

STATE OF MICHIGAN
COURT OF APPEALS

MATTHEW JOSEPH CREHAN, a/k/a
MATTHEW CREHAN,

UNPUBLISHED
March 10, 2009

Plaintiff-Appellee,

v

STATE OF MICHIGAN, MUSKEGON
COUNTY, and SIXTIETH DISTRICT COURT,

No. 282883
Muskegon Circuit Court
LC No. 06-044966-AW

Defendants,

and

ROOSEVELT PARK POLICE DEPARTMENT
and OFFICER JARED PASSCHIER,

Defendants-Appellants.

Before: Donofrio, P.J. and K.F. Kelly and Beckering, JJ.

PER CURIAM.

Defendants Roosevelt Park Police Department (RPPD) and RPPD Officer Jared Passchier appeal as of right from the trial court's order denying their motion for summary disposition based on governmental immunity, MCR 2.116(C)(7), and failure to state a cause of action, MCR 2.116(C)(8). We reverse and remand for entry of judgment in favor of defendants. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's suit arises out of a traffic stop conducted by Passchier, allegedly because plaintiff was driving with a defective brake light and because Passchier "recognized the vehicle and was aware that it had an improper plate." Passchier discovered that plaintiff was driving with a suspended license, had outstanding warrants, and that the plate was not registered to plaintiff's automobile. Plaintiff locked the door and acted as if he was going to drive away until Passchier threatened to break the window if plaintiff did not get out of the vehicle. Passchier cuffed and patted plaintiff down, then put him into the police cruiser and read him his rights. Plaintiff was eventually convicted of driving with a suspended license.

Plaintiff brought suit against a variety of governmental entities and Passchier, alleging a number of constitutional and common law claims as well as court rule violations. Defendants all moved for dismissal based on governmental immunity and failure to state a claim, MCR 2.116(C)(7) and (C)(8).¹ Eventually, the trial court dismissed all of plaintiff's claims for failure to state a claim except for his gross negligence claim against RPPD and Passchier, for which the circuit court denied defendants' motion. The other defendants were dismissed.

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts, and are construed in the light most favorable to the nonmoving party. *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 670; ___ NW2d ___ (2008). However, a mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action. *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

The governmental tort liability act (GTLA), MCL 691.1401, *et seq.*, provides in relevant part at MCL 691.1407:

(1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

(2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following 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.

¹ The State of Michigan was never served, and was dismissed from the case.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

(3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.

* * *

(7) As used in this section:

(a) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Under the GTLA, a governmental agency is immune from tort liability unless it engaged in an ultra vires activity or one of the statutory exceptions applies.² *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 620; 363 NW2d 641 (1984). An activity of a sworn law enforcement officer within the scope of his authority performed on private or public property as directed or assigned by his employer for the purpose of public safety is a governmental function. MCL 691.1401(f). Only individuals may be sued for intentional torts under MCL 691.1407(3) or for gross negligence under MCL 691.1407(2). *Odom v Wayne County*, ___ Mich ___; ___ NW2d ___ (December 30, 2008), slip op at 18. Although a plaintiff must plead in avoidance of governmental immunity when suing an agency, an individual defendant must affirmatively plead the defense. *Id.* at 19. If an intentional tort is claimed, the court must determine whether the defendant established that he is entitled to individual governmental immunity by showing the following:

(a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,

(b) the acts were undertaken in good faith, or were not undertaken with malice, and

(c) the acts were discretionary, as opposed to ministerial. [*Id.* at 20-21.]

If negligence is claimed, the court must follow MCL 691.1407(2) and . . . determine if the individual caused an injury or damage while acting in the course of employment or service or on behalf of his governmental employer and whether:

² There is no dispute that none of the exceptions is applicable in this case.

(a) the individual was acting or reasonably believed that he was acting within the scope of his authority,

(b) the governmental agency was engaged in the exercise or discharge of a governmental function, and

(c) the individual's conduct amounted to gross negligence that was the proximate cause of the injury or damage. [*Id.* at 20.]

The trial court erred in denying RPPD's motion for summary disposition because under the circumstances presented, RRPD cannot be sued for intentional tort or gross negligence. MCL 691.1407(1).

The circuit court also erred in denying Passchier's motion for summary disposition on the gross negligence count. Nothing in the facts cited by the trial court identify "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). In fact, the sequence of events cited by the trial court describes an ordinary traffic stop and arrest, and there are no other facts alleged anywhere in the pleadings that would constitute reckless conduct.

We reverse and remand for entry of judgment in favor of defendants. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering