

STATE OF MICHIGAN
COURT OF APPEALS

JAMES E. WILSON,

Plaintiff-Appellant,

v

CITY OF DETROIT, DETROIT POLICE
DEPARTMENT, and CITY OF LIVONIA,

Defendants,

and

SERGEANT DONNELLY, DEPUTY ERIC
CATNER, and DEPUTY RIAD AHMAO,

Defendants-Appellees.

UNPUBLISHED

March 6, 2007

No. 271522

Wayne Circuit Court

LC No. 04-421452-NO

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Plaintiff appeals by right from an order granting summary disposition to defendants-appellees in this action, apparently based on MCR 2.116(C)(7), (8), or (10). We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 2.714(E).

Defendants appeared at a rental home owned by plaintiff's uncle in search of another person. Plaintiff did not recognize the person and would not authorize a search of the home. Defendant Donnelly asserted that plaintiff smelled of marijuana and admitted to there being marijuana inside the home, an assertion plaintiff denies. A LEIN search revealed that there was a warrant for plaintiff's arrest pertaining to a \$100 ticket. Donnelly indicated that he intended to handcuff plaintiff for purposes of investigation, and not pursuant to the warrant. Plaintiff asserted that he was unaware of the warrant and did not understand why he was to be handcuffed. He maintained that as he was inquiring why, he backed up until defendant Catner tackled him from behind. Defendants then began using force to subdue plaintiff, including striking him with batons and using a choke hold. Plaintiff provided affidavits from witnesses

Elwin Taylor and Gregory Thrift,¹ who attested that the choking and beating continued after plaintiff had lost consciousness.

Plaintiff brought claims for assault and battery, false arrest/false imprisonment, intentional infliction of emotional distress, and gross negligence. Although stated as a separate claim, the gross negligence claim appears to merely be a pleading in avoidance of governmental immunity. See MCL 691.1407(2). Plaintiff has abandoned his claim that it was error to grant summary disposition on the false arrest/false imprisonment claim. See *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). On appeal, plaintiff addresses this claim by arguing that he was subject to malicious prosecution. Plaintiff did not plead a count of malicious prosecution; therefore, we decline to address the claim. Regarding the remaining claims, we review de novo the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to plaintiff to determine whether defendants were entitled to judgment as a matter of law. See *Corley v Detroit Bd of Ed*, 470 Mich 274, 277-278; 681 NW2d 342 (2004).

We note that our governmental immunity statute does not shield an individual's intentional torts. *Sudul v Hamtramck*, 221 Mich App 455, 458; 562 NW2d 478 (1997). However, in *Van Vorous v Burmeister*, 262 Mich App 467, 483; 687 NW2d 132 (2004), this Court recognized that actions that would normally constitute intentional torts are shielded from liability if those actions are justified because they were objectively reasonable under the circumstances. Stated differently,

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. Specifically, a police officer may use reasonable force when making an arrest. Therefore, the measure of necessary force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary. By itself, the use of handcuffs is not unreasonable force. [*Brewer v Perrin*, 132 Mich App 520, 528-529; 349 NW2d 198 (1984) (citations and internal punctuation omitted)].

Based on these principles, we conclude that plaintiff's claims for assault and battery and intentional infliction of emotional distress, relative to the initial attempt to handcuff and detain him, can only survive if the attempt to handcuff plaintiff and pursue him when he resisted was not objectively reasonable.

Plaintiff claims he was given no reason for the attempt to handcuff him, and that his resistance was therefore reasonable.² However, although plaintiff may have had a valid reason

¹ An affidavit by Willie Parker was missing the signature page; thus, we have not considered it in deciding this appeal.

² We note that the reasonableness of the resistance would not have been a defense to a criminal charge of resisting and obstructing. See *People v Ventura*, 262 Mich App 370, 377-378; 686 (continued...)

for resisting, this is not the focus of the inquiry. Rather, the focus must be on the objective reasonableness of the officers' actions. Regardless of whether the warrant was a pretext for the detention, the officers had a legal basis for detaining and arresting plaintiff based on the warrant. Thus, the detention itself was not unlawful, and the officers' use of reasonable force to subdue plaintiff when he resisted would have been objectively reasonable.

However, we conclude that a question of fact was established regarding whether the extent of the force used was reasonable. Plaintiff acknowledged that he was struggling with the officers, but claims that when he was struck on the wrist he gave up the struggle and, at that point, Catner choked him until he became unconscious. Further, there was evidence that the choking and the beating continued after plaintiff was subdued and/or unconscious. Plaintiff alleged that he was tasered after he became unconscious, but this allegation is called into question by the record indicating that the taser was not used. Where an officer "uses more force than is reasonably necessary to effect a lawful arrest, [he or she] commits a battery upon the person arrested." *White v City of Vassar*, 157 Mich App 282, 293; 403 NW2d 124 (1987). We conclude that a question of fact existed as to whether these officers used more force than was reasonably necessary and, accordingly, conclude that summary disposition was erroneously granted to these defendants.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Kurtis T. Wilder

(...continued)

NW2d 748 (2004). However, this rule has not been applied in a civil context.