STATE OF MICHIGAN

COURT OF APPEALS

GERALDINE ARTLEY, Individually and as Next Friend of LIONEL ARTLEY, TERRANCE ARTLEY, GABRIEL ARTLEY and BIANCA ARTLEY, Minors,

Plaintiffs-Appellants,

v

CITY OF DETROIT, DENNIS RICHARDSON, JAMES E. HERBERT, ROBERT WILLIAMS, WILLIAM HART and WILLIAM K. WYLIE, JR.,

Defendants-Appellees,

and

DETROIT POLICE CHIEF and DETROIT POLICE DEPARTMENT,

Defendants.

UNPUBLISHED
July 17, 1998

No. 199080
Wayne Circuit Court
LC No. 94-426392 NO

Before: Markman, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the orders of the lower court granting defendants summary disposition. We affirm.

I

This case arises from the arrest of plaintiff Geraldine Artley[1] as an alleged accomplice or conspirator in the prison escape by approximately ten inmates. On Sunday morning, August 21, 1994, an eyewitness reported to the police that she saw plaintiff's car stop near the prison and plaintiff move from the driver's seat to the passenger side of the car to allow five or six of the escapees into her car,

including an escapee who drove the car away. The witness reported that her own impression of the events was that plaintiff had been waiting for the escapees in order to assist them. Officers in the surrounding areas were broadcast the description of the car and its occupants, as well as information about the breakout and the possibility that the escapees were armed. Officers thereafter located a car meeting the eyewitness' description and pulled up behind it with their lights and sirens engaged; however, the driver of the car did not immediately stop but continued on to a vacant lot where he fled on foot. The officers noticed that the passenger side door was opening and believed that plaintiff was also attempting to get away. The officers identified themselves, ordered plaintiff to lie on the ground, and handcuffed her. It was near noon that same day when officers transported plaintiff to the police station.

Plaintiff answered the officers' questions about her participation in the prison escape for approximately ten hours. She stated that when she heard the prison sirens sound, she was near the prison because her car had stopped there and she could not get it restarted. She stated that she was not assisting the escapees but that they had forced their way into her car. Additionally, plaintiff revealed that the driver had made several stops around the city and allowed her to make a telephone call at one such stop. Plaintiff stated that she called home and told her children that she would be home as soon as she dropped off some people. She conceded that she did not attempt to call the police. After the questioning, plaintiff was transferred to a female cell block at the police station. Late Monday evening, August 22, 1994, she was transported to a state police station to take a polygraph test, which indicated no deception in her answers. Plaintiff was released early Tuesday afternoon, August 23, 1994, approximately thirty-eight hours after her arrest.

On September 2, 1994, plaintiff brought this suit against defendants, including the city and officers who were involved either in her arrest, transport, or questioning.[2] Plaintiff alleged in part that defendants were negligent, grossly negligent, and employed a negligent use of force (count I) and that defendant officers committed an assault and battery upon plaintiff and her children (count II).[3] Defendants filed various motions for summary disposition. The lower court found that probable cause existed for plaintiff's arrest and granted defendant city summary disposition pursuant to MCR 2.116(C)(7) (immunity granted by law) and defendant officers summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue as to any material fact, and moving party is entitled to judgment as a matter of law).

II

Plaintiff's discussion of the issues on appeal blurs the distinction between the different subdivisions of MCR 2.116 cited by the lower court in granting defendants summary disposition. Specifically, discussion of each issue seems to include her assertion that defendants were "grossly negligent," presumably in an attempt to fit her case within the gross negligence exception of MCL 691.1407(2)(c); MSA 3.996(107)(2)(c) of the governmental immunity act.[4] However, tort liability and immunity are separate inquiries, which should not be confused. *Glancy v City of Roseville,* ___ Mich ___; 577 NW2d 897, 901, n 3 (1998), (citing *Canon v Thumudo,* 430 Mich 326, 335; 422 NW2d 688 (1988)). The separateness of the inquiries means, in practical terms, that if defendant officers did not wrongfully conduct themselves in the ways alleged by plaintiff in her complaint, then summary

disposition pursuant to MCR 2.116(C)(10) was properly granted and it is unnecessary to address whether the officers are immune from liability where no wrongful conduct occurred or whether plaintiff has alleged facts sufficient to warrant the application of an exception to governmental immunity, such as the gross negligence exception.

