STATE OF MICHIGAN

COURT OF APPEALS

ERIKA CUMMINGS,

Plaintiff/Appellee-Cross-Appellant,

v

SETH LEWIS,

Defendant/Appellant-Cross-Appellee,

and

ROGELIO GERARDO VILLARREAL and CITY OF FLINT,

Defendant-Cross-Appellees.

UNPUBLISHED
July 3, 2012

No. 303386
Genesee Circuit Court
LC No. 09-092707-NO

Before: RONAYNE KRAUSE, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Defendant Seth Lewis[1] appeals as of right an order that denied defendant summary disposition for claims of excessive force and assault and battery. Plaintiff, Erika Cummings, filed a cross-appeal alleging that the City of Flint is liable for failing to enforce its use-of-force policy for police officers. For the reasons set forth in this opinion, we affirm.

Officers Lewis and Villarreal were on patrol when they saw two individuals on the ground, with one straddling the other. Kirkland Dean Rodgers had both hands on plaintiff's chest and appeared to be pushing her down. According to plaintiff, she was hugging Rodgers when they slipped and fell on the ice. The officers stopped to investigate and Lewis went to speak with plaintiff.

Plaintiff and defendant provided two different versions of the events. Plaintiff claims that defendant grabbed her from behind and threw her against the house. He then kicked her legs out

[1] Defendant Rogelio Gerardo Villarreal was dismissed from the suit and is not involved in this appeal. Accordingly, the singular use of *defendant* in this opinion refers to Seth Lewis.

from her and she fell to the ground. She stated that defendant had her on the ground, with one of her hands cuffed, when he proceeded to punch her in the face. This resulted in facial fractures and a swollen and bruised eye. However, defendant stated that plaintiff's face was already beaten and bruised when he arrived. While looking at plaintiff's injuries, defendant stated that plaintiff swung at his head with an open hand, and as he raised his arm to protect his head, she struck his wrist and shoulder. There was a struggle and plaintiff grabbed his portable-radio cord. At this point, Officer Villarreal came to assist and they were able to subdue plaintiff.

Plaintiff pled no contest to one count of resisting arrest under a city ordinance. Subsequently, she filed a nine-count complaint against defendants. The trial court eventually dismissed all claims except the excessive force and assault and battery claims against Lewis.

We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Defendants filed their motion under MCR 2.116(C)(7), (8), and (10), but the trial court did not state the rule it relied on to make its decision. "However, where, as here, the trial court considered material outside the pleadings, this Court will construe the motion as having been granted [or denied] pursuant to MCR 2.116(C)(10)." *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007). When reviewing a motion pursuant to MCR 2.116(C)(10), summary disposition may be granted if the evidence establishes that "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." MCR 2.116(C)(10). All documentary evidence supporting a motion under (C)(10) must be viewed in a light most favorable to the nonmoving party. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 278; 769 NW2d 234 (2009).

First, defendant argues that plaintiff's excessive force claim is barred under *Heck v Humphrey*, 512 US 477; 114 S Ct 2364; 129 L Ed 2d 383 (1994) because of plaintiff's no contest plea. We disagree. In *Heck*, the United States Supreme Court held,

> [W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit. [*Heck*, 512 US at 487.]

Defendant asserts that *Heck* bars plaintiff's claim because a favorable ruling would invalidate her resisting-arrest conviction. Plaintiff was charged under the following city ordinance:

> It shall be unlawful for any person to:
>
> (a) Knowingly and willfully obstruct, resist and oppose any police officer or other person duly authorized, in serving, attempting to serve or execute any process, rule or order make or issued by lawful authority.

(b) Knowingly or willfully obstruct, resist or oppose any police officer or other person so duly authorized to the execution of any provision of this code, ordinance, bylaw, or any rule, order or resolution made, issued or passed by the City Council of the City of Flint.

(c) Knowingly and willfully obstruct, resist or oppose any member of the Police Department or Fire Department in the discharge of his lawful duties or fail to obey the lawful order of the officer, when such person knows or should know him to be a member of the Police Force or Fire Department. [Flint Ordinance 2641, § 31-2.][2]

In *Schreiber v Moe*, 596 F3d 323, 334 (CA 6, 2010), the Sixth Circuit applied *Heck* to Michigan's resisting-arrest statute, MCL 750.81d(1), which is similar to the city ordinance in this case. MCL 750.81d(1) states that "an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers person who the individual knows or has reason to know is performing his or her duties is guilty of a felony . . . ." This includes, "the use or threatened use of physical interference or force" against a police officer, "or a knowing failure to comply with a *lawful* command" of a police officer. MCL 750.81(7)(a) & (7)(b)(*i*) (emphasis added).

The Sixth Circuit listed two circumstances where *Heck* would bar an excessive-force claim: (1) "when the criminal provision makes the lack of excessive force an element of the crime[,]" and (2) "when excessive force is an affirmative defense to the crime." *Schreiber*, 596 F3d at 334. None of these circumstances are present here. First, there is no indication that the city ordinance requires proof that the officer did not use excessive force. Under the law in place at the time of plaintiff's arrest, this Court had ruled that even if the arrest was unlawful, plaintiff was not allowed to use force to resist it. *People v Ventura*, 262 Mich App 370, 377-378; 686 NW2d 748 (2004).[3] Second, this same proposition indicates that excessive force is not an affirmative defense to resisting arrest. Even if plaintiff had gone to trial, she could not have asserted excessive force as an affirmative defense to the resisting-arrest charge. We therefore cannot find that plaintiff's no contest plea operates as a bar to her excessive-force claim.

Next, defendant argues that he did not use excessive force to effectuate the arrest. Excessive-force claims are analyzed under the Fourth Amendment's reasonableness standard.

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[2] It is unclear which subsection of the ordinance plaintiff pled no contest to.

[3] Defendant cites *People v Moreno*, ___ Mich ___; ___NW2d ___ 2012, (Docket No. 141837, issued April 20, 2012) for the proposition that she could have argued that defendant had acted illegally. We reject this invitation as *Ventura* was law at the time of plaintiff's plea. Additionally, *Moreno* does not stand for the proposition that excessive force is an affirmative defense to resisting a lawful arrest. Rather it stands for the rule that MCL 750.81d did not abrogate the common-law right to resist *unlawful* arrests and unlawful entries. Thus, defendant would have this Court hold that use of excessive force renders an arrest unlawful. Defendant does not cite any case law in support of this proposition, and we do not read our Supreme Court's decision in *Moreno* to compel such a ruling.

Graham v Connor, 490 US 386, 395; 109 S Ct 1865; 104 L Ed 2d 443 (1989). The facts and circumstances of each case must be examined, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or other, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. Further, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* Plaintiff and defendant both give subjective versions of the events. The determination of whether excessive force was used is dependent upon credibility, see *Oliver v Smith*, 290 Mich App 678, 686; 810 NW2d 57 (2010), and credibility issues are for the jury to decide. Accordingly, the trial court properly denied summary disposition on this basis.

Lastly, defendant argues that he is entitled to governmental immunity. In *Odom v Wayne Co*, 482 Mich 459, 479-480; 760 NW2d 217 (2008), our Supreme Court provided the following test to determine if an individual is entitled to governmental immunity:

> (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.
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> * * *
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> (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*, 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.

Here, defendant is a lower-ranking governmental official and plaintiff pled an intentional tort of assault and battery, which takes us to the fourth prong announced in *Odom*. The record indicates that defendant was acting during the course of his employment and that he also reasonably believed that he was acting within the scope of his authority. Further, an officer's decision regarding "the amount of force necessary to effectuate an arrest" is a discretionary act. See *Odom*, 482 Mich at 476. However, a question of fact remains as to whether defendant acted with malice. When viewing the facts in a light most favorable to plaintiff, the record reveals that defendant punched her repeatedly while she was down on the ground with one hand cuffed. Punching is an intentional act, meant to inflict harm. And, even if plaintiff was struggling to get off the ground, it is a question for the trier of fact to decide whether repeated punches to the face

were necessary to effectuate the arrest. Given the outstanding factual disputes as to whether defendant acted with malice, the trial court properly denied summary disposition on this basis.

Plaintiff asserted on cross-appeal that the city should have been liable under a "custom or policy" theory of municipal liability. The United States Supreme Court has held that municipalities can be liable for its employs' action under § 1983. *Monell v New York City Dept of Social Servs*, 436 US 658, 689; 98 S Ct 2018; 56 L Ed 2d 611 (1978). However, plaintiff has to "identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." *Bd of Comm'rs of Bryan Co v Brown*, 520 US 397, 403; 117 S Ct 1382; 137 L Ed 2d 626 (1997).

> The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct casual link between the municipal action and the deprivation of federal rights. [*Id.* at 404.]

Plaintiff presented insufficient evidence to demonstrate that the city was the "moving force" behind her injury. The city had a use-of-force policy that the officers were supposed to follow and there was no indication that officers frequently failed to follow it. This is an isolated event involving defendant and plaintiff and did not demonstrate that the city had the requisite degree of culpability needed to establish liability.

Affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Amy Ronayne Krause
/s/ Henry William Saad
/s/ Stephen L. Borrello