STATE OF MICHIGAN

COURT OF APPEALS

KEVIN DUNN, SR.,

Plaintiff-Appellee,

v

OFFICER B. MATATALL and SGT. LAWRENCE PORTER,

Defendants-Appellants.

UNPUBLISHED
May 18, 2010

No. 291254
Wayne Circuit Court
LC No. 07-732258-NI

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

Defendants, officers with the Southfield Police Department, appeal as of right the trial court's order denying their motion for summary disposition predicated in part on governmental immunity. We reverse and remand.

Plaintiff brought this action seeking damages for injuries he allegedly sustained when defendants arrested him. The complaint, alleging counts for assault, battery, gross negligence, and intentional infliction of emotional distress, was filed after a federal court dismissed plaintiff's § 1983[1] action against the same defendants based on a finding that the officers acted reasonably in the matter. See *Dunn v Matatall*, 549 F3d 348 (CA 6, 2008). Both the federal district court and the Sixth Circuit Court of Appeals relied on a video recording of the arrest that was captured by a device affixed to defendant Officer B. Matatall's patrol car. The federal district court's opinion and order granting the officers' motion for summary judgment provides what the Sixth Circuit describes as "an accurate and thorough summary of the events depicted in the video," *id*. at 350, and states as follows:

> "The recording, which is about fifteen and a half minutes long, begins at 2:30:53. At about 2:31:29, Matatall turned on his flashing lights along with a few siren bursts to initiate the traffic stop while Plaintiff was making a right turn onto a residential street. (2:31:29-47.) Matatall reported over the radio that "the vehicle is not stopping." (2:31:58.) He then sounded the siren until Plaintiff

[1] 42 USC 1983.

eventually stopped almost two minutes later. (2:32:04-2:33:48.) Plaintiff failed to stop at the first stop sign he encountered. (2:32:06-10.) Plaintiff then crossed to the other side of the street to pass another vehicle as Matatall announced his speed at fifty miles per hour. (2:32:10-18.) Plaintiff at that point ran through a second stop sign at [a speed very near fifty miles per hour], and then accelerated noticeably[.] (2:32:20-23.) Plaintiff continued, passing another vehicle driving in the opposite direction and executing a number of turns while Matatall verbally recorded his speed at forty-five miles per hour. (2:32:24-33:15.) Plaintiff ran a third stop sign and encountered a more commercial area that Matatall announced as eastbound on 7 Mile Road. (2:33:16-22.)"

"On 7 Mile, Plaintiff began to slow somewhat in the left lane and slowly pulled over to the right and stopped driving. (2:33:35-55.) Matatall instructed Plaintiff to place the car keys outside of the car and to drop the keys, which Plaintiff did onto the roof of the car through his open window[, holding one or both hands outside the window]. (2:33:55-34:15.) Matatall then exited his car and approached the rear passenger side of Plaintiff's car with a flashlight in one hand and his gun in the other. (2:34:16-21.) Using the flashlight, Matatall took a few seconds to briefly examine Plaintiff's vehicle from the passenger side and re-holster his gun. He then walked up to the driver's side window, telling Plaintiff not to move his hands. (2:34:21-26.) Matatall attempted to open the driver's door, instructed Plaintiff to unlock the door and grabbed one of Plaintiff's hands. (2:34:26-29.) Plaintiff unlocked the door, Matatall opened it and began to attempt to remove Plaintiff from the car. (2:34:29-31.) At that moment, Porter pulled up and came to an abrupt stop in his police car, parking at an angle in front of Plaintiff's car. (2:34:31-36.) As Porter parked, Matatall struggled with Plaintiff, ordering him with a raised voice to get out of the car. (*Id*.) Plaintiff yelled that his seatbelt was preventing him from exciting ("my seatbelt; my seatbelt"). (2:34:36-39.) Matatall told Plaintiff to get his hands in the air. (2:34:39-40.) In the meantime, Porter stepped out of his car and rapidly approached Plaintiff's door from the front of the car, leaving the door between Porter and Matatall. (2:34:40-44.) Porter briefly—for about one second—pointed his firearm in Plaintiff's direction and then put the gun away and walked around the open door to assist Matatall, who at this point was grabbing Plaintiff's hands or wrists; Porter stood now on the other side of Matatall, between Matatall and the camera. (2:34:44-46.) Plaintiff said "okay" and "I'm coming, I'm coming" as his belt was apparently now unfastened and together Defendants pulled Plaintiff out of his car. (2:34:46-49.) Plaintiff was somewhat bent over at the waist as Defendants pulled him out, clutching his wrists or forearms as they forced him between them out and onto the street. (*Id*.) As he was being pulled from both sides while still bent over, Defendant Matatall [seems to have] lost his grip on Plaintiff's right wrist while Defendant Porter maintained his grip on the other side. Plaintiff then twisted or spun slightly around on his left foot, [apparently] lost [his] balance and fell hard

> on his right side, landing with his back to the camera. (2:34:47-50.) Plaintiff remained on the ground as Defendants handcuffed him. (2:34:50-[35:]13.) Plaintiff exclaimed a few times, saying he was a "sick man," "you broke my hip" and asking the officers to feel where the bone was "sticking out."[2] (2:34:55-35:30.) Within a few seconds, Matatall assessed Plaintiff's injury and called for medical help over the radio. (2:35:31-34.) The remaining several minutes of the video show additional officers on the scene, who, along with Defendants, search Plaintiff's pockets, ask him why he ran and announce that medical help is on the way." [*Id*. at 350-352.]

