

STATE OF MICHIGAN
COURT OF APPEALS

ANNIE FAILS,

Plaintiff-Appellee,

v

S. POPP,

Defendant-Appellant,

and

CITY OF DEARBORN HEIGHTS and
DEARBORN HEIGHTS POLICE
DEPARTMENT,

Defendants.

UNPUBLISHED

October 5, 2004

No. 247743

Wayne Circuit Court

LC No. 02-210654-NO

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

I. NATURE OF THE CASE

Defendant S. Popp is a police officer employed by defendants the City of Dearborn Heights and the Dearborn Heights Police Department. Plaintiff filed a complaint against defendants¹ and alleged counts of false arrest, false imprisonment, assault and battery, gross negligence, “constitutional deprivation,” intentional infliction of emotional distress, and defamation.

Plaintiff’s tort claims against Officer Popp all stem from Officer Popp’s arrest of plaintiff and alleged misconduct that occurred during the postarrest “booking” procedures. Officer Popp asked the trial court to dismiss² plaintiff’s tort claims because he says he is immune from suit

¹ The parties stipulated to the entry of an order dismissing with prejudice plaintiff’s claims against the City and the Department. Officer Popp is the only remaining defendant, and we will hereafter refer to him simply as “defendant” or “Officer Popp.”

² Pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10).

pursuant to the GTLA. This statute immunizes individual governmental employees from tort claims unless the employee acted with gross negligence,³ or intentionally.⁴ After a hearing on Officer Popp's motion, the trial court dismissed those claims that specifically arose from the arrest, but allowed plaintiff's postarrest ("booking"-related) gross negligence and intentional tort claims to stand. Officer Popp appeals that portion of the trial court's order that denied him summary disposition with respect to plaintiff's postarrest gross negligence and intentional tort claims.⁵ For reasons detailed below, we reverse.

II. FACTS AND PROCEDURAL HISTORY

Officer Popp arrested plaintiff on April 19, 2000, in a store parking lot. Six days before plaintiff's arrest, an unidentified assailant and a companion kidnapped an elderly woman from the same parking lot, and forced the victim to drive to two different banks in an attempt to get

³ MCL 691.1407(2) defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

⁴ See *Lavey v Mills*, 248 Mich App 244, 257; 639 NW2d 261 (2001).

⁵ The trial court's denial of Officer Popp's motion for summary disposition arises solely out of the trial court's ruling on the pivotal issue of whether this governmental employee's conduct was insufficiently or sufficiently egregious to fall within or outside the GTLA's grant of immunity. Therefore, we regard the trial court's order as "an order denying governmental immunity to a governmental party" that may be appealed as of right pursuant to MCR 7.202(6)(a)(v) and 7.203(A). That is, the factual predicate to the legal conclusion regarding governmental immunity (the severity of the alleged misconduct that formed the basis of the trial court's ruling) could have disposed of the entire case against Officer Popp had the trial court ruled, as we do here, that no reasonable trier of fact could find that defendant's conduct was so egregious as to fall outside the protections of the GTLA. However, we are constrained by this Court's opinion in *Newton v Michigan State Police*, ___ Mich App ___, ___ NW2d ___ (2004). In *Newton*, another panel of this Court held that there is no appeal as of right pursuant to MCR 7.202(6)(a)(v) and 7.203(A) where the trial court makes factual findings that supports the legal conclusion that a governmental party is not entitled to governmental immunity under the GTLA. In *Walsh v Taylor*, ___ Mich App ___, ___ NW2d ___ (2004) (Talbot, J.), and *Costa v Community Emergency Medical Services, Inc.*, ___ Mich App ___, ___ NW2d ___ (2004), we faced a similar jurisdictional question. In *Walsh*, we held that, but for *Newton*, we would hold that any order based upon a trial court's ruling that a governmental defendant's conduct was sufficient to create a question of fact regarding whether that defendant was entitled to governmental immunity is considered "an order denying governmental immunity," regardless of the basis for the ruling. Accordingly, in *Walsh*, we invoked the conflict resolution procedure pursuant to MCR 7.215(J). Though we agree with the *Walsh* panel's analysis of the "final order" issue, regardless of whether the trial court's order here is appealable as of right in its entirety, where, as here, neither party raises the jurisdictional issue, we may consider these issues (otherwise not appealable as of right) as though the party that now raises such issues on appeal had applied for leave to appeal and we had subsequently granted leave. *Newton*, *supra* at ___; see also *Costa*, *supra*; *Roberts v Emergency Servs-North Oakland, PC*, 176 Mich App 572, 574 n 1; 440 NW2d 55 (1989). We elect to do so here, and we will accordingly review the trial court's order that denied Officer Popp summary disposition in its entirety.

money. The victim was able to give a description of the assailant, and a police sketch was made based upon the description. Officer Popp saw plaintiff speaking to an elderly woman standing next to a car with the trunk open, and observed that plaintiff resembled both the description and the police sketch of the person wanted in connection with the robbery and kidnapping. He believed that plaintiff was the perpetrator of these crimes and placed her under arrest and took her to the Dearborn Heights police station, where plaintiff was booked and fingerprinted. Plaintiff was released several hours later.

Plaintiff filed her suit, and Officer Popp moved for summary disposition. The trial court found that Officer Popp had probable cause to arrest Officer Popp and that plaintiff was not detained for an unreasonable amount of time. Accordingly, for these reasons, the trial court dismissed plaintiff's false arrest and false imprisonment claims.⁶

Regarding the post-arrest claims, the trial court denied Officer Popp's motion as it related to plaintiff's assault and battery claim because it held that there was a question of fact whether Officer Popp treated plaintiff in an abusive manner and used excessive force while fingerprinting her. Likewise, it denied Officer Popp summary disposition relating to plaintiff's gross negligence claim arising out of her treatment after the arrest because it held that Officer Popp's conduct might have been sufficiently reckless to constitute gross negligence under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.* For the same reasons, the trial court also denied Officer Popp's motion regarding plaintiff's intentional infliction of emotional distress claim because it held that a jury might find that Officer Popp had acted in a sufficiently outrageous manner to find in favor of plaintiff.⁷ In essence, the trial court erroneously ruled that Officer Popp's postarrest conduct may have been sufficiently egregious to fall outside the immunity protection of the GTLA.

Officer Popp appeals the trial court's partial denial of his motion for summary disposition.

III. STANDARD OF REVIEW

We review a trial court's grant or denial of summary disposition under MCR 2.116(C)(7) *de novo*. *Poppen v Tovey*, 256 Mich App 351, 353; 664 NW2d 269 (2003). "In reviewing the order, we must give consideration to the affidavits, depositions, admissions, and other documentary evidence filed by the parties, and determine whether they indicate that defendant[] [is] in fact entitled to immunity." *Id.* at 353-354. A plaintiff "must allege facts justifying the application of an exception to governmental immunity." *In re Estate of Marchyok*, 260 Mich App 684, 687; 679 NW2d 703 (2004) (internal quotation omitted). Though the issue of whether

⁶ The trial court dismissed plaintiff's defamation claim because the claim was filed on April 1, 2002, outside of the one-year limitation period for defamation claims provided by MCL 600.5805(7).

⁷ On appeal, plaintiff does not challenge the trial court's rulings that are adverse to her. In addition to summarily dismissing her arrest-related tort claims, the trial court dismissed plaintiff's constitutional claim and plaintiff similarly failed to appeal this ruling.

a government employee's conduct constituted gross negligence under MCL 691.1407 is generally a question of fact, a court may grant summary disposition under MCR 2.116(C)(7) "if, on the basis of the evidence presented, reasonable minds could not differ." *In re Estate of Tarlea*, ___ Mich App ___; ___ NW2d ___ (2004), quoting *Jackson v Saginaw County*, 458 Mich 141, 146; 580 NW2d 870 (1998).

IV. ANALYSIS

A. Plaintiff's Gross Negligence Claim

Officer Popp argues that the trial court erred in denying summary disposition in his favor with respect to plaintiff's gross negligence claim. Generally, government employees are immune from tort liability, except in cases where their actions constitute gross negligence. *Maiden v Rozwood*, 461 Mich 109, 121-122; 597 NW2d 817 (1999). Gross negligence is defined by the GTLA "as 'conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.'" *Id.* at 122, quoting MCL 691.1407(2)(c).

Here, plaintiff's complaint fails to plead specific facts that, if true, would sustain a finding of gross negligence against Officer Popp. Plaintiff bears the burden of pleading facts sufficient to establish an exception to the GTLA; one may not, as plaintiff does here, simply make the conclusory allegation that a defendant acted in a grossly negligent manner. Plaintiff's complaint states merely that she sustained injuries to her wrists and fingers, but it does not state how plaintiff allegedly sustained these injuries, or, incredibly, even who allegedly inflicted these injuries upon plaintiff. In her brief in opposition to Officer Popp's motion for summary disposition, plaintiff claims that after her arrest "someone" twisted and injured her hands and fingers during fingerprinting. However, importantly, and dispositively, nowhere in her brief does plaintiff claim that Officer Popp was the officer who did the "twisting and injuring." Plaintiff submitted no affidavits, depositions, or other such evidence to support her claim, and she submitted no evidence, medical or otherwise, to substantiate her claim that she was injured. Thus, the record is totally devoid of any evidence that would allow reasonable minds to differ on the question of whether Officer Popp's acts after her arrest constituted gross negligence. Indeed, there is no evidence at all that Officer Popp engaged in any tortious conduct regarding plaintiff, much less tortious conduct of the severity to fall outside the immunity protection of the GTLA. Thus, we hold that no reasonable person could conclude that Officer Popp acted so recklessly as to display a disregard for whether plaintiff was injured, and, therefore, the trial court erred when it denied Officer Popp summary disposition with respect to plaintiff's gross negligence claim.⁸

B. Plaintiff's Intentional Tort Claims

⁸ Moreover, we note that plaintiff's complaint is poorly drafted, and fails to allege whether defendant, in fact, committed any of the alleged acts, or even what the alleged acts constituting assault and battery were. Indeed, with respect to the intentional infliction of emotional distress count, plaintiff's complaint states that "Plaintiff CALVIN BOYD, prays for judgment . . ." (our review of the record fails to reveal a party named "Calvin Boyd.")

Officer Popp correctly says that the trial court should have granted summary disposition pursuant to MCR 2.116(C)(10) because there is no genuine issue of material fact with respect to plaintiff's intentional tort claims. Because we have already held that plaintiff has failed to present any, much less sufficient, evidence to allow a finder of fact to conclude that Officer Popp's conduct was grossly negligent (i.e. "reckless"), *a fortiori*, we similarly hold that plaintiff has not established that Officer Popp's conduct was so egregious as to satisfy the more requiring intentional tort standard. Therefore, we hold that the trial court should have dismissed plaintiff's intentional tort claims.

V. CONCLUSION

In summary, we hold that the trial court erred when it denied Officer Popp's motion for summary disposition as it relates to plaintiff's gross negligence claim and intentional tort claims.

Therefore, we reverse that portion of the trial court's order that denied Officer Popp's motion for summary disposition, dismiss plaintiff's claims against Officer Popp, and enter judgment in favor of defendant. See MCR 7.216(A)(7).

/s/ Henry William Saad

/s/ Michael J. Talbot