

STATE OF MICHIGAN
COURT OF APPEALS

RHONDA RENEE GREEN,

Plaintiff-Appellee,

v

OFFICER JILL KULHANEK, OFFICER
ANNETTE M. COPPOCK, OFFICER BRENT
YUCHASZ, OFFICER LEON FORYSTEK, and
SERGEANT AMY F. WALKER,

Defendants-Appellants,

and

OFFICER MICHAEL ARNTZ and SERGEANT
STACY CAIN,

Defendants.

RHONDA RENEE GREEN,

Plaintiff-Appellee/Cross-Appellee,

v

OFFICER MICHAEL ARNTZ and SERGEANT
STACY CAIN,

Defendants-Appellants,

and

SERGEANT AMY F. WALKER,

Defendant-Cross-Appellant,

and

UNPUBLISHED

October 1, 2009

No. 285882

Washtenaw Circuit Court

LC No. 06-001404-NZ

No. 285918

Washtenaw Circuit Court

LC No. 06-001404-NZ

OFFICER JILL KULHANEK, OFFICER
ANNETTE M. COPPOCK, OFFICER BRENT
YUCHASZ, and OFFICER LEON FORYSTEK,

Defendants.

Before: Meter, P.J., and Murray and Beckering, JJ.

BECKERING, J. (*concurring*).

I concur in the result only in this matter. This lawsuit arises out of an incident that occurred outside of a Buffalo Wild Wings restaurant in Ypsilanti, Michigan at approximately 12:45 a.m. on December 29, 2004, and resulted in plaintiff Rhonda Renee Green's arrest. Plaintiff was arrested while embroiled in a fight with her cousin over the ownership of a coat that her cousin was wearing. Due to an estimated 150 or more people in the parking lot at the time of the fight and concerns regarding crowd control, police officers were dispatched to the scene from the Ypsilanti Police Department, Eastern Michigan University's police force, Ann Arbor Police Department, Pittsfield Police Department, and Washtenaw County Sheriff's Department.¹ As stated by the majority, the trial court found, and the record demonstrates, that police officers were justified in arresting plaintiff and plaintiff resisted arrest.

Two years after the incident, plaintiff filed this lawsuit against defendants, two of whom are officers in Eastern Michigan University's police force and five of whom are officers in the Ypsilanti Police Department. In her complaint, plaintiff alleged four counts against defendants arising out of the events that transpired during her arrest: 1) assault and battery; 2) intentional infliction of emotional distress; 3) false arrest and imprisonment; and 4) gross negligence. Defendants filed motions for summary disposition under MCR 2.116(C)(7) and (C)(10).² In a May 20, 2008 order, the trial court denied summary disposition under MCR 2.116(C)(7). The court granted summary disposition under MCR 2.116(C)(10), but only with respect to plaintiff's claims of false arrest and imprisonment and intentional infliction of emotional distress. Defendants now appeal as of right the trial court's denial of their motions for summary disposition under both MCR 2.116(C)(7) and (C)(10), with respect to plaintiff's remaining claims of gross negligence and assault and battery. Plaintiff has not filed a brief on appeal.

¹ Although plaintiff did not file a brief on appeal, she submitted portions of the police reports generated by various responding officers to the scene and asserted that the reports were admissible under MRE 803(6) and (8) in opposing defendants' motions for summary disposition at the trial court level.

² The Ypsilanti police officers also moved for summary disposition under MCR 2.116(C)(8), but this issue was not raised by the parties on appeal, and is therefore considered abandoned. *Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002).

“We review de novo a trial court’s determination regarding a motion for summary disposition.” *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). In a motion brought under MCR 2.116(C)(7), “the moving party is entitled to summary disposition if the plaintiff’s claims are barred because of immunity granted by law” *Id.* (quotation marks and citation omitted). The moving party may support its motion with “‘affidavits, depositions, admissions, or other documentary evidence,’ the substance of which would be admissible at trial.” *Id.* (citation omitted). The contents of a complaint are accepted as true unless contradicted by the evidence provided. *Id.* In a motion brought under MCR 2.116(C)(10), we review the pleadings, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party, and summary disposition is only appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 466-467.

I respectfully disagree with the majority’s conclusion that the trial court erred by not granting summary disposition of plaintiff’s “gross negligence” and assault and battery claims under MCR 2.116(C)(7). Specifically, I take issue with the assertion that it is plaintiff’s burden to plead and prove facts in avoidance of governmental immunity. In *Odom*, *supra* at 478-479, our Supreme Court clarified the burden of proof with regard to governmental immunity, stating:

A plaintiff filing suit against a governmental *agency* must initially plead his claims in avoidance of governmental immunity. Placing this burden on the plaintiff relieves the government of the expense of discovery and trial in many cases.

Over time, governmental immunity for *individuals* evolved into an affirmative defense under the common law and thus was differentiated from the immunity given to the sovereign. In the [governmental tort liability act], the Legislature has not abrogated the common law by shifting the burden of proof with regard to governmental immunity for individuals. Accordingly, the burden continues to fall on the governmental employee to raise and prove his entitlement to immunity as an affirmative defense. [Footnotes omitted and emphasis added.]

Defendants are individuals, not governmental agencies. Consequently, it is not plaintiff’s burden to plead and prove that her claims against defendants are excepted from governmental immunity. Rather, in order to be entitled to summary disposition under MCR 2.116(C)(7), defendants have the burden of proving that they are entitled to governmental immunity as a matter of law.³ *Id.* at 466, 479.

The Supreme Court in *Odom* set forth the following steps that a court must follow when a defendant raises the affirmative defense of individual governmental immunity:

³ Defendants timely raised governmental immunity as an affirmative defense in their first responsive pleadings, as well as in their motions for summary disposition under MCR 2.116(C)(7).

(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* [v *Consumers Power Co* (*On Rehearing*), 420 Mich 567; 363 NW2d 641 (1984)] 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. [*Id.* at 479-480.]

With respect to plaintiff's gross negligence claim, a negligent tort, the trial court applied the proper test set forth in MCL 691.1407(2) in assessing defendants' entitlement to summary disposition on the basis of governmental immunity under MCR 2.116(C)(7). The trial court viewed the evidence in the light most favorable to plaintiff as the nonmoving party, and determined that there are genuine issues of material fact in dispute such that summary disposition is not appropriate. As was clarified in *Odom*, however, in order to determine whether defendants are entitled to summary disposition under MCR 2.116(C)(7), the proper inquiry is whether *defendants* have met their burden of proof in establishing that they are entitled to governmental immunity as a matter of law. See *id.* at 466, 479. Although rendering a different outcome than the trial court, the majority likewise evaluates governmental immunity as if plaintiff bears the burden of proof. In accord with the Supreme Court's ruling in *Odom*, I would remand the case to the trial court for a determination whether defendants have met their burden of proof in

establishing entitlement to governmental immunity under MCR 2.116(C)(7). However, because I agree with the majority that plaintiff has failed to establish a genuine issue of material fact with regard to her underlying gross negligence claim, the issue is moot.

With respect to plaintiff's assault and battery claim, an intentional tort, the trial court should have determined whether defendants established that they are entitled to governmental immunity under the *Ross* test.⁴ To be entitled to governmental immunity, defendants must establish that they were acting in the course of their employment and at least reasonably believed they were acting within the scope of their authority, that their actions were discretionary in nature, and that they acted in good faith or without malice. "The good-faith element of the *Ross* test is subjective in nature." *Id.* at 481-482. In evaluating defendants' motion for summary disposition under MCR 2.116(C)(7), with respect to plaintiff's assault and battery claim, the trial court erroneously applied the test set forth in MCL 691.1407(2). While I would otherwise remand the case for the trial court's determination whether defendants successfully established entitlement to immunity under the *Ross* test, a remand is unnecessary because I agree with the majority that plaintiff has failed to establish a genuine issue of material fact with regard to her underlying assault and battery claim.

Review of the record reveals that plaintiff has produced no admissible evidence identifying any action by any named defendant constituting gross negligence⁵ that was the proximate cause of her injury or damages. Further, review of the evidence in a light most favorable to plaintiff reveals that no reasonable juror could conclude that any of the named defendants engaged in an assault and battery⁶ wherein the force used was not objectively

⁴ It is understandable that the trial court did not apply the *Ross* test considering that the Supreme Court had not yet issued *Odom*. In *Odom*, the Supreme Court indicated that it had initially denied the defendant's application for leave to appeal, but upon reconsideration, determined that "this area of the law had fallen into disarray and required clarification." *Odom, supra* at 466.

⁵ While I agree with the majority that the "governmental immunity statute does not itself create a cause of action called 'gross negligence,'" *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009), a defendant can nevertheless be held liable for acts of gross negligence (government employees are entitled to qualified immunity against ordinary negligence) if the plaintiff establishes that the defendant owed a duty, breached that duty, and through gross negligence proximately caused the plaintiff's injury or damages, *id.* at 692, 694.

⁶ According to this Court in *VanVorous v Burmeister*, 262 Mich App 467, 482-483; 687 NW2d 132 (2004):

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." To recover for battery, plaintiff must demonstrate a "wilful and harmful or offensive touching of another person which results from an act intended to cause such a contact."

(continued...)

reasonable to effectuate a lawful arrest under the circumstances set forth in the documents deemed admissible by plaintiff. Neither plaintiff nor any of her proposed witnesses could identify by name or adequate description any officer who allegedly assaulted her, and the record indicates that plaintiff's injuries were likely caused by her own admitted efforts to thwart officers' attempts to restrain her.⁷ Plaintiff admitted at her deposition that she attempted to avoid being restrained by squirming on her stomach while prone on the pavement and, after being involuntarily placed into the police cruiser, she kicked the cruiser's windows, and continued to do so even after being maced. As such, I would hold that summary disposition should be granted under MCR 2.116(C)(10) as to plaintiff's remaining claims.

/s/ Jane M. Beckering

(...continued)

But again, government actors may find it necessary—and are permitted—to act in ways that would, under different circumstances, subject them to liability for an intentional tort. To find for plaintiff on these claims, our courts would have to determine that the officers' actions were not justified because they were not objectively reasonable under the circumstances. [Citations omitted.]

⁷ Although plaintiff claims in her complaint that she was thrown to the ground, face first, and then kicked, punched and/or pepper-sprayed while handcuffed and compliant, her allegations are contradicted by the record evidence.