaintiff's claim is clearly barred by the wrongful conduct rule and, therefore, the trial court should have granted summary disposition to Officer Laban on this issue. As this Court explained in *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 89; 697 NW2d 558 (2005):

The wrongful-conduct rule provides that when a "plaintiff's action is based, in whole or in part, on his own illegal conduct," his claim is generally barred. [*Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 N.W2d 208 (1995).] The rule rests on the public policy premise that courts should not, directly or indirectly, encourage or tolerate illegal activities. *Id.* at 559-560. . . . However, that a plaintiff was engaged in illegal conduct at the time of his injury does not automatically bar his claim. Rather, to implicate the wrongful-conduct rule, the conduct must be serious in nature and prohibited under a penal or criminal statute. *Orzel, supra* at 561. Further, the wrongful-conduct rule only applies if there exists a sufficient causal nexus between the plaintiff's illegal conduct and the asserted damages.

The wrongful conduct rule arose under the common law and was supplemented by the Legislature in 2000 under MCL 600.2955b.<sup>2</sup> The statute provides, in relevant part:

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<sup>2</sup> While not binding, we are persuaded by the House Legislative Analysis HB 5232, June 19, 2000, and the observations of this Court in *Barth v Goal Tender Sports Pub and Grill*, unpublished opinion per curiam of the Court of Appeals, issued September 22, 2005 (Docket No. 262605):

[T]he legislative analysis indicates that it was intended to supplement, rather than replace, the common law. This is supported by our Supreme Court's explanation that the wrongful-conduct rule is "rooted in the public policy that courts should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct" because otherwise "the public would view the legal system as a mockery

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(1) Except as otherwise provided in this section, the court shall dismiss with prejudice a plaintiff's action for an individual's bodily injury or death and shall order the plaintiff to pay each defendant's costs and actual attorney fees if the bodily injury or death occurred during 1 or more of the following:

(a) The individual's commission, or flight from the commission, of a felony.

(b) The individual's acts or flight from acts that the finder of fact in the civil action finds, by clear and convincing evidence, to constitute all the elements of a felony.

It is undisputed that when plaintiff collided with the patrol car, he was running from police. He pleaded guilty to the felony of fleeing and eluding and it is clear that his accident occurred while he was fleeing from his commission of a felony.

Though plaintiff's counsel variously asserts that Officer Laban "intentionally" struck plaintiff and that he "rammed" plaintiff, there is no evidence in the record to support his rhetorical hyperbole; while plaintiff maintains that the patrol car hit him and not the other way around, plaintiff admitted under oath that he does not know how the accident occurred and Officer Michowski testified that the patrol car did not swerve or change direction and that plaintiff ran in front of and hit the patrol car. The police report also stated that, when plaintiff ran from his vehicle after the high-speed chase ended in a head-on collision, plaintiff ran into the patrol car. Thus, regardless whether the patrol car struck plaintiff, whether plaintiff ran into the patrol car or a combination of both, no reasonable jury could infer that Officer Laban "intentionally" used force to hit plaintiff with the vehicle.<sup>3</sup>

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of justice." *Orzel, supra* at 559- 560. Enactment of MCL 600.2955b was clearly not intended by the Legislature to overturn the courts' reluctance to condone, encourage, permit parties to profit from, or permit parties to evade responsibility for wrongdoing. *Id.* Thus, MCL 600.2955b requires claims to be dismissed under certain circumstances of wrongdoing, but does not preclude dismissal under other circumstances of wrongdoing.

<sup>3</sup> For this reason, we find the second section of MCL 600.2955b inapplicable:

(2) If the bodily injury or death described in subsection (1) resulted from force, the court shall not apply subsection (1) to the claim of the plaintiff against a defendant who caused the individual's bodily injury or death unless the court finds that the particular defendant did either of the following:

(a) Used a degree of force that a reasonable person would believe to have been appropriate to prevent injury to the defendant or to others.

(b) Used a degree of force that a reasonable person would believe to have been appropriate to prevent or respond to the commission of a felony. In making a finding under this subsection, the court shall not consider the fact that the

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There was also an adequate causal connection between plaintiff's flight and his injuries. As our Supreme Court stated in *Orzel, supra*, "The maintenance of an action, under the general rule, may be refused or precluded only where the illegality or immorality with which plaintiff is chargeable has a causative connection with the particular transaction out of which the alleged cause of action asserted arose." *Id.* at 564, quoting 1A CJS, Actions, § 30, pp. 388-389. For that reason:

"[The plaintiff's] injury must have been suffered while and as a proximate result of committing an illegal act. The unlawful act must be at once the source of both his criminal responsibility and his civil right. The injury must be traceable to his own breach of the law and such breach must be an integral and essential part of his case. Where the violation of law is merely a condition and not a contributing cause of the injury, a recovery may be permitted." [*Orzel, supra* at 565, quoting *Manning v Bishop of Marquette*, 345 Mich 130, 136; 76 NW2d 75 (1956), quoting *Meador v Hotel Grover*, 193 Miss 392, 405-406; 9 So2d 782 (1942).]

