STATE OF MICHIGAN

COURT OF APPEALS

LENN LATOSKI and TRACY ORNATOWSKI,

Plaintiffs/Counter-Defendants-Appellants,

v

DEBORAH LYNN GARLOCK,

Defendant/Counter-Plaintiff,

and

MICHIGAN STATE POLICE, ROBIN SEXTON, MARK SOSNOSKI, GEORGE TIERNAN, CLINT MICHELIN, and EMMETT BLAKE,

Defendants-Appellees,

and

JOHN DOE 3 and JOHN DOE 4,

Defendants.

UNPUBLISHED
October 18, 2002

No. 236096
Mackinac Circuit Court
LC No. 99-004752-CZ

Before: Hood, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Plaintiffs Lenn Latoski and Tracy Ornatowski appeal as of right from a grant of summary disposition in favor of defendants[1] under MCR 2.116(C)(7).[2] We affirm.

[1] Plaintiffs' claim against defendant Deborah Lynn Garlock was successfully mediated; therefore, the term "defendants" refers only to the Michigan State Police and named and unnamed individual state police officers.

[2] The trial court also granted summary disposition in a separate Court of Claims case arising out of the same incidents against the state of Michigan and the director of the Michigan State Police.

Plaintiffs argue that defendants were grossly negligent in their responses to allegations that Latoski had pointed a gun at Garlock and her son as they rode past his property on an all-terrain vehicle (ATV), strung a wire across a public trail on which Garlock rode her ATV, and set fire to Garlock's house on two separate occasions.[3] Latoski was also accused of causing property damage to another neighbor's car by scratching it with the prosthetic device he wears on his right arm. The trial court held that defendants were immune from suit because their alleged conduct during the investigations did not amount to gross negligence as a matter of law.

We review the trial court's decision to grant a motion for summary disposition under MCR 2.116(C)(7) de novo to determine if the moving party was entitled to judgment as a matter of law, considering the entire record in making the determination whether summary judgment was appropriate. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). For this purpose, we accept plaintiffs' well-pleaded allegations as true and construe them in a light most favorable to plaintiffs. *Stabley v Huron-Clinton Metropolitan Park Authority*, 228 Mich App 363, 365; 579 NW2d 374 (1998).

Because defendants were state police officers acting within the scope of their authority and exercising a governmental function, they are generally immune from liability unless their conduct amounted to gross negligence. MCL 691.1407. Plaintiffs first allege that during the execution of the search and arrest warrants, defendants pointed their guns at plaintiffs, conducted pat-down searches, and spoke in a "disrespectful, threatening, and intimidating manner," and that this constituted gross negligence. Where a plaintiff alleges that a defendant government employee was negligent, "summary disposition is precluded in cases in which reasonable jurors could honestly have reached different conclusions with regard to whether the defendant's conduct amounted to gross negligence." *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992).

At the time the first warrant was executed, Latoski was under suspicion of aiming a firearm at a neighbor. Police officers have a wide degree of discretion to determine how to respond in potentially dangerous situations, *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 659; 363 NW2d 641 (1984), and "a police officer may use reasonable force when making an arrest," *Brewer v Perrin*, 132 Mich App 520, 528; 349 NW2d 198 (1974). Likewise, "[o]n the basis of a reasonable suspicion of criminal activity and reasonable fear for the safety of himself and others, a police officer may pat down an individual for the limited purpose of discovering weapons." *People v McCrady*, 213 Mich App 474, 482; 540 NW2d 718 (1995). See also *People v Jackson*, 188 Mich App 117, 121; 468 NW2d 523 (1991). Thus, no reasonable juror could have found that this conduct constituted gross negligence, and the trial court properly granted summary disposition with respect to these claims. *Vermilya*, *supra* at 83.

Plaintiffs also allege that defendants treated them in a "disrespectful, threatening, and intimidating manner"; however, the complaint does not give specific examples. A review of the record indicates that the conduct most likely to fit this description includes one of the officers telling Ornatowski, "Freeze, or I'll shoot," and another repeatedly and angrily accusing plaintiffs of setting the fire at Garlock's home, and telling plaintiffs to "shut up" while simultaneously

[3] Garlock herself was ultimately charged with the second arson.

asking more questions. Because no reasonable juror could have found that this conduct constituted gross negligence – in other words, "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results," MCL 691.1407(2)(c), the trial court properly granted summary disposition with respect to this conduct. *Vermilya*, *supra* at 83.

Plaintiffs next argue that defendants' affidavits supporting the search and arrest warrants were unsupported by probable cause and that this amounted to gross negligence. See *Bell v Fox*, 206 Mich App 522, 525; 522 NW2d 869 (1994). A search warrant may only be issued if probable cause exists to justify the search. US Const, Amend IV; Const 1963, art 1, § 11; MCL 780.651; *People v Sloan*, 450 Mich 160, 166-167; 538 NW2d 380 (1995). In reviewing whether probable cause existed, we determine "whether a reasonably cautious person could have concluded, under the totality of the circumstances, that there was a substantial basis for the magistrate's finding of probable cause." *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997).

