

STATE OF MICHIGAN
COURT OF APPEALS

ANTHONY LEMON,

Plaintiff-Appellee,

v

MARK BOUDREAU, KEVIN SMITH,
STEPHEN MCFADDEN, and JUSTIN
BROUGHTON,

Defendants-Appellants,

and

CYNTHIA HERFERT,

Defendant.

UNPUBLISHED
October 18, 2012

No. 304642
Genesee Circuit Court
LC No. 09-092581-CZ

Before: METER, P.J., and FITZGERALD and WILDER, JJ.

PER CURIAM.

Defendants¹ appeal as of right the trial court's order denying their motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). We affirm in part, reverse in part, and remand.

A little after midnight on December 8, 2007, Officers Mark Boudreau and Kevin Smith initiated a traffic stop of a vehicle being driven by plaintiff. Plaintiff initially pulled over, but when Boudreau and Smith exited their vehicle, plaintiff sped away. Plaintiff led the officers on a car chase, which concluded at a dead end road when plaintiff attempted to brake but slid into a residential yard, coming to rest against a home's front porch. Plaintiff then exited his vehicle and attempted to flee on foot, but Boudreau and Smith soon caught plaintiff and forced him to the ground on his stomach. Boudreau held plaintiff's legs as Smith attempted to handcuff plaintiff's hands behind his back. Despite numerous orders, plaintiff actively resisted being handcuffed. Officers Stephen McFadden and Justin Broughton soon arrived at the scene, and the officers eventually were able to handcuff plaintiff's hands behind his back. Plaintiff claims that

¹ Unless otherwise noted, "defendants" in this opinion will refer to the four appellants.

before the handcuffs were applied, he was kicked and punched several times in the face and head.

Plaintiff subsequently sued Officers Boudreau, Smith, McFadden, and Broughton, as well Sergeant Cynthia Herfert, for assault and battery. Plaintiff's claim is predicated on two specific areas of conduct: when the officers tackled him to the ground and when they allegedly kicked and punched him in the face and head. The five named defendants all gave deposition testimony in which they denied ever punching or kicking plaintiff. The named defendants moved jointly for summary disposition under MCR 2.116(C)(7) and (10), asserting that the "force allegedly employed was reasonable under the circumstances," that they were entitled to governmental immunity, and that Herfert, McFadden, and Broughton should be dismissed from the case because they were not involved in the alleged acts. The trial court granted the motion as to Herfert since she was not present at the arrest site, but denied it for the remaining four defendants.

Defendants argue that the trial court erred by denying their motion for summary disposition. We agree in part.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008). We also review questions of law regarding governmental immunity de novo. *Tellin v Forsyth Twp*, 291 Mich App 692, 698; 806 NW2d 359 (2011). "In reviewing a (C)(7) motion, a court must accept all well-pleaded allegations as true and construe them in favor of the nonmoving party." *Id.* "[I]n order to determine whether defendant is entitled to summary disposition under MCR 2.116(C)(7), the proper inquiry is whether defendant has met his burden of proof in establishing that he is entitled to governmental immunity as a matter of law." *Oliver v Smith*, 290 Mich App 678, 684-685; 810 NW2d 57 (2010). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ." *Nuculovic v Hill*, 287 Mich App 58, 61-62; 783 NW2d 124 (2010).

Generally, governmental immunity does not apply to intentional torts. However, governmental immunity does apply to intentional torts when the conduct at issue meets the following criteria: (1) the challenged acts were undertaken during the course of employment and the employees were acting, or reasonably believed that they were acting, within the scope of their authority, (2) the acts were undertaken in good faith, and (3) the acts were discretionary, as opposed to ministerial. *Odom v Wayne Co*, 482 Mich 459, 461; 760 NW2d 217 (2008), citing *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984).

I. THE TAKEDOWN

There is no dispute that Officers Boudreau and Smith were the only officers involved with the takedown of plaintiff after he fled on foot. Plaintiff argues that the tackle was unnecessary because he had stopped running due to being out of breath at the time of the tackle.

We find that the argument is without merit and that the officers were immune for any liability on the basis of the takedown of plaintiff.

Even accepting plaintiff's testimony as true, that he had stopped running because he was tired, Boudreau and Smith satisfied the requirements for governmental immunity for their actions related to the takedown. Smith testified that he was the first to catch up to plaintiff, but when he went to grab plaintiff's coat, plaintiff got away. Then Boudreau caught up to plaintiff and grabbed plaintiff's legs so he could not move anymore. Right after that, Smith grabbed plaintiff's upper body and essentially tackled him so plaintiff was lying chest down on the ground.

Police officers are not required to take unnecessary risks in the performance of their duties. Police officers work in a milieu of criminal activity where every decision is fraught with uncertainty. In light of the unusual and extraordinary nature of police work, it is improper to second-guess the exercise of a police officer's discretionary professional duty with the benefit of 20/20 hindsight. [*Norris v Lincoln Park Police Officers*, 292 Mich App 574, 579-580; 808 NW2d 578 (2011) (internal quotations and citations omitted).]

After witnessing plaintiff speed away in a car after a traffic stop, crash into a home, and take off on foot, the officers reasonably believed that they were dealing with someone who would go to great lengths to avoid arrest, including feigning acquiescence in order to gain an advantage. As such, there is no question that the officers' actions were undertaken during the course of their employment. There is also no question that they acted within the scope of their authority because officers are allowed to use reasonable force to effectuate arrests. *People v Jones*, ___ Mich App ___; ___ NW2d ___ (Docket No. 303753, issued June 19, 2012), slip op, p 5. The acts also were performed in good faith because the officers were concerned about plaintiff continuing to attempt to flee. Lastly, the decision regarding how to effectuate the arrest was discretionary. Therefore, summary disposition was warranted to all defendants related to the "tackle" of plaintiff. Boudreau and Smith were entitled to summary disposition under MCR 2.116(C)(7) because they met the requirements for governmental immunity, and McFadden and Broughton were entitled to summary disposition under MCR 2.116(C)(10) because there is no question of fact that they were not involved with the takedown act.

II. HITS TO THE HEAD

Next, we address the issue related to plaintiff's claim based on allegedly being punched and kicked in the head. Defendants denied throwing any punches or hits of any kind. As such, we must conclude that defendants were not entitled to summary disposition on the basis of governmental immunity for these alleged acts because the underlying basis of the rule in *Odom* cannot be satisfied. Specifically, under *Odom*, a defendant can seek governmental immunity as long as the challenged acts were undertaken within the scope of employment and were done with a certain mindset. Thus, in order to meet *Odom's* good-faith requirement, defendants had to establish that they *did* perform *the alleged act* without "malicious intent, capricious action or corrupt conduct." *Odom*, 482 Mich at 474 (quotations omitted). Here, because defendants deny hitting plaintiff, defendants cannot establish that if plaintiff was hit, he was hit in good faith. Moreover, we specifically note that defendants' deposition testimony, viewed in the light most

favorable to plaintiff, supported that repeatedly striking plaintiff in the face would be unwarranted and inappropriate under the circumstances. Broughton, McFadden, and Smith all testified that they saw no reason for any officer to have hit or kicked plaintiff in the head, thereby vitiating against any finding of good faith. Accordingly, because the testimony established that repeatedly striking plaintiff in the head would constitute “malicious intent, capricious action or corrupt conduct,” defendants failed to meet their burden of establishing that they were entitled to governmental immunity related to *the alleged conduct*, and summary disposition under MCR 2.116(C)(7) was properly denied.

However, as a matter of law, we also conclude that defendants Boudreau and Smith were entitled to summary disposition pursuant to MCR 2.116(C)(10). Plaintiff testified that the officers who were striking him were the “two officers standing up. It wasn’t the officers that was [sic] on the ground, because the first officer was on my back, and then another officer end[ed] up, he was on my back – on my leg area. And it was the officers above me bending down.” The record is clear that plaintiff was referring to Boudreau and Smith as being not involved. Boudreau was the officer on plaintiff’s leg area, and although Smith did not state that he was on plaintiff’s back, plaintiff identified that person as the same person who previously had “jumped on [his] back,” which was Smith. Therefore, under MCR 2.116(C)(10), Boudreau and Smith are entitled to judgment as a matter of law.

III. CONCLUSION

All defendants are entitled to summary disposition related to the takedown of plaintiff. Additionally, defendants Boudreau and Smith are entitled to summary disposition related to the alleged striking of plaintiff. Because Boughton and McFadden deny plaintiff’s allegation they struck plaintiff in the face, the existence of genuine issues of material fact preclude summary disposition as to these allegations.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. No costs are taxable pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder