STATE OF MICHIGAN

COURT OF APPEALS

DARLINDA M. BOCHENEK,

Plaintiff-Appellant,

v

CITY OF MADISON HEIGHTS, MADISON HEIGHTS POLICE DEPARTMENT, JASON CHAPUT, COUNTY OF OAKLAND, and OAKLAND COUNTY SHERIFF'S DEPARTMENT,

Defendants,

and

ROBERT ANDERSON,

Defendant-Appellee.

UNPUBLISHED
December 27, 2002

No. 237422
Oakland Circuit Court
LC No. 00-023420-NO

Before: Kelly, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant Robert Anderson's motion for a directed verdict regarding her claims that he committed an assault and battery and used excessive force in arresting her. We affirm.

On appeal, plaintiff contends that the trial court erred in granting defendant's motion for a directed verdict because there was conflicting testimony by which a reasonable juror could differ as to whether defendant committed an assault and battery or used excessive force in violation of the Fourteenth Amendment when arresting plaintiff. We disagree.

This Court reviews the trial court's grant of a directed verdict de novo. *Cacevic v Simplematic*, 248 Mich App 670, 679; 645 NW2d 287 (2001). In reviewing the trial court's decision, we view the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed. *Id*. This Court recognizes the unique opportunity of the trial judge to observe witnesses and the factfinder's responsibility to determine the credibility and weight of the testimony. *Zeeland*

Farm v JBL Enterprises, 219 Mich App 190, 195; 555 NW2d 733 (1996). A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Cacevic, supra,* 248 Mich App 679-680.

An assault is "any intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish contact." *Smith v Stolberg*, 231 Mich App 256, 260; 586 NW2d 103 (1998). Battery is "the willful and harmful or offensive touching of another person which results from an act intended to cause such contact." *Id*.

With regard to plaintiff's excessive force claim, the Sixth Circuit in *Darrah v City of Oak Park*, 255 F3d 301 (CA 6, 2001) recently pointed out:

> [W]hile the Fourth Amendment "objective reasonableness" analysis should be used in excessive force cases involving searches and seizures, where there is no search and seizure, the Supreme Court has held that the substantive component of the Fourteenth Amendment's due process clause is the most appropriate lens with which to view an excessive force claim. *County of Sacramento v Lewis*, 523 US 833, 843-844; 118 S Ct 1708; 140 L Ed 2d 1043 (1998).
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> A substantially higher hurdle must be surpassed to make a showing of excessive force under the Fourteenth Amendment than under the "objective reasonableness" test of *Graham* [*v Connor*, 490 US 386; 109 S Ct 1865; 104 L Ed 2d 443 (1989)], in which excessive force can be found if the officer's actions, in light of the totality of the circumstances, were not objectively reasonable. *Graham*, 490 US at 396-97, 109 S Ct 1865; *Lewis*, 523 US at 845-46, 118 S Ct 1708. The substantive due process rights of the Fourteenth Amendment protect citizens from the arbitrary exercise of governmental power. *Lewis*, 523 US at 845, 118 S Ct 1708. The test applied by the Supreme Court to determine when governmental conduct reaches this threshold is to ask whether the alleged conduct "shocks the conscience." *Id*. at 846, 118 S Ct 1708. In *Lewis*, the Supreme Court explained that whether governmental conduct shocks the conscience depends on the factual circumstances of the case. *Id*. at 851-53, 118 S Ct 1708. More specifically, in situations where the implicated government actors
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> > are afforded a reasonable opportunity to deliberate various alternatives prior to electing a course of action . . . , their actions will be deemed conscience-shocking if they were taken with "deliberate indifference" towards the plaintiff's federally protected rights. In contradistinction, in a rapidly evolving, fluid, and dangerous predicament which precludes the luxury of calm and reflective pre-response deliberation ..., public servants' reflexive actions "shock the conscience" only if they involved force employed "maliciously and sadistically for the very purpose of causing harm" rather than "in a good faith effort to maintain or restore discipline."

> *Claybrook v Birchwell*, 199 F3d 350, 359 (6th Cir.2000) (quoting *Lewis*, 523 US at 852-53, 118 S Ct 1708). [255 F3d 305-306.]

Because plaintiff claims that defendant used excessive force in arresting her, we thus apply the "shock the conscience" test to this claim. *Darrah, supra*, 255 F3d 306.

In addition, this Court has recognized that actions by police officers, which might normally constitute intentional torts, are protected by governmental immunity if those actions are justified. *Butler v City of Detroit*, 149 Mich App 708, 715; 386 NW2d 645 (1986). A police officer may use reasonable force when making an arrest. *Tope v Howe*, 179 Mich App 91, 106; 445 NW2d 452 (1989); *Brewer v Perrin*, 132 Mich App 520, 528; 349 NW2d 198 (1984). The measure of necessary force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary. *Brewer, supra*, 132 Mich App 528.

In this case, the trial court properly granted a directed verdict in favor of defendant. The record indicates that plaintiff, who had a longstanding history of emotional problems, advised the police in her 911 call from her residence that things were "going to get ugly." The police immediately responded to the call. Upon arriving at her residence, the police discovered that plaintiff had poured gasoline both inside and outside her house and was preparing to kill herself by setting the house ablaze. When the officers on the scene ordered plaintiff to stop, she ignored them, ran back into her house, and tried to prevent the officers from entering. Upon entering through the back door of the house, Officers Chaput and Anderson noticed that their uniforms were "covered in gas" and the house was filled with an "extreme odor of gas". At that point, Officers Chaput and Anderson grabbed plaintiff and carried her from the gasoline-soaked house onto the edge of the deck outside the house. According to plaintiff, she was lying peacefully on the floor waiting to be handcuffed when defendant pressed or ground his knee into her ankle while handcuffing her. However, plaintiff admitted that she fell when the officers rushed in the back door and was "wet" from the gasoline.

Given the facts of this case, plaintiff simply cannot show that any reasonable juror could find that Officer Anderson committed an assault and battery or that his conduct "shocks the conscience." Indeed, under the circumstances, defendant's response to the rapidly unfolding events was heroic, sparing plaintiff's life at great risk to his own. Therefore, we find the trial court did not err in granting defendant's motion for a directed verdict.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Pat M. Donofrio