Again, here, plaintiff's injuries occurred during his effort to flee from police in the middle of a public road following the high-speed chase and multiple collisions.<sup>4</sup> Accordingly, plaintiff's injuries were caused, in large part, by his own illegal conduct. Our Courts will "not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct." *Orzel, supra* at 559.<sup>5</sup> Therefore, we reverse the trial court's denial of Officer Laban's motion for summary disposition on this claim.

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defendant may not have known that the plaintiff's actions or attempted actions would be the commission of a felony.

<sup>4</sup> In this way, the case is similar to *Robinson v Detroit*, 462 Mich 439, 452 n 10, 613 NW2d 307 (2000), in which our Supreme Court observed that, as to a driver fleeing from police:

A fleeing driver would . . . be barred from seeking to recover for injuries sustained while attempting to evade a lawful order to stop his vehicle under Michigan's wrongful conduct rule. This rule is rooted in the public policy that courts should not lend their aid to plaintiffs whose cause of action is premised on their own illegal conduct.

<sup>5</sup> As our Supreme Court aptly explained in *Orzel*:

If courts chose to regularly give their aid under such circumstances, several unacceptable consequences would result. First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct. Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third, and related to the two previously mentioned results, the public would view the legal system as a mockery of justice. Fourth, and finally, wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties. As stated by the Court of Appeals, where the plaintiff has engaged in illegal conduct, it should be the

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Plaintiff also included in his complaint a separate count for assault and battery against Officer Laban because plaintiff claims that Officer Laban punched him twice when he placed plaintiff under arrest. Officer Laban asserts that the trial court erred when it denied his motion for summary disposition because he is entitled to governmental immunity and evidence showed that Officer Laban used a reasonable amount of force to effectuate plaintiff's arrest.

If a police officer is engaged in the exercise or discharge of a governmental function, that officer is protected by governmental immunity from liability based on justifiable actions that normally would constitute intentional torts. MCL 691.1407; *Butler v Detroit*, 149 Mich App 708, 715; 386 NW2d 645 (1986). In subduing a suspect, police officers may use a substantial level of force that may even result in injury to the suspect if the use of that force was necessary. See *Sudul v Hamtramck*, 221 Mich App 455, 458, 485-486; 562 NW2d 478 (1997) (opinion of Murphy, P.J.), citing *Burns v Malak*, 897 F Supp 985, 988 (ED Mich, 1995).

However, the governmental immunity statute does not shield a governmental employee's intentional torts and our Courts have long recognized that if an officer uses excessive force against a suspect, the officer may be held liable for assault and battery. *Sudul, supra* at 458; *White v City of Vassar*, 157 Mich App 282, 293; 403 NW2d 124 (1987). To determine whether the amount of force used by a police officer was justified, this Court inquires whether that force was "objectively reasonable under the circumstances." *VanVorous v Burmeister*, 262 Mich App 467, 482; 687 NW2d 132 (2004), citing *Brewer v Perrin*, 132 Mich App 520, 528; 349 NW2d 198 (1984). See also *Graham v Connor*, 490 US 386, 397; 109 S Ct 1865; 104 L Ed 2d 443 (1989).

We hold that the trial court correctly denied Officer Laban's motion for summary disposition on this issue. Officer Laban testified that he struck plaintiff on the brachial plexus area of his neck because plaintiff held his hands under his body to avoid being handcuffed. Under the circumstances, this may have been objectively reasonable conduct. However, plaintiff testified that Officer Laban punched him in the head after he fully submitted to the arrest and after he was handcuffed. Viewing the evidence in a light most favorable to plaintiff, his testimony created an issue of material fact that must be resolved by a jury with regard to whether Officer Laban used unreasonable force during plaintiff's arrest.<sup>6</sup> Accordingly, we affirm the trial court's denial of Officer Laban's motion for summary disposition on this issue and remand for further proceedings. We note, however, that any award of damages to plaintiff will be nominal in light of his repeated assertions that he sustained no injuries during the handcuffing process.

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"plaintiff's own criminal responsibility which is determinative." [*Orzel, supra* at 559-560 (citations omitted).]

<sup>6</sup> For similar reasons, we reject Officer Laban's argument that this claim is also barred by the wrongful conduct rule. On the basis of plaintiff's testimony, a reasonable jury could find that plaintiff complied when Officer Laban placed him under arrest and, therefore, his conduct was not "wrongful" for purposes of the wrongful conduct rule.

Reversed in part, affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck  
/s/ Henry William Saad