

STATE OF MICHIGAN
COURT OF APPEALS

HARVEY JOHNSON, Personal Representative of
the Estate of HARVEY STEWARD, Deceased,

UNPUBLISHED
January 31, 2013

Plaintiff-Appellee,

v

No. 306560
Genesee Circuit Court
LC No. 09-091432-NO

JEREMY DRIGGETT,

Defendant-Appellant.

Before: TALBOT, P.J., and JANSEN and METER, JJ.

PER CURIAM.

Defendant appeals by right the circuit court's order denying his motion for summary disposition brought on the basis of governmental immunity.¹ We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND FACTS

Shortly before noon on April 25, 2009, defendant, a city of Burton police officer, was dispatched to the area of Lippincott Boulevard and Center Road in response to complaints that an unknown man, later identified as plaintiff's decedent, was running in and out of traffic and yelling at motorists. Defendant testified at his deposition that, upon arriving at the scene, he witnessed plaintiff's decedent walking in the street, holding up traffic, and shouting. Two witnesses noticed that plaintiff's decedent was "slapping cars" as he ran through traffic. Another witness testified that while plaintiff's decedent appeared to be "crazy," he "wasn't bothering [any]body, he was just in the middle of the street and the cars were going around him."²

¹ The circuit court's denial of a motion for summary disposition brought on the basis of governmental immunity is appealable by right. MCR 7.203(A)(1); MCR 7.202(6)(a)(v); *Thurman v Pontiac*, 295 Mich App 381, 383 n 1; 819 NW2d 90 (2012).

² Sharon Harris, the fiancée of plaintiff's decedent, testified at her deposition that plaintiff's decedent had smoked crack cocaine throughout the evening of April 24, 2009, and on the morning of April 25, 2009. Plaintiff's decedent had stayed up all night using drugs and had left

Defendant stopped his patrol car in the westbound lane of Lippincott Avenue, turned on his overhead lights, and got out of the vehicle. Plaintiff's decedent was standing in the middle of the eastbound lane. Defendant testified that he "approached [plaintiff's decedent], asked him what was going on, what can I do to help." Plaintiff's decedent told defendant that he thought someone was trying to shoot or kill him. Defendant noticed that plaintiff's decedent seemed "scared" and "frantic," but did not have time to ask him whether he was intoxicated or on drugs.

Plaintiff's decedent walked toward the driveway of a nearby convenience store. Defendant followed him and continued talking to him in an effort "to figure out what was going on." Defendant approached plaintiff's decedent from behind and put his hand on his right shoulder to get his attention. Witness Theodore Mark Berberich, who was standing nearby, testified that defendant approached plaintiff's decedent "in a very nonaggressive manner" and that plaintiff's decedent walked around the driveway "kind of in a zigzag motion." Plaintiff's decedent was not armed; he did not have any kind of weapon. Defendant testified that he was merely "investigating what was going on at that point in time" and was not trying to arrest plaintiff's decedent for any crime.

As defendant touched plaintiff's decedent on the right shoulder, plaintiff's decedent turned around and pushed defendant with both hands. Defendant testified that he "stumbled backwards" but was able to remain on his feet. Defendant immediately called for backup on his lapel microphone. Defendant testified that plaintiff's decedent had become "enraged" and "violent," and that he had decided to "take this gentleman into custody" for having assaulted a police officer. Defendant did not feel that his life was in danger at this time and did not draw his gun.

After defendant called for backup, he and plaintiff's decedent grabbed each other and they both "went down to the ground." Plaintiff's decedent was shorter but significantly stockier than defendant. Witness Joshua Edwards, who was standing nearby, testified that plaintiff's decedent "was a big guy. He was a lot bigger than [defendant]." Plaintiff's decedent "was face down on the ground" and defendant "was on top of him." Defendant was trying to pin plaintiff's decedent to the ground using his body weight and was telling plaintiff's decedent to "stop fighting." Plaintiff's decedent was yelling, "Get off me," and trying to push himself up from the ground to throw defendant off. After having been on the ground for approximately 15 or 20 seconds, plaintiff's decedent successfully pushed himself up, threw defendant off, and stood up. Defendant immediately stood up as well. Defendant then "took [plaintiff's decedent] back down to the ground." Plaintiff's decedent was lying on his back, facing up; defendant was "straddling his upper body area facing down at him" with his knees on the ground on either side of his torso. Witnesses reported that plaintiff's decedent then attempted to punch defendant or grab at defendant, and that the two men "wrestled," "tussled," or "struggled" on the ground for several additional seconds. Defendant testified that plaintiff's decedent began to reach for his chest or neck.

Harris's house at approximately 10:00 a.m. on April 25, 2009. That was the last time Harris ever saw him alive.

At that point, defendant decided to use his pepper foam. Defendant reached for his can of pepper foam with his right hand and sprayed the foam directly into plaintiff's decedent's face and eyes. However, according to defendant, the pepper foam "had no effect" on plaintiff's decedent and "made him even angrier." At least one bystander recalled being surprised that plaintiff's decedent continued to fight with defendant after having been sprayed with the pepper foam.

Then, according to defendant, plaintiff's decedent raised his upper body slightly off the ground, leaned forward, and began to reach for defendant's gun. Defendant's gun was in a holster on defendant's belt. Defendant threw the can of pepper foam out of his hand and grabbed plaintiff's decedent's hands in an effort to protect his gun. Defendant pushed the button on his lapel microphone and said, "He's trying to get my gun." Defendant testified that he kept telling plaintiff's decedent, "[L]et go of my gun, let go of my gun," but plaintiff's decedent was not complying. At this point, the gun had not yet come out of defendant's holster.

Berberich testified that, from where he was standing, he could see plaintiff's decedent reaching for defendant's holster. Berberich then walked forward and began to call 911. Berberich heard defendant yell, "[H]and off my gun, hand off my gun, hand off my gun," but saw defendant trying to gain control of the situation by grabbing plaintiff's decedent's hands. According to Berberich, defendant "was using one hand to block the access to his gun" and "ha[d] to take the man's wrist a couple of times and pull it away from the gun."

Berberich reported that plaintiff's decedent then began to throw punches. Berberich testified that the fight had been ongoing for about two minutes and it appeared "that the officer was proverbially running out of gas." Berberich believed that defendant's "energy was draining," so he "hollered over to the officer" and asked whether defendant needed any help. Berberich approached and stepped on plaintiff's decedent's left wrist, pinning it to the pavement. Several other witnesses observed Berberich standing on plaintiff's decedent's left hand or wrist, but defendant did not recall this event. Defendant only recalled that Berberich had yelled over and had approached from the area of Center Road.

Berberich testified that he placed approximately one-third or one-half of his weight on plaintiff's decedent's left wrist and that plaintiff's decedent's arm "was not moving anymore . . . [t]hat arm is incapacitated." According to Berberich, defendant then grabbed plaintiff's decedent's throat and was able to regain some control over the situation. Nevertheless, plaintiff's decedent continued to struggle and fight, throwing punches with his right arm. Berberich recalled that plaintiff's decedent then reached up and grabbed defendant's throat; defendant continued to protect his gun (still in the holster) with his right hand, but used his left hand to try to break plaintiff's decedent's grip on his throat. Eventually, according to Berberich, defendant "broke [plaintiff's decedent's] grip and stood up all in one motion."

Defendant initially testified that he and plaintiff's decedent remained on the ground struggling with one another and that the gun somehow "came out of the holster" during the struggle. He later testified that he was "in the process of standing up" at the time. At any rate, defendant recalled that, as the two men were struggling, the gun somehow ended up in his hand and plaintiff's decedent "lunged" at him. Defendant did not believe that plaintiff's decedent had actually removed the gun from the holster, but it somehow came out during the struggle.

Defendant had no memory of having pulled the gun out of his holster. Defendant testified that he took hold of the gun with his right hand, pointed it at plaintiff's decedent, and told him, "[S]top fighting, stop fighting." According to defendant, plaintiff's decedent then "lunged for my gun again He came up and with his right hand tried to grab my gun." Defendant estimated that the muzzle of the gun was two or three feet away from plaintiff's decedent at this time. Defendant testified that, as plaintiff's decedent was raising his body off the ground, he shot him once in the chest. Defendant testified that he shot plaintiff's decedent because he believed "he was trying to get my weapon and trying to kill me."

According to defendant, Berberich had backed away from the area before the shot was fired. When asked whether plaintiff's decedent was still on the ground when he was shot, defendant responded, "Nope, he was coming up towards my gun." However, defendant later admitted that plaintiff's decedent was still on the ground when he was shot. Defendant testified that he had grown tired of fighting with plaintiff's decedent and this is one of the reasons that he fired his gun. Defendant confirmed that the shooting was intentional—not accidental.

Witness Monte Mansfield testified that defendant had one knee on plaintiff's decedent at the time he fired his gun. Contrary to defendant's testimony that the gun had somehow come out of the holster during the struggle, Mansfield recalled having seen defendant draw the gun from the holster and point it downward at plaintiff's decedent before firing. After the shot was fired, Mansfield heard defendant say, "I told you to stop." Another witness testified that although defendant was essentially on his feet, the two men's knees were touching, as if defendant was bracing himself, when the shot was fired. Witness Joshua Edwards testified that defendant "was just kind of hovering over [plaintiff's decedent] and he shot him." Edwards recalled that defendant was "in a dominant position" at the time of the shooting and that plaintiff's decedent was still on the ground.

Berberich recalled that although defendant still had one foot on either side of plaintiff's decedent, defendant had actually stood up and taken one step backward before drawing and firing the weapon. According to Berberich, plaintiff's decedent "raised up and started throwing another punch, and that's when the officer fired his weapon" Berberich did not believe that plaintiff's decedent was reaching for defendant's gun; he believed that plaintiff's decedent was merely attempting to throw a punch. But Berberich testified that plaintiff's decedent was too far away and could not have actually punched or made contact with defendant. According to Berberich, "[T]here was no way he could get up with me standing on his left wrist. He could not have gotten that high." Berberich testified that he was still standing on plaintiff's decedent's left arm when the shot was fired. Berberich testified that plaintiff's decedent was not armed and that the only time he had reached for defendant's gun was early in the struggle when the firearm was still in the holster.

Witness Joseph Morris, who lived in a nearby apartment, testified that defendant was standing up when he drew his gun and shot, and that plaintiff's decedent was still lying on the ground at the time. Morris reported that defendant continued screaming, "[L]et me see your hands, let me see your hands," even after he had shot plaintiff's decedent. Morris recalled that Berberich had backed away from the scene before defendant fired his gun. Witness Mansfield similarly testified that Berberich had backed away from plaintiff's decedent by the time the shot was fired. Morris recalled that plaintiff's decedent had actually given up and had stopped

fighting with defendant by the time defendant shot him. Edwards confirmed that plaintiff's decedent had stopped aggressively fighting with defendant at the time of the shooting, but testified that plaintiff's decedent was "still squirming around" and "moving around" on the ground.

Witness D'Andra Johnson lived across Lippincott Boulevard from the scene of the incident. Johnson saw the entire incident out her window. By the time Johnson heard a commotion and looked out the window, defendant and plaintiff's decedent were already fighting and defendant was on top of plaintiff's decedent. Johnson testified that defendant "had one knee up and the other one was slightly on the ground like a little bit off the ground" when he shot plaintiff's decedent. Johnson stated that defendant "was not standing" at the time of the shooting, but that he was "possibly" trying to stand up at the time he fired the gun. According to Johnson, it did not appear that defendant was in any immediate danger at the time he fired the gun. Johnson did not believe that plaintiff's decedent was reaching for defendant's gun.

Witness Viean Sanders recalled that defendant and plaintiff's decedent were still "tussling . . . on the ground" at the time the shot was fired. Witness Mark Lasley recalled that defendant was still straddling plaintiff's decedent and had "just beg[u]n to rise up just a little bit" when the shot was fired.

Witness William Haberland was driving north on Center Road at the time of the incident and saw defendant fighting with plaintiff's decedent on the ground in front of the convenience store. Haberland recalled that, as he was stopped at a red light, he saw defendant stand up, pull out his gun, and point it downward at plaintiff's decedent. Haberland heard defendant say, "[D]on't move," and then heard a gunshot. Haberland pulled over and waited for additional police to arrive. Haberland did not recall having seen Berberich rendering assistance or stepping on plaintiff's decedent's wrist.

Defendant did not render any first aid to plaintiff's decedent after shooting him. Instead, witnesses reported that defendant kept pointing his gun at plaintiff's decedent and kept yelling at him, even after he had stopped moving. When a detective arrived on the scene, defendant handed him his gun. Defendant sustained various scratches, bruises, and abrasions in the altercation with plaintiff's decedent.

It is undisputed that several other police officers arrived on the scene almost immediately after defendant shot plaintiff's decedent. Plaintiff's expert witnesses opined at their depositions that defendant had not followed proper police procedures and that deadly force should not have been used in this case.

Genesee County Deputy Medical Examiner Dr. Allecia Wilson testified that plaintiff's decedent had been shot at point-blank range. Wilson believed that the muzzle of the firearm had actually been in contact with the body or clothing of plaintiff's decedent when the shot was fired. According to Wilson, plaintiff's decedent had been shot straight through the chest. Expert witness Dr. Werner Spitz agreed with Wilson that plaintiff's decedent had been shot at point-blank range, describing it as a "contact shot" or "loose contact shot." Spitz opined that plaintiff's decedent did not die immediately upon being shot. Instead, Spitz opined that the bullet went through plaintiff's decedent's lung causing internal bleeding, and that plaintiff's decedent would

have experienced conscious pain and suffering until he bled to death “several minutes” later. Plaintiff’s decedent had the metabolites of cocaine in his blood at the time of his death.

II. PROCEDURAL HISTORY

Plaintiff, as personal representative of his decedent’s estate, filed this action against defendant in the Genesee Circuit Court. Plaintiff set forth claims of gross negligence (Count I) and assault and battery (Count II).

With regard to Count I, plaintiff alleged that defendant had been negligent or grossly negligent in several ways, including: (1) failing to communicate with plaintiff’s decedent before using deadly force, (2) failing to know and understand the state of mind of plaintiff’s decedent before using deadly force, (3) failing to follow proper police standards and procedures before using deadly force, (4) failing to follow police department policies, procedures, and training concerning how to interact with others, (5) failing to render medical treatment to plaintiff’s decedent, (6) using unnecessarily excessive force when plaintiff’s decedent posed no threat to defendant’s life, (7) failing to obtain prompt emergency medical services, and (8) any and all other acts of gross negligence or misconduct that might become known during the course of discovery. With regard to Count II, plaintiff alleged that defendant had committed the intentional torts of assault and battery without justification when he shot plaintiff’s decedent and caused his death.

After extensive discovery, defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). Relying on *Odom v Wayne Co*, 482 Mich 459; 760 NW2d 217 (2008), *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984), and *VanVorous v Burmeister*, 262 Mich App 467; 687 NW2d 132 (2004), defendant argued that plaintiff’s gross negligence claim and intentional tort claim were both barred by governmental immunity. Defendant also argued that, even if the claims were not barred by governmental immunity, they were barred by Michigan’s wrongful conduct rule.

The circuit court dispensed with oral argument, MCR 2.119(E)(3), and issued an opinion and order denying defendant’s motion for summary disposition. With respect to Count I, the circuit court ruled that plaintiff had alleged a claim of gross negligence that was separate and distinct from his assault-and-battery claim. Specifically, the circuit court observed that plaintiff had “sufficiently alleged a claim of gross negligence by pleading alternative facts that are not based solely on the claim of excessive force or intentional acts of defendant.” The court went on to rule that plaintiff’s gross negligence claim was not barred by governmental immunity. The circuit court noted that, unlike decedents in other cases wherein this Court has affirmed the grant of summary disposition for police defendants sued for gross negligence, plaintiff’s decedent in the instant case was not armed, was in a defensive position on the ground, and had been at least partially subdued through other means. The court concluded that there remained genuine issues of material fact concerning whether defendant had acted in a grossly negligent manner under the circumstances and whether defendant’s alleged gross negligence was the proximate cause of plaintiff’s decedent’s death.

With respect to Count II, the circuit court noted that the central question under *Odom* and *Ross* was whether defendant had acted in good faith. The court also noted that, under *Odom*, the

burden was on defendant to prove that he was entitled to the protection of governmental immunity. After reviewing the documentary evidence and the conflicting deposition testimony, the circuit court concluded that there remained a genuine factual dispute concerning whether defendant had acted without malicious intent and in good faith when he intentionally fired his weapon at plaintiff's decedent.³

III. STANDARDS OF REVIEW

We review de novo the circuit court's grant or denial of a motion for summary disposition. *Thurman v Pontiac*, 295 Mich App 381, 384; 819 NW2d 90 (2012). "If there are no material facts in dispute or if reasonable minds could not differ regarding the legal effect of the facts, the issue of governmental immunity is resolved as an issue of law." *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 578; 808 NW2d 578 (2011). However, "[i]f underlying issues of fact exist regarding whether a party is entitled to immunity granted by law, it is proper for the jury to decide those facts." *Regan v Washtenaw Co Bd of Rd Comm'rs*, 249 Mich App 153, 163 n 9; 641 NW2d 285 (2002), remanded on other grounds 468 Mich 851 (2003). Specifically, "[i]f reasonable jurors could honestly reach different conclusions regarding whether conduct constitutes gross negligence, the issue is a factual question for the jury." *Oliver v Smith*, 290 Mich App 678, 685; 810 NW2d 57 (2010). Similarly, whether a defendant acted in the course of his employment, within the scope of his authority, and in good faith are questions of fact for the jury when reasonable minds could differ. *Gillam v Lloyd*, 172 Mich App 563, 577; 432 NW2d 356 (1988).

IV. GROSS NEGLIGENCE

Pursuant to the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, a lower-level government employee, such as defendant in this case, is entitled to immunity from negligence liability if (1) the employee reasonably believed that he or she was acting within the scope of his or her authority, (2) the employee was engaged in the exercise or discharge of a governmental function, and (3) the employee's conduct did not amount to gross negligence that proximately caused the injury or damage. MCL 691.1407(2); *Odom*, 482 Mich at 470.

Plaintiff did not actually allege that defendant acted in a negligent or grossly negligent manner by firing his weapon at plaintiff's decedent. Indeed, defendant's decision to point his firearm and shoot at plaintiff's decedent was *intentional*. See *Latits v Phillips*, ___ Mich App ___, ___ NW2d ___ (2012) (October 9, 2012; Docket No. 304236), slip op at 6. Instead, plaintiff alleged that defendant was negligent or grossly negligent in the following ways: (1)

³ The circuit court also ruled that there remained a genuine issue of material fact concerning whether plaintiff's claims were barred by Michigan's wrongful conduct rule. Defendant does not argue on appeal that the circuit court erred by ruling that there remained a genuine factual dispute concerning the applicability of the wrongful conduct rule. Nor would any such argument be properly before this Court. Defendant's appeal is "limited to the portion of the order with respect to which there is an appeal of right." MCR 7.203(A)(1). Only that portion of the circuit court's order denying governmental immunity is appealable by right. MCR 7.202(6)(a)(v).

failing to communicate with plaintiff's decedent before using deadly force against him, (2) failing to know and understand the state of mind of plaintiff's decedent before using deadly force against him, (3) failing to follow proper police standards and procedures before using deadly force, (4) failing to follow police department policies, procedures, and training concerning how to interact with others, (5) failing to render medical treatment to plaintiff's decedent, (6) using unnecessarily excessive force when plaintiff's decedent posed no threat to defendant's life, (7) failing to obtain prompt emergency medical services, and (8) any other acts of gross negligence or misconduct that might become known during the course of discovery.

Plaintiffs' allegations that defendant acted in a grossly negligent manner by failing to communicate with plaintiff's decedent, failing to know and understand the state of mind of plaintiff's decedent, failing to follow proper police standards and procedures, failing to follow police department policies and training, and using unnecessarily excessive force all pertain to the circumstances surrounding defendant's decision to fire his weapon—an intentional act. Stated differently, these allegations all relate to the reasonableness or correctness of defendant's *intentional* use of deadly force, see *id.*, and are fully premised on plaintiff's underlying claim of excessive force, *VanVorous*, 262 Mich App at 483. “[T]his Court has rejected attempts to transform claims involving elements of intentional torts into claims of gross negligence.” *Id.* Accordingly, plaintiffs' allegations that defendant failed to communicate with plaintiff's decedent, failed to know and understand his state of mind, failed to follow proper police standards and procedures, failed to follow police department policies and training, and used excessive force were legally insufficient to justify recovery on a theory of gross negligence as a matter of law. *VanVorous*, 262 Mich App at 484.

Plaintiff's allegation that defendant might have been grossly negligent in other ways that would become known during the course of discovery was “simply meaningless,” *Latits*, slip op at 7, and was similarly insufficient to justify recovery on a theory of gross negligence.

Plaintiff did plead a legally cognizable claim of gross negligence insofar as he alleged that defendant had failed to render medical treatment and obtain prompt emergency medical services for plaintiff's decedent after he shot him. Unlike the aforementioned allegations, these two allegations are unrelated to the reasonableness or correctness of defendant's intentional use of deadly force.

As an initial matter, it appears that defendant had a duty to render medical assistance to plaintiff's decedent after having shot him. Because defendant had taken plaintiff's decedent into his constructive custody by shooting him, see *King v Taylor*, 694 F3d 650, 662 (CA 6, 2012),⁴ he had a common-law duty to render aid and assistance, *Farwell v Keaton*, 396 Mich 281, 290 n 4; 240 NW2d 217 (1976). Moreover, MCL 752.842 provides in relevant part:

Any person who discharges a firearm and thereby injures or fatally wounds another person, or has reason to believe he has injured or fatally wounded

⁴ A police officer's intentional shooting of an individual constitutes a “seizure” for Forth Amendment purposes. *King*, 694 F3d at 662.

another person . . . shall render to the person so injured immediate assistance and reasonable assistance in securing medical and hospital care and transportation for such injured person.

It is axiomatic that in addition to arising under the common law, a duty may be created by statute. *Rakowski v Sarb*, 269 Mich App 619, 628 n 4; 713 NW2d 787 (2006); *Walker v Flint*, 213 Mich App 18, 22; 539 NW2d 535 (1995).

For purposes of the GTLA, “[g]ross negligence” is defined as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a). It is true that “evidence of ordinary negligence does not create a material question of fact concerning gross negligence.” *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999). In the present case, however, there was at least some admissible evidence to suggest that defendant, by failing to render or promptly summon medical assistance for plaintiff’s decedent after the shot was fired, demonstrated a substantial lack of concern for whether plaintiff’s decedent lived or died. See MCL 691.1407(7)(a). It is undisputed that defendant did not render medical aid to plaintiff’s decedent. Several witnesses testified that, after the shooting, defendant continued to yell at plaintiff’s decedent and merely stood by without providing any assistance. In addition, defendant testified that one of the reasons he shot plaintiff’s decedent was because he was tired of fighting. Reasonable jurors could infer from this testimony that defendant harbored a general disregard for plaintiff’s decedent’s life and well-being. Because the question whether defendant was grossly negligent within the meaning of the GTLA by failing to render and secure prompt medical treatment ultimately turns on the weight of the evidence and the credibility of the witnesses, it would be proper to submit the issue to the jury if defendant’s failure was the proximate cause of plaintiff’s decedent’s death. *Oliver*, 290 Mich App at 686.

But it is beyond factual dispute that defendant’s failure to render and secure prompt medical treatment after the shooting was not the proximate cause of plaintiff’s decedent’s death. It is not clear how much longer plaintiff’s decedent might have lived, if at all, had he received more immediate medical attention. Dr. Spitz opined that plaintiff’s decedent survived for several minutes until he bled to death internally. However, as noted previously, a lower-level government employee is entitled to immunity from negligence liability unless his or her gross negligence was “the proximate cause of the injury or damage.” MCL 691.1407(2)(c) (emphasis added). In order to be the proximate cause of an injury, the asserted gross negligence must be “the one most immediate, efficient, and direct cause of the injury or damage[.]” *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000).

To reiterate, the only legally cognizable act of gross negligence committed by defendant was his failure to render or summon immediate medical assistance for plaintiff’s decedent. However, “the one most immediate, efficient, and direct cause” preceding the injury was clearly the intentionally fired gunshot—not defendant’s allegedly negligent failure to render or summon medical aid. Thus, even though it was defendant who was ultimately responsible for shooting plaintiff’s decedent, no reasonable juror could conclude that defendant’s “gross negligence” was “the proximate cause of the injury or damage” within the meaning of MCL 691.1407(2)(c). The circuit court erred by denying defendant’s motion for summary disposition with regard to plaintiff’s claim of gross negligence.

V. ASSAULT AND BATTERY

While the GTLA governs the issue of immunity from negligence liability for lower-level government employees, it does not govern the issue of immunity from intentional torts. *Odom*, 482 Mich at 470-472. Instead, the GTLA preserves the common-law test for immunity from intentional torts that existed before July 7, 1986. MCL 691.1407(3); *Odom*, 482 Mich at 472. Under this common-law test, a lower-level government employee is entitled to immunity from intentional-tort liability if: (1) the government employee's actions were taken during the course of employment and the employee was acting, or reasonably believed he or she was acting, within the scope of his or her authority, (2) the government employee was engaged in a discretionary act, and (3) the government employee was acting in good faith. *Odom*, 482 Mich at 473-476; *Ross*, 420 Mich at 633-634. It is beyond dispute that defendant was acting within the scope of his employment and that he was engaged in a discretionary act at the time he shot plaintiff's decedent. See *Oliver*, 290 Mich App at 688. Therefore, the only factor at issue in the present case is whether defendant was acting in good faith.

Stated most simply, a government employee acts in good faith when he or she acts without malice. *Norris*, 292 Mich App at 579; see also *Odom*, 482 Mich at 473-474. Our Supreme Court has observed that bad faith includes "malicious, corrupt, and otherwise outrageous conduct on the part of those guilty of an intentional abuse of power[.]" *Id.* at 474, quoting Prosser, Torts (4th ed), § 132, p 989. "[T]here is no immunity when the governmental employee acts maliciously or with a wanton or reckless disregard of the rights of another." *Odom*, 482 Mich at 474. "[A]n 'action may lie only if the officer has utilized wanton or malicious conduct or demonstrated a reckless indifference to the common dictates of humanity.'" *Id.*, quoting *Dickey v Fluhart*, 146 Mich App 268, 276; 380 NW2d 76 (1985). Malice may be demonstrated not only by evidence that the officer had an intent to harm, but also by evidence that the officer was indifferent to whether harm would result. *Odom*, 482 Mich at 475; see also *Burnett v City of Adrian*, 414 Mich 448, 455; 326 NW2d 810 (1982); M Civ JI 14.11.

In other words, contrary to defendant's contention on appeal, a specific intent to harm is not required to overcome immunity with respect to intentional torts. Instead, a lack of good faith may be shown by wanton or reckless conduct or by evidence of a defendant's indifference to whether harm will result. *Odom*, 482 Mich at 474-475.

Turning to the present case, it is undisputed that plaintiff's decedent was not armed with a weapon.⁵ While plaintiff's decedent may have been larger and stronger than defendant, witnesses testified that plaintiff's decedent was in a defensive position on the ground and that

⁵ Unlike the plaintiffs or decedents in *Latits*, slip op at 2-4, *Norris*, 292 Mich App at 580, and *VanVorous*, 262 Mich App at 471-472, plaintiff's decedent in the present case was not in control of an automobile, driving an automobile, or attempting to use an automobile against an officer. It is well settled that an automobile can constitute a dangerous weapon. *People v Velasquez*, 189 Mich App 14, 17; 472 NW2d 289 (1991); *People v Sheets*, 138 Mich App 794, 799; 360 NW2d 301 (1984).

defendant had at least partially subdued him by the time the fatal shot was fired. Several witnesses testified that defendant was either standing over plaintiff's decedent or kneeling on top of him, and witness Berberich testified that there was no way plaintiff's decedent could have reached defendant's gun at the time the shot was fired. Furthermore, although it is disputed by other witnesses, Berberich testified that he was still standing on plaintiff's decedent's wrist at the time defendant fired his gun. Defendant testified that one of the reasons he shot plaintiff's decedent was because he was tired of fighting. On the basis of this testimony, reasonable jurors could conclude that defendant acted wantonly, recklessly, or was indifferent to whether plaintiff's decedent would be seriously harmed or killed. See *id.* Because reasonable minds could differ, it was for the jury to decide whether defendant acted in good faith and without malice. *Gillam*, 172 Mich App at 577. The circuit court did not err by ruling that there remained a genuine issue of material fact concerning whether defendant acted in good faith when he intentionally fired his gun at plaintiff's decedent. *Alexander v Riccinto*, 192 Mich App 65, 67-68, 70-71; 481 NW2d 6 (1992).

VI. CONCLUSION

The circuit court erred by denying defendant's motion for summary disposition with respect to plaintiff's claim of gross negligence. We therefore reverse that portion of the circuit court's ruling and remand for entry of judgment in favor of defendant on plaintiff's gross negligence claim.

However, there remained a jury-submissible question of fact concerning whether defendant acted in good faith and without malice when he intentionally shot plaintiff's decedent. Accordingly, we affirm the circuit court's denial of summary disposition with respect to plaintiff's claim of assault and battery.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Michael J. Talbot

/s/ Kathleen Jansen

/s/ Patrick M. Meter