

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL WILSON,

Plaintiff-Appellee,

V

DENNIS BIXLER and NELSON MARTINEZ,

Defendants-Appellants.

UNPUBLISHED

June 16, 2011

No. 297045

Wayne Circuit Court

LC No. 07-708850-NO

Before: FORT HOOD, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendants appeal as of right¹ from the order denying their motion for summary disposition. We reverse and remand for entry of summary disposition in favor of defendants.

This litigation arises from the attempted service of a subpoena. In the late afternoon of December 2, 2005, plaintiff, Michael Wilson, entered the bond office of the Third Circuit Court Criminal Division to serve a subpoena. The bond office was a secured area because the employees handle cash payments. The office consists of teller windows in the vestibule that are closed to the public at 4:00 p.m., but the office closes at 4:30 p.m. Between 4:00 p.m. and 4:30 p.m., the employees count the money and balance the payments at their desks in the offices behind the vestibule area. At 4:30 p.m., employees are required to leave the first floor bond office and proceed to the ninth floor to punch the time clock. For security reasons, employees of the bond office who had keys were the only individuals allowed in the bond office area.

On December 2, 2005, the manager of the bond office, Anne Hurych, was exiting the office to enter the public or vestibule area where there was another door. As she exited the first door to leave the secured office area and enter the vestibule, she encountered plaintiff. Hurych did not know plaintiff who said he had a subpoena. She testified that he did not identify himself as a police officer or that he worked for the prosecutor's office. He did not provide any identification, a police badge, or show a holstered gun. Hurych advised him that it was after hours, and a subpoena would not be accepted. Plaintiff tried to hand the subpoena to her, but she would not accept it and put her hands to her side. Plaintiff put the subpoena at her feet on the

¹ See MCR 7.202(6)(a)(v) and MCR 7.203(A)(1).

floor. Plaintiff then retrieved the paper off the floor and walked past her from the vestibule into the secured area. The door to the secured area was normally locked, but it was propped open because Annie McCroy, an accountant in the bond office, was also leaving for the day. Hurych yelled for security because she did not know why plaintiff had entered the office and feared for the safety of herself and McCroy.

After calling for security, she entered the secured area of the bond office and saw plaintiff put the subpoena on the corner of McCroy's desk. Plaintiff still did not identify who he was. He proceeded to exit the secured door when two sheriff deputies arrived there. Hurych heard the deputies ask what plaintiff was doing, but he tried to walk past them without identifying himself. In fact, Hurych testified that plaintiff never said anything while he was in the bond office. Plaintiff kept walking and went into the vestibule area. One of the deputies advised plaintiff that he was under arrest, but plaintiff told the deputies not to touch him. The men began to "tussle" and struggle against the wall while they attempted to handcuff plaintiff. Fearing for their safety, Hurych unlocked her office and stood in there with McCroy until she heard that plaintiff had been escorted from the bond office.

Plaintiff, a sheriff's deputy assigned to the prosecutor's office, testified that he frequently entered the "secured" area of the bond office and that it was only "secure" to the public. On December 2, 2005, the bond office door to the vestibule area was opened by Brian Fair, Anne Hurych's son, after plaintiff tapped on the door. The men greeted each other. Hurych was standing at the second door which was open. Plaintiff testified that he stated that he was from the prosecutor's office and had to serve a subpoena for a court date on Monday morning at 9:00 a.m. Hurych would not let plaintiff finish his statement. She became loud and said, "It's 4:30 on Friday, we're trying to get out of here." He put the subpoena on the floor in front of her, and she began to kick at it with her feet. Plaintiff realized that he did not want to explain to a judge that he put it on the floor, so he picked it up, reached in, and put it on a desk. He then noticed a woman, McCroy, at a second desk. He testified that he identified himself as from the prosecutor's office with a subpoena and stepped into the office to put it on McCroy's desk. To do so, he had to walk past Hurych who was in the doorway of the bond office. Hurych instructed McCroy not to touch the subpoena. Hurych advised plaintiff that he was not supposed to be in the bond office; he had to retrieve the paper and leave, or she would call the deputies. Plaintiff said, "The paper stays, the subpoena has been served." As he began to leave, Deputy Nelson Martinez arrived at the door to the bond office. The deputy told him to take the paper and return Monday and grabbed plaintiff by the sweater. Plaintiff testified that he tried to show the deputy his badge and identified himself as a detective, but they did not care who he was. Deputy Dennis Bixler arrived, and both men grabbed plaintiff's arms and twisted them behind his back. Despite the fact that he did not resist, Deputy Jerome Jenkins entered the room and sprayed pepper spray in plaintiff's face and ear. Sergeant Bradburn entered the room and asked why the deputies were arresting Detective Wilson.

On the contrary, Deputy Bixler testified that the bond office was a secured area, and even the deputies who provided security in the building did not have keys to the area. Additionally, Deputies Martinez and Bixler were unable to secure plaintiff who resisted their attempts to arrest him. Consequently, Deputy Jenkins arrived on the scene and told plaintiff to quit resisting. When plaintiff did not comply, he depressed the spray. Although plaintiff alleged that the amount of spray was excessive, Deputy Bixler testified that there was only a short burst. Both

deputies were in proximity to plaintiff in order to effectuate the arrest at the time plaintiff was sprayed. Deputy Bixler asserted that they only learned that plaintiff was a detective when advised by the sergeant who arrived on the scene.

Deputy Jenkins was working at the front door security desk when he heard a female call for security. Deputies Martinez and Bixler responded, but also had to call Jenkins for help in their attempt to arrest plaintiff. Deputy Jenkins told plaintiff to stop resisting, but he would not. The deputy dispensed one short two-second burst of pepper spray, but stopped spraying after he saw the spray was having an effect on plaintiff. Deputy Jenkins watched for Sergeant Blackburn, who had been called to the scene, and backed up to watch the front security desk that had been left unmanned.²

On April 2, 2007, plaintiff filed a complaint alleging assault and battery, “Liability Under State Law as to Individual Defendants,” and intentional infliction of emotional distress.³ Defendants filed a motion for summary disposition relying on the doctrine of collateral estoppel and immunity. The trial court denied defendants’ motion for summary disposition, concluding that there were factual issues that precluded summary disposition.

A trial court’s ruling on a motion for summary disposition presents a question of law subject to review de novo. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). A motion brought pursuant to MCR 2.116(C)(7) alleges that a claim is barred because of immunity by law. *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 264; 792 NW2d 781 (2010). To determine whether summary disposition is appropriate on the basis of MCR 2.116(C)(7), a court must examine all documentary evidence submitted by the parties and accept as true the allegations in the complaint unless affidavits or other documentation contradicts them. *Blue Harvest, Inc v Dep’t of Transportation*, 288 Mich App 267, 271; 792 NW2d 798 (2010).

Defendants contend that the trial court erred in denying their motion for summary disposition premised on immunity. We agree. In *Odom v Wayne Co*, 482 Mich 459, 468, 480; 760 NW2d 217 (2008), the Supreme Court concluded that lower-level employees are entitled to qualified immunity from tort liability for intentional torts when the acts were undertaken during the course of employment and the employee acted or reasonably believed that he was acting in the scope of his authority, the acts were performed in good faith or without malice, and the acts were discretionary, not ministerial. The good faith element is subjective in nature, and it protects a defendant’s honest belief and conduct taken in good faith with the cloak of immunity. *Id.* at 481-482. Discretionary acts are those that require personal deliberation, resolution, and judgment. “Granting immunity to an employee engaged in discretionary acts allows the employee to resolve problems without constant fear of legal repercussions.” *Id.* at 476.

² Plaintiff’s conduct was the subject of a discipline hearing and arbitration appeal. The factual basis is taken from testimony presented at the appeal.

³ The trial court granted summary disposition in favor of individual defendants Jerome Jenkins, Rodney Blackburn, and Anne Hurych. Plaintiff has not challenged their dismissal.

A police officer's determination regarding the type of action to take, whether an immediate arrest, the pursuit of a suspect, or the need to wait for backup assistance, constitute discretionary action entitled to immunity. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 659-660; 363 NW2d 641 (1984). A police officer's decision regarding how to respond to a citizen, how to safely diffuse a situation, and how to effectuate a lawful arrest of a citizen who resists are clearly discretionary. *Oliver v Smith*, ___ Mich App ___; ___ NW2d ___ (2010), slip op p 6. Once the decision to arrest is made, it must be performed in a proper manner. *Ross*, 420 Mich at 660. For executing an arrest, "[a]n action may lie only if the officer utilized wanton or malicious conduct or demonstrated a reckless indifference to the common dictates of humanity." *Dickey v Fluhart*, 146 Mich App 268, 276; 380 NW2d 76 (1985). When addressing a claim of assault and battery, discretion must be reposed in a law enforcement officer when making an arrest, the means necessary to apprehend the alleged offender, and to keep him secure after the apprehension. *Firestone v Rice*, 71 Mich 377, 384; 38 NW 885 (1888). Furthermore, "this discretion cannot be passed upon by a court or jury unless it has been abused through malice or wantonness or a reckless indifference to the common dictates of humanity." *Id.* Accordingly, the trial court must address a preliminary question of law. Good faith means acting without malice. See *Armstrong v Ross Twp*, 82 Mich App 77, 85-86; 266 NW2d 674 (1978).

Police officers are not required to take unnecessary risks in the performance of their duties. See *People v Otto*, 91 Mich App 444, 451; 284 NW2d 273 (1979). Police officers work in a "milieu of criminal activity where every decision is fraught with uncertainty." *White v Beasley*, 453 Mich 308, 321; 552 NW2d 1 (1996) (opinion by Brickley, J) (further quotations omitted). In light of the unusual and extraordinary nature of police work, it is improper to second-guess the exercise of a policeman's discretionary professional duty with the benefit of 20/20 hindsight. *Id.* (further citation omitted).

In the present case, the intentional tort claims are barred by governmental immunity. *Odom*, 482 Mich at 468, 480; *Ross*, 420 Mich 659-660. Here, the deputies were called to the bond office by Hurych, the manager. She advised the deputies that plaintiff entered a secured area after hours and tried to serve a subpoena. The deputies also testified that the area that plaintiff had entered was a secured area; an area that even they were not able to access. Assuming without deciding that plaintiff identified himself as a member of law enforcement officer, the deputies were advised by the bond office manager Hurych that plaintiff was trespassing in an unauthorized area, and based on their knowledge and experience working in the area, plaintiff was in fact trespassing in an area where employees counted cash deposits. Consequently, the deputies who rushed to the scene had to make a split second decision regarding the amount of force to employ and the type of action necessary after receiving a call for help from the bond office manager.⁴ When the two deputies were unable to subdue plaintiff,

⁴ Plaintiff contends that the amount of spray released and the need for medical treatment creates a factual issue precluding summary disposition. We disagree. The release of the spray was a discretionary action entitled to immunity. Although plaintiff contends that an excessive amount of spray was dispensed, there was no evidence that the officers who were in the process of arresting plaintiff were impacted by the spray. We also dismiss plaintiff's claim of "liability of

a third deputy had to be called from the front security desk to assist. The type of action that the deputies took and the decision regarding how to effectuate the arrest constituted discretionary action that was entitled to immunity. *Ross*, 420 Mich at 659-660. Accordingly, the trial court erred in denying defendants' motion for summary disposition.

Reversed and remanded for entry of summary disposition in favor of defendants. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause

state law” because it is merely a restatement of the intentional tort claims. See *VanVorous v Burmeister*, 262 Mich App 467, 483; 687 NW2d 132 (2004); *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). In light of our resolution of the issues, we need not address defendants' alternative arguments in support of summary disposition.