STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF JOSHUA L. BROUHARD, DECEASED, by and through SANDRA L. BROUHARD and DONALD R. BROUHARD, Co-Personal Representatives

Plaintiff-Appellant,

v

OFFICER ROBERT ALONZI and OFFICER JERRY LOTZ,

Defendants-Appellees.

UNPUBLISHED
November 20, 2001

No. 224649
Oakland Circuit Court
LC No. 97-543237-CZ

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition. We affirm.

On January 24, 1997, officers of the Oxford Township Police Department were dispatched to Squaw Lake boat launch due to a report that there was a fight involving about eight to twelve teenage boys. When Officer Alonzi arrived at the scene, three vehicles were attempting to leave. Officer Alonzi secured the area by positioning his police vehicle across the path of the vehicles. Officer Lotz arrived at the scene shortly thereafter to assist Officer Alonzi.

Joshua Brouhard was the driver of the first vehicle.[1] An officer asked Brouhard to step outside his vehicle. A passenger in Brouhard's vehicle, Nicholas Dissmore, stated that Officer Lotz called Brouhard a "stupid m----- f-----" as Brouhard was getting out of his vehicle. The driver of the second car, Jerry Stetkewycz, heard one of the officers tell Brouhard to "Get out of the car you fat f---." However, Anthony Ward, a passenger in the second vehicle, claimed that he never heard the officers make these statements. Officers Bradley Ostrander and David Gulda arrived at the scene after Officer Alonzi and Officer Lotz.

Brouhard was placed in handcuffs and searched for weapons. There were no weapons found on him; however, a hatchet and a can of pepper spray were discovered in his vehicle.

[1] Brouhard was not involved in the fight.

Brouhard was placed in Officer Lotz's vehicle as Officer Alonzi contacted dispatch for verification of Brouhard's driver's license. Officer Alonzi issued Brouhard a citation for driving on a suspended license. Brouhard was not placed under arrest and the handcuffs were subsequently removed.[2] Officer Lotz testified that when he asked Officer Alonzi what he should do with Brouhard, Officer Alonzi replied "Take him to M-24 and Drahner and let him walk his fat a-- home." Stetkewycz stated that he saw Brouhard crying in the backseat of the police vehicle. Officer Alonzi testified in his deposition that he was aware that Brouhard suffered from depression and that Brouhard was taking medication for this problem.

Officer Lotz provided Brouhard with a ride home. At Brouhard's request, Officer Lotz dropped him off at an intersection, approximately three blocks from his house. On January 26, 1997, a jogger discovered Brouhard's body hanging from a tree in a remote area near Brouhard's home. Brouhard's death was ruled a suicide by the medical examiner.

Plaintiff filed a complaint in circuit court which was removed to the federal court at defendants' request. Following discovery, the federal court judge issued an Opinion and Order granting defendants' motion for summary judgment and dismissing all of plaintiff's federal claims. Plaintiff's state law claims were remanded to the circuit court.

In circuit court, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). Judge Tyner dismissed the claims against the Township of Oxford, the Village of Oxford and the Oxford Emergency Safety Authority (OESA) on the grounds that they were entitled to governmental immunity. However, Judge Tyner denied defendants' motion as it pertained to individual defendants Robert Alonzi and Jerry Lotz. Judge Tyner also denied defendants' subsequent motion to file a second summary disposition motion and the matter was placed on the court's standby trial docket. Additionally, Judge Tyner granted plaintiff's motion to deny a hearing on defendants' motion in limine because it was identical to defendants' earlier motion for summary disposition. The case was then reassigned to visiting Judge Christensen. Judge Christensen held a pre-trial conference and allowed defendants to file their second motion for summary disposition. In a December 21, 1999 Order the trial court granted defendants' motion for summary disposition.

A trial court's grant or denial of summary disposition is subject to de novo review on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and is only appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and is granted only when there can be no factual development to justify recovery. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Furthermore, to survive a motion for summary disposition claiming governmental immunity, the plaintiff must

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[2] At the time of this incident Brouhard was under probation for receiving and concealing stolen property over $100. The conditions of Brouhard's probation stated that he "shall [n]ot violate any criminal law . . . ."

allege facts which justify an exception to governmental immunity. MCR 2.116(C)(7); *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

Plaintiff first argues that the trial court erred when it agreed to hear defendants' motion for summary disposition. Specifically, plaintiff claims that MCR 2.116(J)(1) requires a case to proceed to trial if summary disposition is denied. Plaintiff states that the scheduling order required that all dispositive motions be filed by June 29, 1998 and that the Final Pre-Trial Order, filed November 2, 1999, did not allow for the filing of another summary disposition motion. Lastly, plaintiff contends that because Judge Tyner declined to hear defendants' second motion for summary disposition, MCR 2.613(B) prevented Judge Christensen from setting aside or vacating her order on a renewed motion. We disagree.

There is no limitation in the court rules on the number of summary disposition motions that a party can file. "This Court has held that MCR 2.116(E)(3) allows a party to file more than one motion for summary disposition." *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997). To ensure that frivolous motions are not filed, the court rules provide for sanctions if a motion is filed in bad faith. MCR 2.116(F). Further, MCR 2.116(D)(3) provides that "[t]he grounds listed in subrule (C)(4), (8), (9), and (10) may be raised at any time." Plaintiff's contention that Judge Christensen violated MCR 2.613(B) is also without merit. In fact, Judge Tyner never ruled on defendants' second motion for summary disposition other than to deny leave to file the motion.

Plaintiff further contends in this appeal that Judge Christensen erred when he ruled that defendants' conduct did not amount to an intentional infliction of emotional distress. We disagree.

To establish a valid claim of intentional infliction of emotional distress, the plaintiff must show: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Graham v Ford,* 237 Mich App 670, 674; 604 NW2d 713 (1999). However, liability for this claim requires that the conduct be so outrageous and extreme that it would be considered intolerable in a civilized society and would lead an average member of the community to exclaim, "Outrageous!" *Id*. at 674-675. Initially, as a matter of law, the court must determine if a defendant's conduct could be reasonably regarded as extreme and outrageous as to permit recovery. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999). If reasonable minds could differ, then a jury must determine if the conduct was extreme according to the particular facts of the case. *Id*.

After viewing this claim in a light most favorable to plaintiff, we do not believe that a trier of fact could conclude that defendants' conduct rose to an extreme or "outrageous" level. This Court has held that "[l]iability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Graham, supra* at 674. In this case there is testimony that defendants called Brouhard some derogatory and clearly inappropriate names. However, even if defendants were aware that Brouhard suffered from depression, their actions were not extreme given the situation and the fact that their comments were limited to three statements. Because we do not find that defendants' conduct achieved the level of extreme and outrageous, further analysis of this issue is unnecessary.

Plaintiff's last claim on appeal is that defendants are not protected by governmental immunity because their conduct amounted to gross negligence. We disagree.

An employee of a government agency is immune from tort liability for an injury to a person caused by that employee, during the course of employment, if the following requirements are met:

> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. [MCL 691.1407(2)].

Plaintiff's pleadings aver that defendants were acting "during the course of employment, within the scope of their authority and under color of State law." Defendants admitted this to be true in their answers to plaintiff's first amended complaint. Moreover, the governmental agency, OESA, was engaged in the discharge of a governmental function because it was operating a police department. "A governmental function is defined as 'an activity . . . expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.'" *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 586; 609 NW2d 593 (2000), quoting MCL 691.1401(f). Plaintiff mistakenly argues that defendants' use of offensive language takes this beyond the discharge of a governmental function. However, the statute specifically refers to the governmental agency's actions and not those of its individual employees. MCL 691.1407(2)(b); see also *Pardon v Finkel*, 213 Mich App 643, 649-650; 540 NW2d 774 (1995).

Defendants in this case called Brouhard three offensive names. This language was used during a confrontation between defendants and several young men after reports of a fight. The evidence also suggests that the other young men, including Brouhard, were using similar language toward defendants. After a careful review of the record, we agree with the trial judge that reasonable minds could not differ in concluding that defendants' conduct in calling plaintiff three offensive names failed to amount to gross negligence as defined in the statute. Additionally, plaintiff has failed to provide any caselaw that would even suggest that the use of offensive language by police officials amounted to gross negligence. See *Goolsby v Detroit*, 419 Mich 651, 655, n 1; 358 NW2d 856 (1984) (an issue is unpreserved when there is little to no citation to supporting authority). Because defendants' conduct did not amount to gross negligence, it is unnecessary to address plaintiff's proximate cause argument.

Plaintiff has also failed to prove that defendants engaged in ultra vires activities that would negate governmental immunity. An "ultra vires activity is not activity that a governmental agency performs in an unauthorized manner. Instead, it is activity that the governmental agency lacks legal authority to perform in any manner." *Richardson v Jackson County*, 432 Mich 377, 387; 443 NW2d 105 (1989). In the instant case, defendants had the legal

authority to detain Brouhard and give him a citation. The fact that during the performance of this function defendants used language unauthorized by the police department is not indicative of ultra vires activity. See *Roberts v Troy*, 170 Mich App 567, 576; 429 NW2d 206 (1988).

Affirmed.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper