

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY MINOR,

Plaintiff/Counter-Defendant-
Appellee,

v

CITY OF SYLVAN LAKE and MARK SILVER,

Defendants-Appellants,

and

JEFFREY FICK,

Defendant/Counter-Plaintiff-
Appellant,

and

OAKLAND COUNTY,

Defendant-Appellee.

Before: MURRAY, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

Defendants City of Sylvan Lake, Sylvan Lake Chief of Police Mark Silver, and Sylvan Lake Police Officer Jeffrey Fick appeal as of right the trial court's order denying their second motion for summary disposition pursuant to MCR 2.116(C)(7) and (8).¹ We affirm in part, reverse in part, and remand for further proceedings.

¹ Defendant Oakland County was not a party to the second motion for summary disposition and has not filed a brief on appeal. Thus, the term "defendants" as used throughout this opinion does not include Oakland County, unless otherwise indicated.

I. BACKGROUND

Prior to the events that led to the filing of this appeal, in November 2007, plaintiff Jeffrey Minor testified for the plaintiff in *Sherrod v Sylvan Lake*, Oakland Circuit Court, Docket No. 2007-083982, a sexual harassment suit filed against Sylvan Lake and Silver. At his deposition, plaintiff testified that in 2003 and May 2007 Silver made lewd comments to plaintiff regarding plaintiff's genitals. The *Sherrod* case settled in April 2008.

Thereafter, on March 28, 2009, plaintiff was at his home in Sylvan Lake doing yard work when his neighbor's dog, which plaintiff was watching, wandered onto the roadway. Plaintiff immediately called the dog back, but at the same time Fick exited his police vehicle and informed plaintiff that he was violating Sylvan Lake's leash law. Fick proceeded to arrest plaintiff and took him to the county jail. According to plaintiff, once Fick informed plaintiff that he was in violation of the city leash ordinance, Fick grabbed plaintiff by the arm and began pulling him towards his patrol vehicle. As Fick was pulling plaintiff to the vehicle, Fick refused to answer plaintiff's inquiries regarding why he was being arrested. At this point, plaintiff attempted to video his arrest with his cell phone, but, Fick grabbed the phone, handcuffed plaintiff, and then placed plaintiff in the back of the patrol vehicle after hitting plaintiff on the side of the head and on the back of his leg. Once other officers arrived at the scene, plaintiff was taken out of the patrol car, shoved onto the vehicle's trunk, patted down, and his handcuffs were tightened before he was placed back into the patrol vehicle and driven to the jail.

Plaintiff remained in jail for two days before his arraignment, where he was charged with resisting an officer, MCL 750.81d(1), and disturbing the peace, MCL 750.170. Plaintiff alleges that while Fick was driving plaintiff to his arraignment, Fick stopped at the Sylvan Lake police station, where Silver looked into the patrol car and smiled at plaintiff. Thereafter, on June 8, 2009, Silver attended plaintiff's preliminary examination. Eventually, on November 16, 2009, the prosecution motioned to dismiss the criminal charges against plaintiff. The prosecution stated that it was requesting the dismissal because, although probable cause existed to bind plaintiff over, it could not meet its burden of proving the case beyond a reasonable doubt.

Subsequently, in April 2010, plaintiff filed a complaint against Sylvan Lake, Silver, and Fick, alleging various state constitutional and tort claims. In response to plaintiff's complaint, defendants filed a motion for partial summary disposition pursuant to MCR 2.116(C)(7) and (8). In response to defendants' motion, the trial court permitted plaintiff to file an amended complaint.

In his first amended complaint against defendants Sylvan Lake, Silver, Fick, Oakland County, and unknown Oakland County Deputy Sheriff(s), plaintiff alleged seven counts. In count I, plaintiff alleged a Fourth Amendment excessive force claim pursuant to 42 USC § 1983 against all defendants for illegal search and seizure, municipality liability for failing to train the police and permitting an unconstitutional policy or custom, and supervisory liability for approving of the unconstitutional conduct. In count II, plaintiff alleged a First Amendment retaliation claim (again pursuant to § 1983) against Sylvan Lake, Silver, and Fick for retaliating against him because he provided deposition testimony in the *Sherrod* case. In count III, plaintiff alleged a § 1983 malicious prosecution claim against Sylvan Lake, Silver, and Fick and a state malicious prosecution claim against Silver and Fick for prosecuting him without probable cause.

In count IV, plaintiff alleged a false arrest and false imprisonment claim against Silver and Fick for improperly arresting and imprisoning him. In count V, plaintiff alleged an abuse of process claim against Silver and Fick for pursuing criminal proceedings against plaintiff. In count VI, plaintiff alleged an assault and battery claim against Silver, Fick, and unknown the Oakland County Sheriff Deputies for threatening to harm him and harmfully touching him when he was arrested and while he was imprisoned. Finally, in count VII, plaintiff alleged an intentional infliction of emotional distress claim against Silver, Fick, and the unknown Oakland County Sheriff Deputies for their outrageous conduct.

After plaintiff filed his first amended complaint, Sylvan Lake, Silver, and Fick filed a second motion for partial summary disposition pursuant to MCR 2.116(C)(7) and (8) seeking a dismissal of all claims against Sylvan Lake and Silver and a dismissal of counts I, II, III, IV, V, and VII against Fick. Defendants asserted that Silver and Fick were immune from suit and that plaintiff failed to state valid claims.

Meanwhile, the trial court denied defendants' initial motion for partial summary disposition before it held the hearing on defendants' second motion for partial summary disposition. The trial court noted that the first amended complaint mooted several of defendants' arguments and that Silver was not entitled to absolute governmental immunity because, although he was the highest executive officer of a level of government, plaintiff's allegations that Silver abused his authority to retaliate against plaintiff were outside the scope of a governmental function, and thus, governmental immunity did not apply.

After the hearing was held on defendants' second motion for summary disposition, the trial court denied the motion.² Regarding the Fourth Amendment excessive force/illegal search and seizure claim, the trial court concluded that plaintiff adequately pleaded the municipality and supervisory claims, and there was a factual question regarding whether Silver and Fick had probable cause to arrest plaintiff. Regarding the First Amendment retaliation claim, the trial court found a factual dispute regarding whether Fick's arrest of plaintiff was motivated, at least in part, by retaliation for plaintiff's testimony in the *Sherrod* case. As to the claims for § 1983 malicious prosecution, state malicious prosecution, and false arrest and false imprisonment, the trial court stated that there was a question of fact regarding whether there was probable cause to arrest plaintiff. It did not address whether plaintiff failed to allege a deprivation of liberty apart from the initial seizure. The trial court also found that plaintiff had alleged the essential elements of his abuse of process claim. Finally, regarding whether governmental immunity should bar the claims against Silver and Fick, the trial court ruled that any argument for Silver was moot because the court had previously ruled that absolute immunity was inappropriate, and as to Fick, he was not immune as a matter of law because there were questions of fact regarding whether there was probable cause to arrest plaintiff and whether Fick's actions amounted to gross negligence. From this ruling, defendants appeal as of right.

II. ANALYSIS

² At the motion hearing the trial court dismissed the official capacity claims against Silver and Fick under count I without prejudice, which was embodied in a separate order.

A. JURISDICTION

Plaintiff asserts that this Court lacks jurisdiction over this appeal because the trial court's denial of defendant's second motion for summary disposition was not a final order. "The question of jurisdiction is always within the scope of this Court's review[.]" *Walsh v Taylor*, 263 Mich App 618, 622; 689 NW2d 506 (2004). The jurisdiction of the Court of Appeals is based entirely in statute, Const 1963, art 6, § 10, and is limited to final orders and judgments, *Walsh*, 263 Mich App at 622, citing MCL 600.308.

MCR 7.203 provides key definition in determining the jurisdiction of the Court of Appeals. MCR 7.203(A)(1) provides:

(A) Appeal of Right. The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1) *A final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6), except a judgment or order of the circuit court*

(a) on appeal from any other court or tribunal;

(b) in a criminal case in which the conviction is based on a plea of guilty or nolo contendere;

An appeal from an order described in MCR 7.202(6)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right. [Emphasis added.]

MCR 7.202(6)(a)(v), in turn, defines what establishes a "final order" in a case involving governmental immunity:

For purposes of this subchapter:

(6) "final judgment" or "final order" means:

(a) In a civil case,

* * *

(v) an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity[.]

We apply the clear language of the court rule as it is written. *Kopf v Bolser*, 286 Mich App 425, 428; 780 NW2d 315 (2009). Thus, according to MCR 7.203(A) and MCR 7.202(6)(a)(v), an order denying governmental immunity is considered a final order that is appealable by right, *Walsh*, 263 Mich App at 623-625, but MCR 7.203(A) limits the scope of this Court's jurisdiction to the "portion of the order with respect to which there is an appeal of

right[.]” *Pierce v City of Lansing*, 265 Mich App 174, 182; 694 NW2d 65 (2005). Consequently, “in an appeal by right from an order denying a defendant’s claim of governmental immunity, such as this one, this Court does not have the authority to consider issues beyond the portion of the trial court’s order denying the defendant’s claim of governmental immunity.” *Id.* Therefore, our review is limited to that portion of the trial court’s order denying defendant’s motion for summary disposition regarding governmental immunity pursuant to MCR 2.116(C)(7) and does not extend to that portion of the trial court’s order holding that plaintiff sufficiently pleaded his claims as a matter of law pursuant to MCR 2.116(C)(8). We dismiss defendants’ appeal as it pertains to the trial court’s order denying summary disposition of plaintiff’s federal claims and plaintiff’s state law claims to the extent that the trial court’s ruling was that plaintiff stated a claim upon which relief could be granted.

As a corollary to his argument, plaintiff also contends that this Court cannot review whether Silver qualifies for absolute governmental immunity regarding the state claims because defendants’ failed to timely file a motion for reconsideration or an appeal regarding the trial court’s order denying defendants’ initial motion for summary disposition. Defendants respond by asserting that the trial court invited them to refile their entire motion for summary disposition after plaintiff filed his first amended complaint. A review of the September 9, 2010, hearing transcript reveals that the trial court did order defendants to refile their motion for summary disposition after plaintiff filed his first amended complaint. Thereafter, the trial court issued two orders – the first in November 2010 denying defendants’ first motion for summary disposition, and the second in January 2011 denying defendants’ second motion for summary disposition. This Court has held that “[w]here a party has claimed an appeal from a final order, the party is free to raise on appeal issues related to other orders in the case.” *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992), citing *Dean v Tucker*, 182 Mich App 27, 31; 451 NW2d 571 (1990). Consequently, because defendants properly appealed as of right the trial court’s final order denying their second motion for summary disposition, this Court can review the issues from the November 2010 order.

B. GOVERNMENTAL IMMUNITY

Defendants argue that governmental immunity precludes any suit against Silver and Fick. A motion for summary disposition brought under MCR 2.116(C)(7) is reviewed de novo. *Bennett v Detroit Police Chief*, 274 Mich App 307, 310; 732 NW2d 164 (2007). Summary disposition is proper under MCR 2.116(C)(7) when a claim is barred because of governmental immunity. *Id.* at 310-311. “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, 428; 789 NW2d 211 (2010) (footnote omitted). Under MCR 2.116(C)(7), we consider documentary evidence in a light most favorable to the nonmoving party. *Moraccini v City of Sterling Hts*, ___ Mich App __; ___ NW2d __ (Docket No. 301678, issued May 1, 2012), slip op, p 2. “If there is no factual dispute, whether a plaintiff’s claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide.” *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). “But where a relevant factual dispute does exist, summary disposition is not appropriate.” *Moraccini*, ___ Mich App at __ (slip op at 3).

1. THE CHIEF OF POLICE

With regard to Silver, defendants argue that he is absolutely immune from suit as the chief of police. “Michigan law provides that “[a] judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.” *Bennett*, 274 Mich App at 311, quoting MCL 691.1407(5).³ Usually, the chief of police is recognized as the highest appointed executive officer in the police department. *Petipren v Jaskowski*, 294 Mich App 419, 426; 812 NW2d 17 (2011), lv gtd in part 491 Mich 913 (2012), citing *Payton v Detroit*, 211 Mich App 375, 394; 536 NW2d 233 (1995). Thus, for Silver to qualify for absolute immunity under MCL 691.1407(5), the inquiry is whether Silver’s alleged conduct was within the scope of his executive authority. In *Marrocco v Randlett*, 431 Mich 700, 711; 433 NW2d 68 (1988), the Supreme Court stated that

[t]he determination whether particular acts are within their authority depends on a number of factors, including the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official’s authority, and the structure and allocation of powers in the particular level of government.

However, the motive of the official is irrelevant. *Petipren*, 294 Mich App at 426-427. Here, plaintiff alleged that on March 30, 2009, while he was being driven to his arraignment, Fick first drove to the Sylvan Lake police station. At the station, plaintiff remained in the back seat of the police vehicle. During this time, plaintiff saw Silver look at him and smile. Plaintiff also alleged that on June 8, 2009, Silver attended plaintiff’s preliminary examination. Furthermore, plaintiff alleged that Silver knew that there was not probable cause to arrest plaintiff and he permitted Fick to arrest plaintiff out of an intent to punish plaintiff for giving deposition testimony against Silver in the *Sherrod* case.

Assuming that the facts as alleged are true, plaintiff’s claims are barred by governmental immunity because Silver was acting within the scope of his executive authority. According to Sylvan Lake’s city ordinance:

(a) The administrative officers of the City shall be the City Manager, Clerk, Treasurer, City Attorney, Health Officer, Chief of Police and Fire Chief. The Council may, by resolution, create such additional administrative offices, and prescribe the duties thereof, as it may deem necessary for the proper operation of

³ MCL 691.1407(5) provides:

A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

the city government. And two or more, or all of such administrative officers, or any part of the power and duties of any of them, may, by resolution of the Council, be combined in any one person. No person shall be eligible to appointment as an administrative officer of the City unless he is a citizen of the United States.

* * *

(c) All other administrative officers of the City, except the City Attorney, shall be appointed or selected by, and served at the pleasure of, the City Manager, who shall set their salaries or wages in accordance with budget appropriations. [Sylvan Lake Ordinances, § 9.1.]

While this section does not list the duties of the chief of police, it does provide that:

[t]he duties of all administrative officers, not otherwise provided for herein, shall be those established by law or ordinance for such offices or prescribed by the City Manager. [Sylvan Lake Ordinances, § 9.11.]

Additionally, the Sylvan Lake City Code provides:

(2) A Police Officer shall be authorized officials for purposes of carrying out the duties of enforcing the ordinance from which this section is derived.

* * *

(4) A person appointed by motion or resolution is authorized to enforce all ordinance provisions set forth in the motion or resolution.

* * *

(5) The duties of a person appointed herein or by motion or resolution shall include the following: investigation of designated ordinance violations; issuance and service of municipal civil infraction citations and municipal ordinance violation notices for the designated ordinance violations; appearance in court or other judicial or quasi-judicial proceedings in the administration of the designated city ordinances. [Sylvan Lake City Code, § 1-7(e).]

Pursuant to Sylvan Lake Ordinances, § 9.1, the chief of police is an appointed official. Thus, his duties pursuant to Sylvan Lake City Code, § 1-7(e)(5) include investigation, issuance of citations, and appearance in court related to ordinance violations. Moreover, while it is true that “the intentional use or misuse of a badge of governmental authority for a purpose unauthorized by law is not the exercise of a governmental function[.]” *Marrocco*, 431 Mich at 707-708 (quotations and citation omitted), plaintiff’s first amended complaint fails to allege that Silver intentionally used or misused his governmental authority. Specifically, the amended complaint does not allege that Silver was involved in the decision to arrest plaintiff, to detain plaintiff for two days, or to charge plaintiff. Rather, plaintiff’s complaint merely alleges that Silver had an improper motive when he permitted plaintiff’s detainment – as evidenced by

Silver's smiling at plaintiff before his arraignment and subsequently attending plaintiff's preliminary examination. But, as previously discussed, the motives of an officer are irrelevant in determining immunity. *Petipren*, 294 Mich App at 426-427. The proper inquiry focuses solely on whether the official acts within the scope of his executive authority. *Marrocco*, 431 Mich at 710-711. Because Silver is the highest executive officer and his actions were within the scope of his executive authority, plaintiff's state law claims against Silver are barred by absolute governmental immunity pursuant to MCL 691.1407(5).⁴ Thus, the trial court erred in denying defendant's motion for summary disposition as to Silver under MCR 2.116(C)(7).

2. SYLVAN LAKE POLICE OFFICER

Defendants argue that Fick is immune from suit against plaintiff's claims of malicious prosecution (count III), false arrest and false imprisonment (count IV), abuse of process (count V), and intentional infliction of emotional distress (count VII).⁵ Immunity from an intentional tort claim is premised upon MCL 691.1407(3),⁶ and the test for determining if a lower-ranking governmental individual is entitled to governmental immunity for an intentional tort⁷ is whether:

- (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 v Wayne Co*, 482 Mich 459, 480; 760 NW2d 217 (2008), citing *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 633-634; 363 NW2d 641 (1984).]

⁴ Immunity against a state claim does not bar a § 1983 action. *Howlett By & Through Howlett v Rose*, 496 US 356, 375-376; 110 S Ct 2430; 110 L Ed 2d 332 (1990); *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 594; 640 NW2d 321 (2001).

⁵ Thus, plaintiff's § 1983 allegations against Fick of excessive force, retaliation, and malicious prosecution (counts I, II, and III) and his allegation of assault and battery against Fick (count VI) are not challenged on appeal.

⁶ MCL 691.1407(3) provides, "[s]ubsection (2) does not alter the law of intentional torts as it existed before July 7, 1986."

⁷ It appears that the trial court erroneously applied MCL 691.1407(2) to Fick in denying him governmental immunity. MCL 691.1407(2) provides immunity to governmental employees against a claim of ordinary negligence. *Bain v City of Southfield*, 463 Mich 982; 625 NW2d 781 (2001), citing *Maiden v Rozwood*, 461 Mich 109, 122; 597 NW2d 817 (1999). Because plaintiff's first amended complaint only contains intentional tort claims against Fick, MCL 691.1407(2) has no application.

A police officer who arrests an individual is usually acting within the course of his employment and within the scope of his authority. *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 578-581; 808 NW2d 578 (2011). Whether a police officer acts in good faith is “subjective in nature, and it protects a defendant’s honest belief and conduct taken in good faith with the cloak of immunity.” *Id.* at 578. “Good faith means acting without malice.” *Id.* at 579.

Discretionary acts involve significant decision-making that require personal deliberation, decision, and judgment, whereas ministerial acts involve the execution or implementation of the decision. *Oliver v Smith*, 290 Mich App 678, 689-690; 810 NW2d 57 (2010), quoting *Ross*, 420 Mich at 592. This means that while the decision to arrest is discretionary, a police officer’s implementation of the means for making the arrest is ministerial, and thus, not entitled to immunity. *Id.* at 690, quoting *Butler v Detroit*, 149 Mich App 708, 718; 386 NW2d 645 (1986). However, “[a]n officer’s decision regarding the type of action necessary to effectuate an arrest is only actionable if the officer engaged in wanton or malicious conduct or demonstrated a reckless indifference to the common dictates of humanity.” *Norris*, 292 Mich App at 581.

Based on the facts as alleged by plaintiff, it is clear that Fick acted within the course of his employment and the scope of his authority when he arrested plaintiff. However, whether Fick’s actions were done in good faith presents an issue in need of further factual development. According to plaintiff’s un rebutted allegations, immediately after informing plaintiff of the leash ordinance violation, Fick began to pull plaintiff towards his patrol vehicle. Fick then struck plaintiff twice even though plaintiff did not physically resist him, and Fick refused to inform plaintiff why he was being arrested. Although the first amended complaint establishes that Fick was present when the dog strayed from the property, this fact alone does not absolve Fick’s actions.⁸ Under *Odom* the inquiry is whether Fick acted in good faith – i.e. without malice – when he arrested plaintiff. 482 Mich at 481. Plaintiff’s undisputed allegations are that a violation of the leash ordinance is only a ticketable offense,⁹ that plaintiff’s arrest for the leash violation was unprecedented in Sylvan Lake, and that Fick used excessive force in effectuating the arrest. Such facts call into question whether Fick’s arrest of plaintiff was malicious, necessitating the need for additional evidence before a proper ruling can be made.

⁸ Defendants’ assertion that probable cause existed as a matter of law and precludes plaintiff from establishing the elements of false arrest and imprisonment, abuse of process and intentional infliction of emotional distress. However, that argument would be based upon MCR 2.116(C)(8), not (C)(7), and defendants motion was based on (C)(7). We cannot consider in an appeal of a final order under MCR 7.203(A) an issue arising from the denial of a motion for summary disposition that did not result from a *denial of governmental immunity*. MCR 7.203(A); MCR 7.202(6)(a)(v); see also *Watts v Nevils*, 477 Mich 856; 720 NW2d 755 (2006); *Walsh*, 263 Mich App at 624-625. Defendant’s argument regarding probable cause does not relate to whether these defendants are entitled to governmental immunity.

⁹ State law allows an officer to arrest an individual for an ordinance violation. MCL 764.15(1)(a); *People v Sinistaj*, 184 Mich App 191, 198; 457 NW2d 36 (1990). But, plaintiff’s allegations that the ordinance itself constitutes only a ticketable offense – if true – creates doubt as to Fick’s true motive in arresting plaintiff.

Moreover, although Fick’s actions in implementing the arrest were ministerial, Fick was not “faced with an aggressive individual who was intent on physically and forcefully resisting the officers’ efforts to restrain him.” *Oliver*, 290 Mich App at 690. Plaintiff’s allegations – including that Fick struck plaintiff without provocation on the head and leg and that plaintiff had his face smashed down onto the trunk of the patrol vehicle because he violated the city’s leash law – create the need for discovery before a ruling can be made regarding whether Fick’s conduct demonstrated wantonness, maliciousness, or a reckless indifference towards the common dictates of humanity such that he would be immune from suit on the state claims of malicious prosecution, false arrest and false imprisonment, abuse of process, and intentional infliction of emotional distress. *Norris*, 292 Mich App at 581. For these reasons, summary disposition pursuant to MCR 2.116(C)(7) at this juncture in the proceedings was not appropriate.¹⁰

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

No costs, neither party having prevailed in full. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Riordan

¹⁰ The trial court erred when it found that summary disposition was inappropriate because there were questions of fact regarding probable cause and gross negligence. This error occurred because the trial court applied MCL 691.1407(2) when determining if governmental immunity barred plaintiff’s claims against Fick. However, as previously noted, because plaintiff alleged intentional torts, MCL 691.1407(3) is the correct statutory provision. But, this Court will not reverse if the correct result is reached, even when the trial court employed a wrong reason. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007).