A

Accordingly, we first address plaintiff's challenges to the grant of summary disposition pursuant to MCR 2.116(C)(10) to Lieutenant Richardson and Officers Herbert, Williams, Hart, and Wylie. We review de novo a lower court's decision to grant summary disposition. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). Summary disposition is proper pursuant to MCR 2.116(C)(10) only if the court is satisfied that no factual development that is possible could justify recovery by the nonmoving party. *Markis v Grosse Pointe Park*, 180 Mich App 545, 552; 448 NW2d 352 (1989). The court must give the benefit of any reasonable doubt to the nonmoving party and must draw any reasonable inferences in favor of that party. *Id.*

First, regarding the arrest in this case, plaintiff argues that the lower court should not have granted summary disposition to defendant officers who arrested her because no probable cause existed to make the arrest. We disagree. When the facts are not in dispute, the existence of probable cause is a legal question we review de novo on appeal. *Matthews v Blue Cross and Blue Shield of Michigan*, 456 Mich 365, 377; 572 NW2d 603 (1998). Probable cause to arrest without a warrant exists when the known facts and circumstances within the officer's knowledge at the time of the arrest are sufficient to a prudent person, or one of reasonable caution, to believe that the suspect has committed a crime or is committing a crime. *Tope v Howe*, 179 Mich App 91, 102; 445 NW2d 452 (1989).

Here, the facts and circumstances within the arresting defendants' knowledge included the fact of the prison break, the eyewitness' testimony and opinion that plaintiff was an accomplice in the prison escape, and the direct observation that plaintiff's car did not stop when the police came up behind it but continued on to a site where the driver fled. We find that these facts established a substantial basis for a prudent person to believe that plaintiff had committed a crime. Therefore, we hold that the lower court properly granted these officers summary disposition pursuant to MCR 2.116(C)(10) because they were entitled to judgment as a matter of law.

Second, regarding her assault and battery claim, plaintiff argues that the lower court should not have granted summary disposition to defendant officers who arrested her because a genuine issue of fact remained for the trier of fact to resolve. We disagree. An assault is defined as "any intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact." *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991). A battery is "the willful and harmful or offensive touching of another person which results from an act intended to cause such a contact." *Id.*

It appears that plaintiff's specific claim on appeal is the touching that occurred during her arrest and detention, namely, being forced to lie on the ground handcuffed and being placed in the officer's

vehicle for transport. However, a police officer may use reasonable force when making an arrest. *Young v Barker,* 158 Mich App 709, 723; 405 NW2d 395 (1987); *Brewer v Perrin*, 132 Mich App 520, 528; 349 NW2d 198 (1984). The measure of necessary force is that which an ordinarily prudent and intelligent person, with the knowledge of the arresting officer, would have deemed necessary in that situation. *Brewer, supra* at 528. The use of handcuffs alone does not constitute unreasonable force. *People v Zuccarini*, 172 Mich App 11, 14; 431 NW2d 446 (1988); *Brewer, supra* at 528.

Here, defendants believed that they were chasing a car in which armed prison escapees and an alleged accomplice were riding. Moreover, defendants had observed one suspect fleeing and plaintiff possibly attempting to flee. After giving plaintiff the benefit of any reasonable doubt and drawing any reasonable inferences in her favor, *Markis, supra* at 552, we find that handcuffing plaintiff, forcing her to lie on the ground, and placing her in a police vehicle constituted reasonable and necessary force under these circumstances. Therefore, we hold that the lower court properly granted these officers summary disposition pursuant to MCR 2.116(C)(10) because they were entitled to judgment as a matter of law.

