STATE OF MICHIGAN

COURT OF APPEALS

AMANDA JEAN ODOM,

Plaintiff-Appellee,

v

CITY OF DETROIT and WAYNE COUNTY,

Defendants,

and

CHRISTINE KELLY,

Defendant-Appellant.

UNPUBLISHED
December 14, 2010

No. 293021
Wayne Circuit Court
LC No. 05-503671-NI

Before: MURRAY, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

This matter is before this Court for the second time after the Michigan Supreme Court remanded it to the trial court for reconsideration whether defendant, a police officer, is immune from liability under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. See *Odom v Wayne Co*, 482 Mich 459; 760 NW2d 217 (2008). On remand, the trial court denied defendant's motion for summary disposition ruling that a genuine issue of material fact existed regarding whether defendant acted in "good faith." Defendant[1] now appeals and we reverse.

I. BASIC FACTS

Our Supreme Court summarized the relevant and undisputed facts in *Odom*, 482 Mich at 462-464:

> [Defendant] investigated prostitution and controlled substances offenses in the department's "morality unit." At the time of the incident giving rise to the present case, she had 10 years' experience and had made more than 500 prostitution-

[1] Defendants City of Detroit and Wayne County were dismissed from these proceedings and are not parties to this appeal.

related arrests. On February 11, 2004, she was conducting surveillance near the intersection of Woodward Avenue and Burlingame Street in the city of Detroit. Defendant claimed that plaintiff, Amanda Jean Odom, walked back and forth along Woodward while making eye contact with the drivers of cars passing by, a method used by prostitutes to attract the attention of potential customers. She observed plaintiff approach the driver's side window of a car parked in a liquor store parking lot and then enter the back seat. The car drove to a nearby grocery store; plaintiff went inside for approximately five minutes and returned to the car, which then drove away.

After contacting her supervisor and calling for backup, defendant followed the car down Woodward Avenue and into a residential area. Detroit police officers stopped the car at a point that, as it turned out, was only two blocks from plaintiff's home. The officers drew their guns and ordered plaintiff and the two female passengers out of the vehicle. The women were all handcuffed and questioned.

Upon being stopped, plaintiff asserted her innocence. She explained that her friend had driven her home from her place of employment and showed that she was still wearing her work identification badge. She further explained that her friend had dropped her off at a bank and driven around the block. However, plaintiff explained that she could not enter the bank because the police were apparently stopping a robbery in progress. She looked north and south before sighting her friend's car in a nearby parking lot. Plaintiff walked to the car, entered the back seat, and was driven to a grocery store, where she used the ATM and purchased some groceries.

After relating her version of events to the officers, plaintiff overheard one officer tell defendant, "Well it's your call." Defendant issued plaintiff a criminal citation for "Disorderly Conduct (Flagging) Impeding the Flow of Vehicular and Pedestrian Traffic"--an offense frequently associated with prostitution. Plaintiff claims that, when she objected to the citation, defendant became angry and told her to "fight it."

Plaintiff was ordered to appear for arraignment one week later. When she appeared, however, the district court had no record of the citation. Plaintiff contacted both the Detroit Police Department and the Wayne County Sheriff's Department to determine the status of the charges against her. Upon learning that the record of plaintiff's citation had been lost, defendant issued a new citation and had the charges reinstated. When plaintiff appeared for arraignment a second time in June 2004, the court required her to attend an AIDS awareness class for sex offenders. The case was postponed several times between June and December 2004. The prosecution finally dismissed the charges on December 6, 2004, because of insufficient evidence. The dismissal order indicated that the parties stipulated to the existence of probable cause. Neither plaintiff nor her counsel signed the dismissal form, and plaintiff denies that she made such a stipulation.

In February 2005, plaintiff brought this action against defendant, alleging false imprisonment and malicious prosecution. Defendant sought summary disposition under MCR 2.116(C)(10) and MCR 2.116(C)(7) on the basis of individual governmental immunity. The trial court initially denied summary disposition and this Court affirmed that decision. *Odom v Wayne Co*, unpublished opinion per curiam of the Court of Appeals, issued February 1, 2007 (Docket No. 270501).

Plaintiff then appealed this Court's decision to our Supreme Court. The Court granted leave to appeal in order to clarify the effect and applicability of the GTLA as it pertained to intentional-tort claims. *Odom*, 482 Mich at 466. The Court held that under § 7(3) of the GTLA, MCL 691.1407(3), the appropriate test for determining individual immunity from liability for intentional torts was that outlined in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984). *Odom*, 482 Mich at 472-473. Accordingly, the Court ruled that both this Court and the trial court applied the incorrect legal standards. *Id*. at 481-482. It vacated both this Court's judgment and the trial court's order and remanded the matter back to the trial court for reconsideration under *Ross*. *Id*. at 482-483.

On remand, the trial court again denied defendant's motion for summary disposition, holding that although the original investigatory stop was justified based on defendant's articulated suspicions, a genuine issue of material fact existed as to whether defendant had acted in "good faith" when she subsequently detained and ticketed plaintiff. This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court's determination regarding a motion for summary disposition. *Odom*, 482 Mich at 466. A trial court properly grants summary disposition under MCR 2.116(C)(7) where a claim is barred because of immunity granted by law. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Dextrom v Wexford Co*, 287 Mich App 406, 429; 789 NW2d 211 (2010). If any documentary evidence is submitted, we must view it in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact. *Zwiers v Growney*, 286 Mich App 38, 42; 778 NW2d 81 (2009). "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court." *Dextrom*, 287 Mich App at 430. Conversely, if a factual dispute exists as to whether immunity applies, summary disposition is not appropriate. *Id*.

III. ANALYSIS

Defendant argues that the trial court erred by denying her summary disposition motion because she is immune from liability under the GLTA. Specifically, she contends that plaintiff failed to establish a genuine issue of fact showing that defendant did not act in good faith, or otherwise acted with a malicious intent. We agree with defendant.

Plaintiff has raised two intentional tort claims against defendant and defendant has asserted the affirmative defense of individual governmental immunity under the GLTA. In

Odom, our Supreme Court clarified the analysis a court must consider when a plaintiff has pleaded an intentional tort and defendant raises a defense of governmental immunity:

> [D]etermine 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*, 482 Mich at 480.]

See also *Ross*, 420 Mich at 633-634.

There is no dispute that defendant was acting in the course of her employment and within the scope of her authority and that her actions were discretionary. Rather, the focus of the present disagreement is whether defendant's "acts were undertaken in good faith, or were not undertaken with malice . . . ." *Odom*, 482 Mich at 480. The purpose of this factor is to "protect[] 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 inquiry is necessarily a subjective consideration. *Oliver v Smith*, ___ Mich App ___; ___ NW2d ___ (2010). In *Odom*, our Supreme Court described a lack of good faith as acting with "malicious intent, capricious action or corrupt conduct," or "willful and wanton misconduct [evincing] an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does." *Odom*, 482 Mich at 474-475. In assessing this factor, the Court also suggested courts consult the Michigan Civil Jury Instructions. *Id*. at 475. "[The] standard civil jury instructions define 'willful misconduct' as 'conduct or a failure to act that was intended to harm the plaintiff' and 'wanton misconduct' as 'conduct or a failure to act that shows such indifference to whether harm will result as to be equal to a willingness that harm will result.'" *Id*. (footnotes omitted); see M Civ JI 14.11 and 14.12.

Here, plaintiff contends, and the trial court agreed, that a question of fact existed regarding whether defendant acted in good faith because defendant detained, and ultimately charged plaintiff with "flagging," despite plaintiff's allegation that defendant's suspicions were "immediately" dispelled upon confronting plaintiff. Plaintiff asserts that her explanation of innocence to defendant at the time of the stop, including observable circumstances that corroborated her story, create an inference that her subsequent detention and ticketing was malicious. We simply fail to see how these circumstances constitute evidence that defendant acted without honesty and with a lack of good faith. Viewing the situation in its entirety, defendant was dealing with an individual who had engaged in numerous actions consistent with illegal activity, but who had an explanation consistent with innocent behavior; consequently, defendant had a decision to make about the veracity of plaintiff's story. Nothing about the situation or plaintiff's explanation definitively demonstrated that plaintiff was telling the truth, such that defendant's decision to detain and ticket plaintiff was necessarily malicious or reckless.

The only reasonable inference to be drawn from the circumstances surrounding plaintiff's detention and subsequent ticketing, despite her explanation of innocence and observable corroborating details, is that defendant did not believe plaintiff was telling the truth. To conclude, as plaintiff urges us to, that defendant acted with intent to harm plaintiff, merely because plaintiff provided an explanation consistent with legal activity, would be an entirely speculative conclusion.

Similarly, we reject plaintiff's contention that a genuine issue of fact exists based on defendant's demeanor when she told plaintiff she could "fight" the ticket in court. Specifically, plaintiff asserts that defendant's rude and obnoxious attitude when she commented that plaintiff could "fight" the ticket is direct evidence of bad faith. However, defendant's comment and composure could just as easily be interpreted as frustration at having to make a difficult decision. Or, it could also indicate defendant's exasperation due to her disbelief of plaintiff's story. In short, defendant's comment could have signified any number of emotions given the circumstances. See cf. *Oliver*, ___ Mich App at ___. Accordingly, the comment alone does not create a justiciable question of fact whether defendant acted with good faith when she detained and ticketed plaintiff. *Id.* When all of the facts are taken into consideration, including the reasonable inferences arising therefrom, in a light most favorable to plaintiff, it cannot be inferred that defendant's actions were motivated by an intent to harm plaintiff or that they embodied an indifference that harm would result. Accordingly, plaintiff has failed to demonstrate a genuine issue of fact regarding whether defendant acted in good faith. The trial court erred by denying defendant's motion for summary disposition under MCR 2.116(C)(7).[2]

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

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio

[2] Because we have concluded that summary disposition for defendant should have been granted, we need not consider defendant's other argument raised in this appeal.