STATE OF MICHIGAN

COURT OF APPEALS

SUSAN ZIEGLER,

Plaintiff-Appellant-Cross-Appellee,

v

DESIREE AUKERMAN and W.A. FOOTE MEMORIAL HOSPITAL,

Defendants-Appellees-Cross-Appellants,

and

DONNA BROWN, D.O., and DANIEL JONOSHIES,

Defendants-Appellees.

UNPUBLISHED
September 16, 2008

No. 277602
Jackson Circuit Court
LC No. 06-006136-NO

Before: Donofrio, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendants Desiree Aukerman, W.A. Foote Memorial Hospital (hospital), Donna Brown, D.O., and Officer Daniel Jonoshies under MCR 2.116(C)(7). The hospital and Aukerman cross appeal, challenging the trial court's failure to grant them summary disposition on additional grounds. Although our analysis differs from that undertaken by the trial court, we affirm the summary dismissal of the case.

This case arises out of plaintiff's eight-hour involuntary commitment to a mental health facility. In plaintiff's complaint, she alleged that she went to defendant hospital on June 16, 2004, "with her husband to get a referral to a counselor for help dealing with family problems." According to an application for hospitalization, which is a standard court form, executed by the emergency room nurse who saw plaintiff, defendant Aukerman, plaintiff stated that she was at the end of her rope, that she had thoughts of harming herself, and that she thought about driving her car into a tree. Aukerman also indicated on the application that plaintiff was tearful throughout their entire conversation. Further, Aukerman checked off a box on the form which provides that the patient "can be reasonably expected within the near future to intentionally or

unintentionally seriously physically injure [herself] or others, and has engaged in an act or acts or made significant threats that are substantially supportive of this expectation."[1]

An emergency department report dictated by defendant Dr. Brown, who treated plaintiff, indicates that Brown diagnosed plaintiff as suicidal and suffering from major depression, and it further provides:

> This 34 year old female was brought into the Emergency Department by her husband because she has been very depressed and has been suicidal. She feels like everything is caving in on her. She has lost three jobs. Recently her mother who is 57 was placed in a care facility. The patient lost her childhood home and all the childhood belongings. The patient is also dealing with a lot of chronic pain with scoliosis arthritic changes. She says that everything has been piling in and then yesterday she started thinking about suicide. She says when she was 15 she took an overdose. When asked how she was thinking of committing suicide today she stated that she was thinking about hitting a tree. . . . The patient was requesting help and has been seeking it. She went to Behavioral Health Connections earlier tonight for three hours and was not seen and then came here to be seen.[2]

Emergency services records reflect that, at one point, plaintiff and her husband stepped outside the hospital to smoke and never returned, that the police were contacted and asked to go to plaintiff's home, and that plaintiff voluntarily returned to the hospital following police contact, at which point Dr. Brown conducted her examination of a tearful plaintiff. The records indicate that a guard was then requested to stay in plaintiff's hospital room and that an individual named Mike met with plaintiff.[3] Medical records further provide that plaintiff expressed a desire to leave the hospital, telling Aukerman that "by law you can't keep me," but Aukerman encouraged plaintiff to stay. Records additionally indicate that, thereafter, plaintiff left the hospital for a second time, defiantly refusing to stay for treatment as requested, that Dr. Brown was informed, that police were again contacted and asked to return plaintiff for admission, that police (Officer Jonoshies) returned an upset and unwilling plaintiff to the hospital, that plaintiff

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[1] Emergency services records signed by Aukerman are consistent with the application and also provide that plaintiff's chief complaint was depression, that plaintiff was under much stress, that she lost her job, that her mother was ill, and that plaintiff was suicidal.

[2] A clinical certificate, which is also a standard court form, executed by Dr. Brown reflects that Brown examined plaintiff for two hours, Brown diagnosed her with depression, plaintiff was stressed, plaintiff told Brown that she was at the end of her rope and everyone would be better off without her, and that plaintiff stated that she thought about driving into a tree that she sees on the way home from work. Brown concluded that plaintiff was likely to injure herself and required treatment, and she recommended hospitalization.

[3] This reference is apparently to Mike Marshall. According to documentary evidence submitted by the parties in an earlier federal action, but not submitted here, Marshall is a mental health evaluator at the hospital who did not believe that plaintiff needed to be hospitalized.

demanded to call her attorney, that plaintiff asserted that Mike Marshall had even stated that the matter was being blown out of proportion, and that plaintiff was transported for committal under guard. There is no dispute that plaintiff was subsequently examined by a psychiatrist and discharged after being involuntarily hospitalized for approximately eight hours.

In plaintiff's complaint, she denied telling anyone at the hospital that she was suicidal, had plans to kill herself, or was intending to run her car into a tree. Plaintiff additionally alleged that she saw a mental health evaluator at the hospital who recommended that she be treated outpatient, opined that plaintiff did not meet involuntary commitment standards, and refused to sign a mental health petition. Plaintiff further alleged that Dr. Brown did not examine her for two hours as claimed, nor did Brown read the notification statement in the clinical certificate to plaintiff before conducting the examination as required by law and claimed by Brown. Plaintiff also asserted that Aukerman's application for hospitalization contained false representations.

Plaintiff pursued a claim of gross negligence against Jonoshies, alleging that he failed to comply with various provisions of the Mental Health Code (MHC), MCL 330.1001 *et seq.*, emphasizing the lack of any court order, and that he did not believe or reasonably believe that plaintiff was mentally ill or dangerous. Plaintiff alleged a claim of false imprisonment against all of the defendants, contending that they unlawfully restrained her movements by causing her to be taken into police custody, to be transported by police to a hospital, and to be confined at a mental health facility against her will. According to plaintiff, defendants' actions were unlawful because they violated the MHC, were predicated on false statements, and caused her to be held eight hours incommunicado without means to secure her release. Finally, plaintiff alleged a cause of action for assault against Aukerman and the hospital, claiming "an intentional and unlawful threat to commit a battery on the plaintiff by force, specifically by threatening to forcibly remove plaintiff's clothing."

The hospital filed a motion for summary disposition, which was concurred in by the remaining defendants. The motion was filed pursuant to MCR 2.116(C)(4), (7), (8), and (10). The supporting arguments were that plaintiff's complaint sounded in medical malpractice and plaintiff did not comply with the statutory requirements relative to medical malpractice actions, that there was immunity under the MHC, that collateral estoppel arising from a previous federal action barred this suit,[4] that plaintiff failed to establish false imprisonment, and that plaintiff was

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[4] Before this lawsuit was filed, plaintiff sued these defendants and others in federal district court. In part, plaintiff pursued a claim under 42 USC 1983 against Officer Jonoshies on the basis that he violated her constitutional rights, along with a gross negligence claim. A false imprisonment claim was also alleged against all of our defendants, as well as an assault claim against Aukerman and the hospital. The district court summarily dismissed the § 1983 action because plaintiff was afforded due process where her involuntary stay and Jonoshies' actions complied with the MHC. The court ruled that a court order, warrant, or other judicial action was unnecessary to involuntarily commit plaintiff. The district court concluded that there was no genuine issue of fact that plaintiff received due process; therefore, the § 1983 action failed. Exercising its discretion, the court declined to invoke its jurisdiction over the remaining state law claims. *Ziegler v Aukerman*, unpublished opinion of the United States District Court for the Eastern District of Michigan (Docket No. 06-CV-12234-DT), issued November 21, 2006. After (continued…)

unable to establish an assault. Attached to the summary disposition motion and accompanying brief were the various documents referenced above in this opinion. Plaintiff responded by arguing that defendants' documentary evidence was inadmissible for purposes of MCR 2.116(C)(10), summary disposition was premature as there had been no discovery, defendants did not file an undisputed fact list as required by MCR 2.116(G)(4), a decision regarding the interpretation of the MHC was premature and contrary to effective judicial administration, there was no immunity because no mental health petition was filed, the case did not sound in medical malpractice, and that collateral estoppel and res judicata did not bar the action. Plaintiff did not attach any documentary evidence to her filings. The trial court ruled that, as to Officer Jonoshies, collateral estoppel barred the false imprisonment claim and he was not liable for gross negligence where he acted reasonably and within the confines of the MHC.[5] With respect to the false imprisonment and assault claims alleged against the medical defendants, the court found that the claims sounded in medical malpractice and were time-barred under the applicable two-year statute of limitations.

On appeal, plaintiff argues that she filed a well-established false imprisonment claim, not a medical malpractice claim, that the federal court's dismissal of the state law claims without prejudice does not bar plaintiff from raising those claims in state court, and that governmental immunity does not apply to the intentional tort of false imprisonment based on police violation of state civil commitment laws.[6]

A trial court's ruling on a motion for summary disposition, matters of statutory construction, and questions of law generally are all reviewed de novo on appeal. *Mt Pleasant v*

(…continued)

the instant suit was filed, the case dismissed, and this appeal filed, the United States Court of Appeals for the Sixth Circuit rendered a decision on plaintiff's appeal of the federal action in *Ziegler v Aukerman*, 512 F3d 777 (CA 6, 2008). The federal appellate court held that the district court erred in applying a due process analysis under § 1983, where the proper analysis involved simply determining whether there existed probable cause to seize plaintiff under the Fourth Amendment on the basis that she was a danger to herself or others. *Id.* at 781-783. The appellate court found that, viewing the evidence in a light most favorable to plaintiff, Jonoshies had probable cause to seize plaintiff and did not violate her Fourth Amendment rights. *Id.* at 784. Finally, contrary to the district court's ruling, the Sixth Circuit held that "whether or not the Michigan Health Code requires a court order for police involvement is irrelevant, because the police officer had probable cause to seize [plaintiff], and thus did not violate her Fourth Amendment rights when he took her into custody." *Id.* at 787. Accordingly, the appellate court affirmed the district court, but on different grounds.

[5] The trial court, in a written order and opinion, quoted the facts articulated in the federal district court's opinion for purposes of describing the background of the case, which included reference to numerous pieces of documentary evidence that were never submitted in the state court lawsuit and thus not part of the record.

[6] In view of our conclusion, infra, that the medical defendants did not violate the MHC and that plaintiff failed to submit documentary evidence to create a factual issue on alleged lies, thus leaving no basis for plaintiff to claim liability against the medical defendants under the theories pled, we need not address whether the claims in this case sounded in medical malpractice, nor do we adopt the trial court's ruling on this issue.

State Tax Comm, 477 Mich 50, 53; 729 NW2d 833 (2007); *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).

The three causes of action at issue are assault, false imprisonment, and gross negligence. "To recover civil damages for assault, plaintiff must show an '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 the contact'" *VanVorous v Burmeister*, 262 Mich App 467, 482-483; 687 NW2d 132 (2004) (citation omitted). False imprisonment involves the unlawful restraint on a person's liberty or freedom of movement. *Walsh v Taylor*, 263 Mich App 618, 627; 689 NW2d 506 (2004). In regard to a claim of false imprisonment, the plaintiff must establish the following elements: (1) an act that was committed with the intention of confining another, (2) the act directly or indirectly resulted in such confinement, and (3) the person confined was conscious of his confinement. *Id.* To prevail on a claim of false imprisonment, "a plaintiff must show that the arrest was not legal, i.e., the arrest was not based on probable cause." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 18; 672 NW2d 351 (2003) (there is no claim if the confinement was legal); M Civ JIs 116.02 and 116.21. Gross negligence is generally defined as conduct so reckless that it demonstrates a substantial lack of concern for whether an injury results. *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003). The immunity provisions of the MHC that place limits on the civil liability of defendants arising from mental health commitments are discussed infra.