Third, regarding her detention, plaintiff argues that the lower court should not have granted Lieutenant Richardson summary disposition because Lieutenant Richardson detained her for an unreasonable length of time. We disagree. Plaintiff correctly asserts that even where a judicial determination of probable cause is held within forty-eight hours, a plaintiff arrested without a warrant has an opportunity to prove that the determination was unreasonably delayed. *Riverside v McLaughlin*, 500 US 44; 111 S Ct 1661; 114 L Ed 2d 49 (1991). Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the plaintiff, or a delay merely for delay's sake. *Id.* at 500 US 56. See also *People v McCray*, 210 Mich App 9, 12; 533 NW2d 359 (1995) (stating that a delay is unreasonable where its purpose is to extract incriminating evidence). Here, plaintiff asserts that the purpose of the delay in this case was to elicit an incriminating statement from her. Plaintiff culls several excerpts of testimony from the deposition of Lieutenant Richardson that purportedly show the unreasonable length of her detention because Lieutenant Richardson detained her without investigating her claims of innocence, without following up on leads, and without ordering a polygraph exam earlier in her detainment.

In evaluating whether the delay in a particular case is unreasonable, "courts must allow a substantial degree of flexibility." *Riverside, supra* at 500 US 56. After giving plaintiff the benefit of any reasonable doubt and drawing any reasonable inferences in favor of her, *Markis, supra* at 552, we are not persuaded by plaintiff's assertion that the duration of her detention was unreasonable. Lieutenant Richardson's testimony as a whole reveals only that plaintiff was detained for approximately thirty-eight hours because there were difficulties in obtaining a polygraph examiner on short notice and because the investigation was so widespread that Lieutenant Richardson was unable to fully assess plaintiff's involvement in the prison escape until late Monday evening. See, e.g., *id.* at 56-57 ("Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.").

Nor do we find that plaintiff's claims of innocence required her earlier release. See *Baker v McCollan*, 443 US 137, 146; 99 S Ct 2689; 61 L Ed 2d 433 (1979) (rejecting the plaintiff's argument that officers must investigate every claim of innocence or mistaken identity and instead

finding that an officer is not required to perform an error-free investigation). See, e.g., *Young, supra* at 719 ("We find no negligence in the fact that the troopers did not know what to believe when plaintiff presented no proof about her identity except her word."). Indeed, although plaintiff proclaimed her innocence, her other statements did not immediately dispel the suspicions Lieutenant Richardson had about her role in the prison escape. Therefore, we find that the length of plaintiff's detention was reasonable. Accordingly, we hold that the lower court properly granted Lieutenant Richardson summary disposition pursuant to MCR 2.116(C)(10).

B

We next address plaintiff's two challenges to the lower court's grant of summary disposition to the city pursuant to MCR 2.116(C)(7). Summary disposition is proper under MCR 2.116(C)(7) for a claim that is barred because of immunity granted by law. *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997). A plaintiff may allege the tort liability of a governmental agency on either of two distinct theories. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 621; 363 NW2d 641 (1984). First, a plaintiff may allege that the agency is vicariously liable for the torts of its officers, employees and agents; however, a governmental agency can be held vicariously liable only when its officer, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity which is nongovernmental or proprietary. *Id.* at 621, 625. Second, a plaintiff may also allege that the agency itself acted, or failed to act, in a tortious manner; however, an agency will only be held directly liable for its torts if the activity in which it was engaged constituted a nongovernmental or proprietary function, or fell within the statutory highway, motor vehicle, or public building exceptions. *Id.* at 621. Thus, to survive a motion for summary disposition brought under MCR 2.116(C)(7), a plaintiff proceeding under either theory of liability must allege facts warranting the application of an exception to governmental immunity. *Smith*, *supra* at 616.

First, plaintiff argues that the lower court should not have granted the city summary disposition because the city is vicariously liable for the gross negligence of Lieutenant Richardson, the officer in charge of the investigation who detained plaintiff.[5] However, by failing to show that her detention was unreasonably long, plaintiff necessarily fails to establish any wrongful conduct for which the city would be vicariously liable. Moreover, even assuming arguendo that the alleged gross negligence occurred, it occurred while the officers were engaged in activities related to the operation of the city's police force, which is a governmental function. MCL 117.34; MSA 5.2114; *Isabella Co v Michigan*, 181 Mich App 99, 105; 449 NW2d 111 (1989). "There are few functions more clearly governmental in nature than the arrest, detention, and prosecution of persons suspected of having committed a crime and the decisions involved in determining which suspects should be prosecuted and which should be released." *Payton v Detroit*, 211 Mich App 375, 392; 536 NW2d 233 (1995). Therefore, the lower court properly granted the city summary disposition pursuant to MCR 2.116(C)(7) because plaintiff has not alleged facts warranting the application of an exception to governmental immunity. See, e.g., *Sherbutte v Marine City*, 374 Mich 48, 50; 130 NW2d 920 (1964).

Second, plaintiff argues that the lower court should not have granted the city summary disposition because the city itself is liable for its gross negligence in failing to train, evaluate, and review the performance of its police officers and in failing to have detainment policies and procedures in place.

We disagree. We initially note that this Court has previously declined to extend the gross negligence exception to a governmental agency such as the city. *Gracey v Wayne Co Clerk*, 213 Mich App 412, 420; 540 NW2d 710 (1995), abrogated on other gds, *American Transmissions, Inc v Attorney General*, 454 Mich 135; 560 NW2d 50 (1997). However, even assuming arguendo that plaintiff's assertion is otherwise meritorious,[6] the city is immune from liability on this charge because protecting the safety of the city's citizens by hiring and training police officers is a governmental function, *White v Vassar*, 157 Mich App 282, 286; 403 NW2d 124 (1987), as is the responsibility of preserving the public peace and order, preventing crime, and protecting the rights of persons, *Ross, supra* at 661. Accordingly, we hold that the lower court properly granted the city summary disposition pursuant to MCR 2.116(C)(7) because plaintiff has not alleged facts warranting the application of an exception to governmental immunity.

Affirmed.

/s/ Stephen J. Markman
/s/ Henry William Saad
/s/ Joel P. Hoekstra

[1] The complaint alleged that while plaintiff Geraldine Artley was in prison, her children, the remaining plaintiffs, were removed from her home and taken to foster care facilities. However, because defendant does not refer to the children's claims in the issues on appeal, we hereinafter refer only to Geraldine Artley when using the term "plaintiff" in the singular.

[2] The parties stipulated below to dismissing the Detroit Police Chief and the Detroit Police Department as defendants in this case.

[3] The parties previously stipulated to dismissing a fourth count concerning plaintiff's allegation that defendant city was liable for the officers' conduct pursuant to the doctrine of respondeat superior. Additionally, on appeal to this Court, the parties stipulated to dismissing the third count of plaintiffs' complaint, which was that defendants deprived plaintiff of her state constitutional rights. 1963 Const, Art 1, §§ 2, 11, 17.

[4] In pertinent part, MCL 691.1407; MSA 3.996(107) states the following:

> (1) Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.
>
> (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 shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while in the course of employment or service or 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. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

[5] Plaintiff does not appear to argue that the city is vicariously liable for the alleged assault and battery by defendant officers, only that defendant city is vicariously liable for Lieutenant Richardson's gross negligence in detaining plaintiff. In any event, because vicarious liability is derivative in nature and we find that plaintiff's claim of assault and battery is without merit, it is unnecessary to engage in the immunity analysis.

[6] Plaintiff's assertion that the city lacked detainment policies and procedures is belied by the deposition testimony of some defendants and by exhibit, which both reference the detainment policies and procedures in place. Indeed, plaintiff's counsel stated at the first hearing on defendants' motions that the city subscribes to the "*Riverside* policy."