STATE OF MICHIGAN

COURT OF APPEALS

JIYA LAL GUPTA,

Plaintiff-Appellee,

v

BARTON CRANE and DALE HAUSERMANN,

Defendants-Appellees,

and

MERIDIAN CHARTER TOWNSHIP,

Defendant.

UNPUBLISHED
April 26, 2012

No. 303155
Ingham Circuit Court
LC No. 09-000763-NZ

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

Defendants, Sergeant Barton Crane and Officer Dale Hausermann, appeal the trial court's order that denied their motion for summary disposition. For the reasons set forth below, we reverse.

I. FACTS AND PROCEEDINGS

This case arises out of the arrest of plaintiff, Jiya Gupta, on June 1, 2007. At approximately 10:00 p.m., a woman called 911 to report that an unidentified man was walking in her neighborhood in Meridian Township. The woman told the police dispatcher that the man was walking slowly and stumbling, he appeared to be intoxicated, and she thought someone should check on him. Sergeant Crane drove his marked police vehicle to the neighborhood and saw Mr. Gupta standing on a public sidewalk on Yosemite Drive. According to Sergeant Crane, Mr. Gupta had trouble balancing, he was staggering, he smelled of intoxicants, and his speech was slurred. As Sergeant Crane talked to Mr. Gupta, Officer Hausermann arrived at the scene. He testified that Mr. Gupta appeared to be intoxicated and both officers stated that they were trying to ascertain his identity, where he lived, or whether he needed assistance.

Mr. Gupta stated in an affidavit that, at one point, he told Sergeant Crane that he was on his way home and that he pointed to his house, but both officers denied that they knew where plaintiff lived or what he was doing in the neighborhood. As the officers attempted to obtain information from Mr. Gupta, he told them to talk to the Meridian Township police chief because

he knew him. Mr. Gupta then said "good-bye" and he began to walk away. According to Officer Hausermann, he tapped Mr. Gupta on the shoulder and told him to stop, but Mr. Gupta then ran into the street away from the officers. Mr. Gupta maintained that he merely walked across the street to his front yard. As noted, both officers stated that they did not know where Mr. Gupta lived, and that they gave chase when Mr. Gupta ran into the street. The officers arrested Mr. Gupta for disturbing the peace on what turned out to be his front lawn at 3798 Yosemite. The prosecutor ultimately dropped the disturbing the peace charge and, instead, charged defendant with obstructing or opposing law enforcement officers. Mr. Gupta filed a motion to dismiss and, after an evidentiary hearing, the district court dismissed the criminal complaint.

On May 29, 2009, Mr. Gupta filed this action against Sergeant Crane, Officer Hausermann, and Meridian Township. Specifically, Mr. Gupta alleged claims of assault and battery, intentional infliction of emotional distress, false imprisonment, malicious prosecution, abuse of process, deprivation of rights pursuant to 42 USC 1983, violation of Article 1, § 17 of Michigan Constitution, and gross negligence. The officers and township removed the action to the United States District Court for the Western District of Michigan. The federal district court granted defendants' motion for summary judgment, but remanded the case to state court for consideration of Mr. Gupta's claims of assault and battery, false imprisonment, malicious prosecution, abuse of process, and gross negligence.[1]

In the Ingham Circuit Court, the officers filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10). In response, Mr. Gupta agreed that his claims for false imprisonment, malicious prosecution, and abuse of process are barred by collateral estoppel because the federal district court ruled that the officers had probable cause to arrest and charge Mr. Gupta. Accordingly, Mr. Gupta voluntarily dismissed those claims. With regard to Mr. Gupta's assault and battery and gross negligence claims against the officers, the trial court declined to grant the officers' motion for summary disposition and, herein, the officers appeal.

II. DISCUSSION

As this Court recently explained in *Oliver v Smith*, 290 Mich App 678, 683; ___ NW2d ___ (2010):

> A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "With regard to a motion for summary disposition pursuant to MCR 2.116(C)(7), this Court reviews the affidavits, pleadings, and other documentary evidence presented by the parties and 'accept[s] the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true.'" *Young v Sellers*, 254 Mich App 447, 449–450; 657 NW2d 555 (2002), quoting *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 681; 599 NW2d 546 (1999). In ruling on a motion for summary disposition under MCR 2.116(C)(10), "a court

[1] All claims against Meridian Township have been dismissed.

> must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). Summary disposition is appropriate under MCR 2.116(C)(10) when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

Sergeant Crane and Officer Hausermann argue that the trial court should have granted their motion for summary disposition on Mr. Gupta's assault and battery claim because they are entitled to governmental immunity. MCL 691.1407 provides, in relevant part:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.
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> (3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.

Assault and battery is an intentional tort. *Oliver*, 290 Mich App at 688. In *Odom v Wayne Cty*, 482 Mich 459, 480; 760 NW2d 217 (2008), our Supreme Court summarized the test to determine whether individual governmental immunity applies to intentional tort claims:

> 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:
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> (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.

Mr. Gupta conceded in the trial court that the officers acted during the course of their employment and that their acts were discretionary. However, he argued that the officers acted outside the scope of their authority and with malice. Contrary to Mr. Gupta's argument, Sergeant Crane and Officer Hausermann were acting within the scope of their authority as police officers in their questioning and arrest of Mr. Gupta. In Michigan, police officers have the authority to detain and arrest persons suspected of committing a crime, and it is undisputed that the officers had probable cause to arrest Mr. Gupta in this case. MCL 117.34; *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001). Further, police officers clearly have duties as community caretakers to determine whether an obviously intoxicated person is in need of assistance. See *People v Slaughter*, 489 Mich 302, 313; 803 NW2d 171 (2011). Accordingly, the officers were clearly acting within the scope of their authority.

As our Supreme Court explained in *Odom*, 482 Mich App at 480, the acts of an officer must also be undertaken in good faith and not undertaken with malice:

> This Court has described a lack of good faith as "malicious intent, capricious action or corrupt conduct" or "willful and corrupt misconduct . . . ." In *Firestone v Rice* [71 Mich 377, 384; 38 NW 885 (1888) (emphasis added)], in which the plaintiff brought an action for false imprisonment and assault and battery against a police officer for handcuffing him, the Court held:
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> > There must be some discretion reposed in a sheriff or other officer, making an arrest for felony, as to the means taken to apprehend the supposed offender, and to keep him safe and secure after such apprehension. And this discretion cannot be passed upon by a court or jury unless it has been abused through *malice or wantonness or a reckless indifference to the common dictates of humanity.*
>
> In addition, this Court has held that "willful and wanton misconduct is made out only if the conduct alleged shows 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." [*Burnett v City of Adrian*, 414 Mich 448, 455; 326 NW2d 810 (1982).]

Here, Sergeant Crane and Officer Hausermann initiated their contact with Mr. Gupta after a resident called to report an unknown, visibly intoxicated person staggering through a residential neighborhood. Sergeant Crane and Officer Hausermann presented evidence that Mr. Gupta did not cooperate with the officers to enable them to ascertain where he lived, what he was doing in the neighborhood, or whether he might need further assistance, and he cut off the conversation by running into a public road even after Officer Hausermann told him to stop. Officer Hausermann testified that he caught up to Mr. Gupta and, as he grabbed his arm, they both fell to the ground. The officers then handcuffed Mr. Gupta and placed him in a police vehicle. Though

Mr. Gupta maintained that Officer Hausermann "threw" him to the ground, under circumstances in which a suspect is fleeing a lawful stop, the amount of force used during the arrest was objectively reasonable and, therefore, no assault and battery occurred. *VanVorous v Burmeister*, 262 Mich App 467, 482-483; 687 NW2d 132 (2004).

Further, the officers established that their actions were undertaken in good faith. Both officers testified that they had no idea where Mr. Gupta lived, he was evasive and uncooperative in his responses, he was clearly intoxicated,[2] and they were trying to ascertain whether he was a danger to himself or others. And, as the federal district court found, once Mr. Gupta fled into the public roadway, it was plainly reasonable for the officers to give chase, to seize him, and to place him in handcuffs. Thus, the officers clearly established that they acted reasonably and without malicious intent. Mr. Gupta claimed in the trial court that the officers must have acted with malice because they declined to release him to his wife at the scene, they told him he had to take a preliminary breath test, and because, at the jail, Officer Hausermann and the jail officer "very aggressively" attempted to remove his wedding ring. However, none of those actions, taken separately or together, establish an issue of material fact with regard to whether the officers acted maliciously or with an intent to harm when they caught Mr. Gupta as he fled and placed him under arrest. Accordingly, the trial court should have granted the officers' motion for summary disposition on Mr. Gupta's assault and battery claim.

Mr. Gupta also argued in the trial court that, if the officers did not commit an intentional tort, they at least acted with gross negligence. Pursuant to MCL 691.1407(2)(c), an officer is not protected by governmental immunity if the officer's conduct amounts "gross negligence that is the proximate cause of the injury or damage." Here, however, it is clear that Mr. Gupta attempted to transform his intentional tort claims into claims of gross negligence. His complaint includes an allegation entitled "gross negligence" which merely refers to the factual and legal allegations cited in support of his intentional tort claims. Further, in response to the officers' motion for summary disposition, Mr. Gupta relied on the same facts and arguments that underlie his assault and battery claim. It is well-settled that "the tort of assault and battery by gross negligence does not exist." *Sudul v Hamtramck*, 221 Mich App 455, 461 477; 562 NW2d 478 (1997). And, just as importantly, our courts have repeatedly rejected plaintiffs' attempts to recast intentional tort claims as gross negligence claims. *VanVorous*, 262 Mich App at 483-484, citing *Smith v Stolberg*, 231 Mich App 256, 258–259; 586 NW2d 103 (1998). The gravamen of Mr. Gupta's claim is that the officers used excessive force in effectuating his arrest—a claim that fails for the reasons set forth above—and the trial court also should have granted summary disposition to the officers on Mr. Gupta's gross negligence claim.

[2] As the federal district court observed in its opinion, plaintiff does not contend that he was not intoxicated.

Reversed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Henry William Saad