

STATE OF MICHIGAN  
COURT OF APPEALS

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STEPHEN SZWABOWSKI,

Plaintiff-Appellee,

v

DEARBORN HEIGHTS POLICE OFFICER  
BURDICK, MARILYN MAKOWSKI, Personal  
Representative of the Estate of JASON  
ANTHONY MAKOWSKI, DEARBORN  
HEIGHTS POLICE OFFICER THOMAS,  
DEARBORN HEIGHTS POLICE OFFICER  
CIOCHON, and DEARBORN HEIGHTS POLICE  
OFFICER SERVATOWSKI,

Defendants-Appellants.

UNPUBLISHED

May 21, 2009

No. 282388

Wayne Circuit Court

LC No. 06-630661-CZ

ON RECONSIDERATION

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Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's opinion and order denying their motion for summary disposition of plaintiff's assault and battery claim pursuant to MCR 2.116(C)(7), based on governmental immunity. On reconsideration, we reverse and remand to reconsider defendant's motion for summary disposition in light of our Supreme Court's decision in *Odom v Wayne County*, 482 Mich 459; 760 NW2d 217 (2008).

While the instant case was pending on appeal in this Court our Supreme Court released *Odom, supra*, in an effort to clarify the law in regard to intentional torts committed by government employees, which the Supreme Court believed was an "area of the law had fallen into disarray and required clarification." *Id.*, at 466. In *Odom, supra*, Our Supreme Court discussed the applicable burden of proof and elements of intentional tort claims filed against government employees. The Court held that the government employees had the burden of establish immunity under MCL 691.1407(3). The Court specifically rejected the contention that government employees were entitled to immunity if their conduct was objectively reasonable." Rather, the Court held that the good-faith element . . . is subjective in nature. It protects a defendant's honest belief and good-faith conduct with the cloak of immunity while exposing to liability a defendant who acts with malicious intent." *Id.* at 481-482.

The Court then summarized the duty of a trial court when a defendant raises the affirmative defense of individual governmental immunity.

(1) Determine whether the individual is a judge, a legislator, or the highest-ranking appointed executive official at any level of government who is entitled to absolute immunity under MCL 691.1407(5).

(2) If the individual is a lower-ranking governmental employee or official, determine whether the plaintiff pleaded an intentional or a negligent tort.

(3) If the plaintiff pleaded a negligent tort, proceed under 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:

(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.

(4) If the plaintiff pleaded an intentional tort, determine whether the defendant established that he is entitled to individual governmental immunity under the Ross test 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. [*Odom, supra* at 479-480.]

Here, the trial court impliedly rejected defendants' claim that the police officers treatment of plaintiff was "objectively" reasonable because police had probable cause to arrest plaintiff. The trial court specifically held that there remained a question of fact in regard to the reasonableness of the defendants' actions. However, as noted, "the good-faith element . . . is subjective in nature. It protects a defendant's honest belief and good-faith conduct with the

cloak of immunity while exposing to liability a defendant who acts with malicious intent.” *Odom, supra*, at 481-482. The trial court here did not consider whether defendants’ actions were “subjectively” reasonable. Accordingly, we reverse and remand to reconsider defendant’s motion for summary disposition in light of our Supreme Court’s decision in *Odom*. We do not retain jurisdiction.

/s/ Joel P. Hoekstra  
/s/ E. Thomas Fitzgerald  
/s/ Brian K. Zahra