The Sixth Circuit, applying an objective-reasonableness standard as guided by pertinent case law, concluded "that the video shows that the Officers acted reasonably in attempting to neutralize a perceived threat by physically removing [plaintiff] from his vehicle after he led Officer Matatall [defendant] on a car chase and then appeared to refuse the Officers' commands to exit the car."[3] *Id.* at 354.

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[2] It is unclear from the video or elsewhere in the record whether plaintiff's fracture broke through his skin or whether he simply referred to a subcutaneous displacement of his bone. Officer Matatall can be heard on the video telling plaintiff, "Your bone is not sticking out." (2:35:50-52.) Plaintiff testified at deposition that he was unsure if the bone broke the skin.

[3] The Sixth Circuit further elaborated on why it deemed the officers' conduct to be reasonable under the circumstances:

> Regarding the threat to the safety of the Officers, neither Officer could have known what threat Dunn may have posed. Up to that point, Dunn had evaded Officer Matatall's attempts to pull him over, suggesting that he may have had something to hide, had driven recklessly, and appeared recalcitrant in complying with the Officers' commands to exit his vehicle. It would have been reasonable for the Officers to be apprehensive that Dunn may have a weapon in the car, that the passenger may have a weapon, or that the car may be used as a weapon.[5] When Sergeant Porter arrived on the scene, he saw an apparent struggle between Dunn and Officer Matatall, giving him ample reason to believe that Dunn was a threat to the Officers' safety. A reasonable officer on the scene would have believed that the threat posed by Dunn was not contained until Dunn was out of the car and handcuffed.
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> As to Dunn's level of resistance, it is undisputed that he resisted by failing to stop for Officer Matatall's signals for approximately two minutes. When Dunn finally pulled over, however, he put his hands out of the car and dropped a set of keys as instructed. When Officer Matatall approached the car and grabbed Dunn's hands, a struggle ensued. Even if, as Dunn argues, the struggle was caused by Dunn's seatbelt, it is clear from the video that the Officers were having a hard time getting Dunn out of the car. Once Officer Matatall unfastened the seatbelt, Dunn was launched out of the car. Although Dunn's statement, "I'm

(continued…)

Defendants filed a motion for summary disposition in this case, arguing that the federal court's determination that the officers' actions were reasonable barred relitigation of that issue. The trial court denied defendants' motion, opining that the federal litigation had no preclusive effect.

At issue on appeal is the extent to which the result of the federal litigation operates to preclude plaintiff's attempts to avoid governmental immunity in connection with his suit against defendants.

Applications of res judicata, as well as decisions on motions for summary disposition, are reviewed de novo as questions of law. *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998). The applicability of collateral estoppel is also a question of law, calling for review de novo. *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996).

For negligent torts committed by lower-level governmental employees, MCL 691.1407(2) provides that "each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person . . . caused by the officer . . . while in the course of employment or service . . . ," if that officer "is acting or reasonably believes he or she is acting within the scope of his or her authority," the "governmental agency is engaged in the exercise or discharge of a governmental function," and the officer's "conduct does not amount to gross negligence that is the proximate cause of the injury." MCL 691.1407(7)(a) defines "[g]ross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

MCL 691.1407(3) indicates that governmental employees may remain subject to liability for their intentional torts. See *Odom v Wayne Co*, 482 Mich 459, 470-471; 760 NW2d 217 (2008). To invoke governmental immunity in connection with intentional torts, "the governmental employee must first establish that the acts were taken 'during the course of . . . employment and' that the employee was 'acting, or reasonably believe[d] [he or she was] acting, within the scope of [his or her] authority[.]'" *Id*. at 473, quoting *Ross v Consumers Power Co*

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> coming, I'm coming," may indicate that he had decided to exit the vehicle on his own, only seconds elapsed between the time the seatbelt was unfastened and when Dunn was pulled out of the car, giving the Officers little opportunity to fully comprehend whether Dunn had finally decided to become compliant. It was reasonable for the Officers still to consider Dunn resistant. As Sergeant Porter stated, "at what point do we then trust this resistant person to suddenly say, okay, I give up." J.A. at 63 (Porter Dep. at 40).
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> [5] Although Dunn did drop his keys as instructed, the Officers still would have been reasonable in fearing the use of the car as a weapon. First, Dunn dropped the keys on the roof of the car, rather than dropping them on the ground outside the car where they would be less accessible. Second, the Officers did not know whether that was the only set of keys in the car, much less whether they were even the keys to that car. [*Id*. at 354-355.]

(On Rehearing), 420 Mich 567, 633; 363 NW2d 641 (1984) "The governmental employee must also establish that he [or she] was acting in 'good faith.'" *Id.* There is no immunity when the governmental employee "'does not act honestly and in good faith, but maliciously, or for an improper purpose.'" *Id*. at 473-474, quoting Prosser, Torts (4th ed), § 132, p 989.

"Under the doctrine of res judicata, 'a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.'" *Wayne Co*, 233 Mich App at 277, quoting Black's Law Dictionary (6th ed, 1990), p 1305. "The doctrine operates where the earlier and subsequent actions involve the same parties or their privies, the matters of dispute could or should have been resolved in the earlier adjudication, and the earlier controversy was decided on its merits." *Id.*

However, "as a general rule, where . . . all federal claims are resolved before trial, federal courts will decline to exercise supplemental jurisdiction over remaining state law claims, preferring to dismiss them without prejudice for resolution in the state courts." *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 384; 596 NW2d 153 (1999). Accordingly, "where the district court dismissed all . . . federal claims in advance of trial, and there are no exceptional circumstances that would give the federal court grounds to retain supplemental jurisdiction over the state claim, . . . it is clear that the federal court would not have exercised its supplemental jurisdiction over the remaining state law claims." *Id.* at 387. In such situations, "res judicata will not act to bar the state claims." *Id.* Accord *Bergeron v Busch (On Remand)*, 228 Mich App 618, 626-628; 579 NW2d 124 (1998). In this case, the trial court specifically held that the federal district court would not have exercised jurisdiction over plaintiff's state claims. Accordingly, res judicata does not apply to bar the claims.

However, the related doctrine of collateral estoppel does come to bear. That doctrine precludes relitigation of an issue in a different, subsequent action "between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006), citing 1 Restatement Judgments, 2d, § 27, p 250. Collateral estoppel bars relitigation of issues where the parties had a full and fair opportunity to litigate those issues in an earlier action. See *Arim v Gen Motors Corp*, 206 Mich App 178, 194-195; 520 NW2d 695 (1994).

Although, as the trial court below observed, plaintiff's federal § 1983 claims and his state intentional tort claims present somewhat different evidentiary questions and standards, this Court has identified the incongruence in allowing state tort litigation to go forward concerning police conduct that was found to be reasonable in federal court. In *VanVorous v Burmeister*, 262 Mich App 467, 483; 687 NW2d 132 (2004), this Court stated:

> [G]overnment 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. Because the federal district court reached and decided the question, further litigation regarding this issue was collaterally estopped. [Citations omitted.]

Accordingly, in *VanVorous*, this Court applied a federal reasonableness determination to defeat the plaintiff's state claims of assault, battery, gross negligence, and intentional infliction of emotional distress, the same claims at issue in this case. *Id.* at 481-484.

Plaintiff suggests that *VanVorous* is not compatible with *Pierson Sand* and *Bergeron*, and suggests that *VanVorous* should not control to the extent that it deviates from those binding authorities. See MCR 7.215(J)(1). However, *Pierson Sand* and *Bergeron* concerned the inapplicability of res judicata where a federal court declines, or would have declined, to exercise supplemental jurisdiction over state claims, whereas *VanVorous* applied collateral estoppel not to bar state claims outright, but to apply the federal court's determination of a necessary issue in deciding those state claims. *VanVorous* thus presents no conflict with *Pierson Sand* or *Bergeron*.

With respect to plaintiff's gross negligence claim against defendants, the exception to governmental immunity in cases of gross negligence applies to conduct that is "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). The federal court's determination that defendants acted reasonably when arresting plaintiff cannot be reconciled with a characterization of that conduct as constituting such recklessness. Accordingly, the determination in the federal court establishes that governmental immunity applies in connection with plaintiff's assertion of gross negligence.

With respect to plaintiff's intentional tort claims against defendants, governmental actors are immune in connection with even intentional torts where they act in good faith in the course of their governmental employment and within the scope of their authority. *Odom*, 482 Mich at 473-474. Accordingly, the federal determination that defendants acted reasonably when arresting plaintiff is fatal to plaintiff's claims of assault, battery, and intentional infliction of emotional distress. See *VanVorous*, 262 Mich App at 481-484.

For these reasons, the trial court erred in failing to recognize that a necessary issue determined in the federal litigation, that of defendants' reasonableness, was not subject to redetermination, and that defendants are therefore protected by governmental immunity. We therefore reverse the trial court's decision and remand for entry of an order granting summary disposition to defendants on grounds of governmental immunity.

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Jane M. Beckering