As a preliminary matter, we note that Latoski is not collaterally estopped from challenging the probable cause finding in his arrest for assault simply because he was bound over for trial. See *Fort Wayne Mortgage Co v Carletos*, 95 Mich App 752, 758; 291 NW2d 193 (1980). However, in light of the fact that none of the statements specified in plaintiffs' brief are false, we also consider plaintiffs' argument that the probable cause affidavits contained false statements to be without merit. *Franks v Delaware*, 438 US 154, 171-172; 98 S Ct 2674; 57 L Ed 2d 667 (1978); *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992).

In our view, probable cause to search for firearms and to arrest Latoski for assault was established based on Garlock's eyewitness report. MCL 780.653; *People v Powell*, 201 Mich App 516, 522; 506 NW2d 894 (1993). Identified citizens and police officers are presumptively reliable, *Powell*, *supra* at 523, and the fact that Garlock ultimately proved an unreliable witness has no bearing on her credibility at the time she reported Latoski's alleged assault. Because Garlock's report was sufficient to lead a prudent person to believe that Latoski committed the crime, the fact that defendants did not interview other possible witnesses does not negate probable cause. *Koski v Vohs*, 426 Mich 424, 436; 395 NW2d 226 (1986).

Probable cause also existed to suspect plaintiffs of stringing a wire across the public path, given that the location of the wire was near both Garlock's and plaintiffs' homes and that defendants and Garlock had engaged in disputes over the use of ATVs in the area. Likewise, probable cause existed to suspect plaintiffs of arson, given the history of hostilities, the proximity of their homes, and the tracking dog evidence. The fact that the affidavit was prepared by an officer who did not participate in the initial investigation is irrelevant. See *People v Mackey*, 121 Mich App 748, 753-754; 329 NW2d 476 (1982).

Furthermore, although plaintiffs argue that the search of their property after the second arson was unsupported, they do not challenge defendants' explanation that the first search warrant was still in effect. Accordingly, a finding of probable cause to search plaintiffs' property for accelerants and other evidence was supported. *Darwich*, *supra* at 637. Taking the totality of the circumstances into account, a reasonably cautious person could have concluded that there was a substantial basis for a finding of probable cause for these searches. *Id*. For these reasons,

we affirm the trial court's grant of summary disposition with respect to Counts II, IV, V, and VI.[4]

We next hold that there was probable cause to suspect Latoski of damaging a neighbor's car, alleged in Count III of plaintiffs' complaint. In the police officer's judgment, the damage was consistent with what a prosthetic hook might have caused. See generally *Ross (On Rehearing)*, *supra* at 659 (police officers have wide discretion in criminal investigations). Furthermore, plaintiffs had experienced disagreements with this neighbor regarding placement of items on each others' property. Consequently, a reasonably cautious person could have found a substantial basis for the finding of probable cause concerning Latoski as a suspect in the property damage incident. See *Darwich*, *supra* at 637. Thus, probable cause to suspect Latoski precluded a finding of gross negligence on this issue. *Vermilya*, *supra* at 83.

With regard to the remainder of plaintiffs' claim in Count III, we also agree with the trial court that defendants' seizure and retention of Latoski's prosthetics did not constitute gross negligence either. Seizure of property during execution of a search warrant is governed by MCL 780.655(2), which provides in relevant part that "property and things that were seized shall be safely kept by the officer so long as necessary for the purpose of being produced or used as evidence in any trial." Although the property seized was uniquely personal, it fit the standard for seizure. Moreover, defendants persuasively argue that the delay in returning Latoski's property was caused by the laboratory, not the police officers.

Therefore, the trial court did not err in granting defendants' motion for summary disposition on Count III of plaintiffs' complaint. *Vermilya*, *supra* at 83. Accordingly, we must affirm the trial court's holding dismissing the derivative loss of consortium claim in Count VIII. See *Moss v Pacquing*, 183 Mich App 574, 583; 455 NW2d 339 (1999) ("recovery for loss of consortium stands or falls upon . . . recovery of damages").

Finally, the trial court properly dismissed plaintiffs' state constitutional claim under Count VII because damages are not available against individual state officers if other remedies are available. *Jones v Powell*, 462 Mich 329, 335; 612 NW2d 423 (2000); *Smith v Dep't of Public Health*, 428 Mich 540; 410 NW2d 749 (1987). Because plaintiffs could and did seek a remedy under common-law tort principles, a constitutional claim is foreclosed in this case. *Jones*, *supra* at 339 (Kelly, J., concurring); *Smith*, *supra* at 651-652. Thus, the trial court did not abuse its discretion in refusing to allow plaintiffs to amend this count to state a claim for gross negligence on the ground that amendment would have been futile. See MCR 2.116(I)(5); *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656-657; 213 NW2d 134 (1973).

Affirmed.

/s/ Harold Hood
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell

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[4] Count I, alleging malicious prosecution, was dismissed following the parties' acceptance of a mediation decision.