We first address the gross negligence and false imprisonment claims against Officer Jonoshies. The federal district court dismissed these claims against Jonoshies without prejudice; therefore, res judicata is inapplicable. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 509-510; 686 NW2d 770 (2004) ("Generally, a dismissal without prejudice is not an adjudication on the merits, and thus res judicata is . . . inapplicable."). In regard to the issue of collateral estoppel (issue preclusion), the United States Court of Appeals for the Sixth Circuit found that summary judgment in favor of Jonoshies was proper relative to his § 1983 action because probable cause existed under the Fourth Amendment to seize plaintiff where Jonoshies had sufficient information that she posed a danger to herself or others. *Ziegler v Aukerman*, 512 F3d 777, 783-785 (CA 6, 2008). To the extent that the false imprisonment and gross negligence claims are not based on alleged violations of the MHC, collateral estoppel bars relitigation of those claims because relevant underlying issues were determined in the federal § 1983 action. See *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995); *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001).[7] Consideration and determination of issues arising out of the MHC are not barred by collateral estoppel because the Sixth Circuit expressly declined to examine compliance with the MHC as it was irrelevant and should not have been part of the federal district court's analysis of the § 1983 action. *Ziegler, supra* at 787. We shall discuss the parameters of the MHC below.

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[7] Our holding thus defeats that part of plaintiff's gross negligence claim that Jonoshies did not believe or reasonably believe that plaintiff was mentally ill or dangerous, which argument was rebuffed by the Sixth Circuit. *Ziegler, supra* at 783-784.

With respect to the false imprisonment and assault claims against the medical defendants, as well as the claims against Jonoshies, we find that the case boils down to an examination of the MHC. We shall proceed on the basis of the documentary evidence submitted by defendants on the summary disposition motion, which included an argument under MCR 2.116(C)(10), and accept it as true, without reflection on the allegations contained in the complaint, where plaintiff failed to present any contradictory documentary evidence. Initially, the moving party has the burden of supporting its position with documentary evidence relative to a motion under MCR 2.116(C)(10), and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996); see also MCR 2.116(G)(3) and (4). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra* at 362.

We reject plaintiff's contention that the documentary evidence submitted by defendants was inadmissible. A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). MCR 2.116(G)(6) provides that evidence submitted in support or opposition of a motion "shall only be considered to the extent that the *content or substance* would be admissible as evidence to establish or deny the grounds stated in the motion." (Emphasis added.) The *Maiden* Court recognized the "content or substance" aspect of the court rule and, discussing the comparable federal rule, observed that [t]he evidence need not be in admissible form; affidavits are ordinarily not admissible evidence at trial[,] [b]ut it must be admissible in content." *Maiden, supra* at 124 n 6. The content or substance of defendants' documentary evidence is admissible as it reflects relevant, and not unfairly prejudicial, personal observations and recollections of medical personnel concerning plaintiff's treatment, demeanor, and statements or admissions in the context of plaintiff seeking medical advice and assistance. See MRE 401-403, 602, 801(d)(2), 803(3), and 803(4). MRE 803(6)(records of regularly conducted activity) would also permit admission of the records and reports themselves. Moreover, despite the fact that discovery had not yet commenced, plaintiff could very easily have prepared affidavits or submitted existing medical reports and records to create a factual dispute as was done in the federal action. Accordingly, the allegations that defendants engaged in numerous fabrications, lacking supporting documentary evidence, will not be considered in our analysis.

Turning to the MHC, we first take note of the immunity provisions contained in the code. MCL 330.1427b provides:

> (1) A peace officer who acts in compliance with this act is acting in the course of official duty and is not civilly liable for the action taken.
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> (2) Subsection (1) does not apply to a peace officer who, while acting in compliance with this act, engages in behavior involving gross negligence or wilful and wanton misconduct.

The plain language of MCL 330.1427b indicates that a peace officer who fails to comply with the MHC can be held civilly liable even absent gross negligence or willful and wanton

misconduct[8] and that compliance with the MHC alone does not afford protection if the officer's behavior nonetheless amounts to gross negligence or willful and wanton misconduct.

MCL 330.1439 provides:

> A cause of action shall not be cognizable in a court of this state against a person who in good faith files a petition under this chapter alleging that an individual is a person requiring treatment, unless the petition is filed as the result of an act or omission amounting to gross negligence or willful and wanton misconduct.

Under this statute, immunity is granted to a person who files a petition for hospitalization in good faith unless the filing was the result of gross negligence or willful and wanton misconduct. Whether this provision encompasses the "application" used here, as opposed to a court petition, and whether the language covers a person who executes a clinical certificate need not be decided because we ultimately find compliance with the MHC, there is no claim of gross negligence alleged against the medical defendants, and the false imprisonment claim fails given that the restraint was lawful.

Chapter 4 of the MHC, MCL 330.1400 *et seq.*, addresses civil admission and discharge procedures relative to mental illness, and, with respect to admissions, the chapter is divided into sections dealing with formal and informal voluntary admissions, admissions by medical certification, and admissions by petition. Pertinent to our analysis are the provisions in the MHC addressing admission by medical certification. MCL 330.1423 provides:

> A hospital designated by the department or by a community mental health services program shall hospitalize an individual presented to the hospital, pending receipt of a clinical certificate by a psychiatrist stating that the individual is a person requiring treatment, *if an application, a physician's or a licensed psychologist's clinical certificate, and an authorization by a preadmission screening unit have been executed*. [Emphasis added.]

Under MCL 330.1423, an appropriate hospital is required to hospitalize an individual if presented with an application for hospitalization, a clinical certificate executed by a physician or licensed psychologist, and an authorization by a preadmission screening unit (PSU).

First, with respect to the application for hospitalization, MCL 330.1424 provides as follows:

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[8] Generally speaking, MCL 691.1407(2) provides a governmental employee with immunity if the employee was acting or reasonably believed he or she was acting within the scope of the employee's authority, the governmental agency was engaged in the exercise or discharge of a governmental function, and the employee's conduct did not amount to gross negligence that was the proximate cause of the injury or damage. In light of our holding, we need not discuss the interplay between MCL 330.1427b and MCL 691.1407(2).

> (1) An application for hospitalization of an individual under [MCL 330.1423] shall contain an assertion that the individual is a person requiring treatment as defined in [MCL 330.1401],[9] the alleged facts that are the basis for the assertion, the names and addresses, if known, of any witnesses to alleged and relevant facts, and if known the name and address of the nearest relative or guardian, or if none, a friend if known, of the individual.
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> (2) The application may be made by any person 18 years of age or over, shall have been executed not more than 10 days prior to the filing of the application with the hospital, and shall be made under penalty of perjury.

Defendant Aukerman executed the application for hospitalization, and we find it to be in compliance with MCL 330.1424.

Second, with respect to the clinical certificate, which in this case was executed by Dr. Brown, MCL 330.1425 provides:

> A physician's or a licensed psychologist's clinical certificate required for hospitalization of an individual under [MCL 330.1423] shall have been executed after personal examination of the individual named in the clinical certificate, and within 72 hours before the time the clinical certificate is filed with the hospital. The clinical certificate may be executed by any physician or licensed psychologist, including a staff member or employee of the hospital with which the application and clinical certificate are filed.

Pursuant to MCL 330.1400(a), a "clinical certificate" is defined as "the written conclusion and statements of a physician or a licensed psychologist that an individual is a person requiring treatment, together with the information and opinions, in reasonable detail, that underlie the conclusion, on the form prescribed by the department or on a substantially similar form."

We find that the clinical certificate executed by Dr. Brown is in compliance with MCL 330.1400(a) and MCL 330.1425.

Finally, with respect to the third requirement of MCL 330.1423, i.e., authorization by a PSU, MCL 330.1400(h) defines a PSU as "a service component of a community mental health services program established under [MCL 330.1409]." In pertinent part, MCL 330.1409 provides:

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[9] Relevant here, MCL 330.1401(1)(a) provides that a "person requiring treatment" includes "[a]n individual who has mental illness, and who as a result of that mental illness can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself, herself, or another individual, and who has engaged in an act or acts or made significant threats that are substantially supportive of the expectation."

> (1) Each community mental health services program shall establish 1 or more preadmission screening units with 24-hour availability to provide assessment and screening services for individuals being considered for admission into hospitals or alternative treatment programs. The community mental health services program shall employ mental health professionals or licensed bachelor's social workers . . . to provide the preadmission screening services or contract with another agency that meets the requirements of this section. Preadmission screening unit staff shall be supervised by a registered professional nurse or other mental health professional possessing at least a master's degree.
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> (6) A preadmission screening unit shall assess and examine, or refer to a hospital for examination, an individual who is brought to the unit by a peace officer or ordered by a court to be examined. If the individual meets the requirements for hospitalization, the preadmission screening unit shall designate the hospital to which the individual shall be admitted. The preadmission screening unit shall consult with the individual and, if the individual agrees, it shall consult with the individual's family member of choice, if available, as to the preferred hospital for admission of the individual.

Here, there is no documentary evidence regarding the actions of any PSU, let alone evidence concerning authorization of a commitment by a PSU. In Dr. Brown's appellate brief, she claims that "[a]uthorization for admission was obtained from a licensed psychiatrist with the Foote hospital pre-admission screening unit for mental health patients."[10] In the hospital's and Aukerman's appellate brief, there is no claim that authorization by a PSU was obtained. Rather, these defendants maintain, and argued below, that MCL 330.1402a creates an exception for private-pay patients such as plaintiff relative to the PSU authorization requirement found in MCL 330.1423. MCL 330.1402a provides:

> A licensed hospital may admit and treat voluntary or involuntary private-pay patients without complying with the preadmission screening requirements of [MCL 330.1410] or consulting with the community mental health services program before release or discharge of the patient, if no state, county, or community mental health services program funds are obligated for the services provided by the licensed hospital, including aftercare services. All other provisions of this code regarding involuntary admission and recipient rights apply to the provision of services by licensed hospitals.

Plaintiff's appellate brief and her reply brief present no arguments whatsoever regarding MCL 330.1423 and the PSU authorization language contained therein, nor is MCL 330.1402a

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[10] The federal district court was presented with evidence and the medical defendants argue that Dr. Samy Wessef, a hospital psychiatrist, agreed with Dr. Brown's assessment that plaintiff should be hospitalized.

broached or even recognized. And her reply brief contains no challenge to Dr. Brown's appellate assertion that a psychiatrist with the hospital's PSU authorized plaintiff's admission. We are not prepared to make plaintiff's arguments for her and search for supporting evidence and authority. See *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). Accordingly, it is unnecessary for us to construe the reaches of MCL 330.1402a, and we cannot find that the medical defendants failed to comply with the PSU authorization language in MCL 330.1423 in light of the challenges and arguments presented.

MCL 330.1428 addresses situations in which a person executes an application for hospitalization but is unable to secure an examination of an individual by a physician or licensed psychologist for purposes of obtaining a clinical certificate, in which case the application may be submitted to a court. This provision is not applicable because plaintiff was examined and a clinical certificate was executed by Dr. Brown. MCL 330.1430 provides:

> If a patient is hospitalized under [MCL 330.1423], the patient shall be examined by a psychiatrist as soon after hospitalization as is practicable, but not later than 24 hours, excluding legal holidays, after hospitalization. The examining psychiatrist shall not be the same physician upon whose clinical certificate the patient was hospitalized. If the psychiatrist does not certify that the patient is a person requiring treatment, the patient shall be released immediately. If the psychiatrist does certify that the patient is a person requiring treatment, the patient's hospitalization may continue pending [court] hearings . . . .

There is no dispute that MCL 330.1430 was honored and that plaintiff was immediately released after the psychiatrist decided not to certify her as a person requiring treatment. Had the psychiatrist certified plaintiff as a person requiring treatment, MCL 330.1431 would demand that "[w]ithin 24 hours after receipt of a clinical certificate by a psychiatrist pursuant to [MCL 330.1430], the hospital director shall transmit a notice to the court that the patient has been hospitalized." This second certification did not occur. Plaintiff's argument that no court order would have been necessary to initially place her in protective custody and hold her at the hospital had two clinical certificates been executed reflects a misunderstanding regarding the process as outlined above. Only one clinical certificate was necessary to initially take plaintiff into protective custody, and there is no claim that the defendants continued to hold plaintiff after the psychiatrist declined to execute a second clinical certificate.

Additionally, with respect to the medical defendants, while plaintiff cites numerous other statutes contained in the MHC, including MCL 330.1408 and MCL 330.1434 – 330.1438, they are simply not applicable in the context of the facts involved here. This case entailed an admission by medical certification, not an admission by petition, and a court order was not required to take plaintiff into protective custody and hold her until timely seen by a psychiatrist and released. MCL 330.1408 is not applicable because it clearly applies to situations where a person has already been admitted or committed to a hospital, and at the time plaintiff was returned to the hospital by Officer Jonoshies she had not yet been formally admitted. In light of the above analysis, we find that there is no genuine issue of material fact that the medical defendants proceeded in compliance with the MHC. Therefore, it cannot be said that the medical defendants unlawfully restrained plaintiff under the MHC for purposes of the false imprisonment count. *Peterson Novelties, supra* at 18. Moreover, given plaintiff's failure to submit documentary evidence showing that the medical defendants engaged in fabrications, there is no

valid claim that the restraint was unlawful based on lies contained in the application for hospitalization, clinical certificate, and other medical documents. With regard to the assault claim, because there was compliance with the MHC and the commitment process was lawful, we find no basis to conclude that ordering plaintiff to remove her clothing or face having her clothing removed forcibly constitutes an unlawful threat, especially where plaintiff cites no authority to the contrary. Absent an unlawful threat or act, an assault action cannot be sustained. *VanVorous, supra* at 482-483.

With respect to Officer Jonoshies, MCL 330.1426 provides:

> Upon delivery to a peace officer of an application and physician's or licensed psychologist's clinical certificate, the peace officer shall take the individual named in the application into protective custody and transport the individual immediately to the preadmission screening unit or hospital designated by the community mental health services program for hospitalization under [MCL 330.1423]. If the individual taken to a preadmission screening unit meets the requirements for hospitalization, then unless the community mental health services program makes other transportation arrangements, the peace officer shall take the individual to a hospital designated by the community mental health services program. Transportation to another hospital due to a transfer is the responsibility of the community mental health services program.

Viewing MCL 330.1426 in conjunction with the other statutes quoted and cited above, we glean that the statutory scheme of the MHC envisions a procedure resulting in involuntary hospitalization, *not initiated through court process*, that entails an application for hospitalization, a duly executed clinical certificate, delivery of the application and clinical certificate to a peace officer, the officer then taking into protective custody the person requiring treatment, transport of that person by the officer to a PSU or properly designated hospital, a PSU determination (possibly) on whether to authorize or not authorize hospitalization pursuant to statutory requirements for hospitalization, and, if authorized by the PSU and needed, further transportation to an appropriately designated hospital.[11] We find that there is no genuine issue of material fact that Officer Jonoshies proceeded in compliance with MCL 330.1426, where he took plaintiff into protective custody pursuant to a valid application for hospitalization and clinical certificate.[12] As indicated earlier, no court order was required. There was no unlawful restraint for purposes of

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[11] Our conclusion regarding the procedures to be used under the MHC to admit a person by medical certification is consistent with the procedures outlined by the State Bar Committee on Mental Disability Law as reflected in a Michigan Bar Journal Article entitled "Guidelines for Attorneys Representing Adults in Civil Commitment Proceedings." 79 Mich B J 1674 (2000).

[12] MCL 330.1427 addresses situations in which a peace officer takes a person into protective custody on the basis of his own observations and determination that an individual requires treatment. This provision is not applicable in the case at bar. MCL 330.1427a addresses the degree of force that an officer may use in taking a person into protective custody and the extent to which an officer can take steps to protect himself or herself during the process. This provision is likewise irrelevant to this lawsuit.

the false imprisonment claim. *Peterson Novelties*, *supra* at 18. While MCL 330.1427b reflects that a peace officer can still be held liable for gross negligence or willful and wanton misconduct even when acting in compliance with the MHC, the doctrine of collateral estoppel, the nature of the allegations against Jonoshies, and the documentary evidence do not support a finding that he engaged in conduct so reckless that it demonstrated a substantial lack of concern for whether an injury resulted or a finding of willful and wanton misconduct.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald