STATE OF MICHIGAN

COURT OF APPEALS

SAM THOMAS,

Plaintiff-Appellant,

v

PONTIAC POLICE OFFICERS: OFFICER P. LUEZAJ, OFFICER MICHAEL STORY, OFFICER B. FLYE, OFFICER MILLER, OFFICER KEELTY, OFFICER PUMMELL, OFFICER PITTMAN, LIEUTENANT. BOVEES, SERGEANT. POWELL and SERGEANT. SITAR

Defendants-Appellees.

UNPUBLISHED
April 27, 1999

No. 203002
Oakland Circuit Court
LC No. 96-525751 NO

Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendants. We affirm.

I. Background Facts and Procedural History

On September 23, 1994, Pontiac police officers executed a search warrant at a building suspected of housing an illegal gambling operation. Plaintiff was standing inside the building behind the door through which the officers entered. Plaintiff alleges he was injured when his right knee was struck by the door. Plaintiff initially filed suit against Pontiac Police Officer Pashko Ivezaj in the United States District Court, Eastern District of Michigan, Southern Division. Ivezaj was the designated "ram person" for the team of officers that executed the search warrant.[1] Plaintiff alleged in the federal action that Ivezaj violated his Fourth and Fourteenth Amendment rights by using excessive force when opening the door. Finding that plaintiff had failed to set forth any evidence that actions taken by Ivezaj had proximately caused plaintiff's injuries, the federal district court summarily dismissed the case.

Plaintiff then filed the present cause of action in state circuit court against these defendants, who apparently all served as members of the raid team. Plaintiff claimed that his rights as secured by article

1, § 11 of the Michigan Constitution[2] were violated by actions taken by the officers on September 23, 1994. Plaintiff also claimed that the officers had acted with gross negligence. Defendants sought summary disposition under MCR 2.116(C)(6), (7), (8), and (10). In granting defendants' motion for summary disposition, the trial court ruled as follows:

> Well having given it considerable consideration, as well as listening to your arguments here, I'm satisfied I am not going to create a remedy under the Michigan constitution [sic] and I will grant summary disposition on the basis of the motion offered here. And I will also grant summary disposition with respect to the gross negligence claim on the basis of there is no material issue of fact that has been offered on the basis of (C)(10).

II. Alleged Violations of Michigan Constitution

Plaintiff first argues that the trial court committed error requiring reversal when it ruled that it would not recognize a cause of action for damages against an individual police officer for violations of article 1, § 11 of the Michigan Constitution. We disagree.

"On appeal, a trial court's determination of a motion for summary disposition is reviewed de novo." *Atkinson v Detroit*, 222 Mich App 7, 9; 564 NW2d 473 (1997). It is not clear to us which specific subrule of MCR 2.116(C) the trial court relied upon when granting summary disposition to defendants on plaintiff's constitutional claims.[3] This uncertainty, however, is not significant. Regardless of whether it would be appropriate to recognize a cause of action for damages for such a violation, we conclude that plaintiff's claim was properly dismissed given that there was absolutely no evidence that by virtue of a custom or policy, defendants violated either the knock-and-announce statute[4] or plaintiff's right to be secure from unreasonable searches and seizures. *Johnson v Wayne Co*, 213 Mich App 143, 150; 540 NW2d 66 (1995). Accordingly, summary disposition was appropriate because there was no genuine issue of material fact concerning whether defendants acted in accordance with a police custom or policy. See *Smith v Union Charter Twp (On Rehearing)*, 227 Mich App 358, 362; 575 NW2d 290 (1998).

III. Allegation of Gross Negligence

Plaintiff also argues that the trial court erred in summarily dismissing under MCR 2.116(C)(10) his claim based on gross negligence. Specifically, plaintiff asserts that in violating the knock-and-announce statute, defendants engaged in "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). We disagree.

Assuming, arguendo, that defendants did not comply with the knock-and-announce statute,[5] plaintiff offers no evidence that defendants' conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury results. This is particularly true considering, as plaintiff himself acknowledged, that the officers could not have been aware that plaintiff was standing directly in the path of the door when they entered the building. Further, there is no evidence that the door was actually forced open by the officers. At most, the evidence indicates that plaintiff's injury was the result of

happenstance. Accordingly, we do not find that a question was raised on which reasonable minds could differ concerning whether defendants' conduct was grossly negligent.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

[1] According to Ivezaj, as the raid team's "ram person," he was supposed "to force open the door in case it was locked." There is no indication in the record that the door was locked.

[2] Const 1963, art 1, § XI, reads in pertinent part: "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. . . ."

[3] In stating that it would not "create a remedy under the Michigan constitution," it seems to us that the trial court was indicating either: (1) that no such cause of action exists in Michigan, and that "no amount of factual development could possibly justify a right to recovery," *Long v Chelsea Community Hospital*, 219 Mich App 578, 581; 557 NW2d 157 (1996); or (2) that summary disposition was appropriate because there was no genuine issue of material fact. Thus, it appears that the trial court relied on either (C)(8) or (C)(10) when summarily dismissing plaintiff's constitutional claims.

> MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief can be granted. . . . The court must accept as true all well-pleaded facts. . . . MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

[4] MCL 780.656; MSA 28.1259(6) provides:

> The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any other person assisting him in execution of the warrant.

[5] This is an assumption that we do not believe is supported by the documentary record. In support of his assertion that the knock-and-announce statute was violated, plaintiff points to his own testimony in which he denied having heard the police announce their presence and purpose. Conversely, Ivezaj testified at his deposition that when the raid team was executing the search warrant, he yelled "Pontiac

Police with a search warrant." Giving plaintiff the benefit of any reasonable doubt, the most that this evidence indicates is that there is a dispute over whether the knock-and-announce statute was complied with by the raid team.