

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD RAY STEWART,

Plaintiff- Appellant,

v

CRAIG HAAN, CITY OF PLYMOUTH, WAYNE
CARROLL, STEVEN F. HUNDERSMARCK,
KEVIN CHUMNEY, R.A. BIANCHI, JOSEPH M.
KAHANES, OFFICER BULTMAN, OFFICER
OCHEL and THOMAS BOWLING,

Defendants- Appellees.

UNPUBLISHED
September 25, 1998

No. 201250
Wayne Circuit Court
LC No. 95-525043 NZ

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

PER CURIAM.

Plaintiff appeals as of right from an order dismissing all defendants. We affirm.

I
Facts and Proceedings

Plaintiff sued defendant Haan, his former neighbor, and the remaining individual defendants (“the officers”), all of whom are police officers employed by defendant City of Plymouth (“the City”), arising out of three incidents in which plaintiff was arrested and imprisoned following an apparent domestic dispute with his girlfriend, Toni Marie Kindle. Plaintiff later voluntarily dismissed Haan. The remaining defendants moved for summary disposition under MCR 2.116(C)(7), (C)(8) and (C)(10), arguing that plaintiff’s claims were barred by governmental immunity, and that plaintiff failed to create a genuine issue of material fact with respect to his claims of assault and battery, false arrest, false imprisonment, malicious prosecution, abuse of process and violation of constitutional rights.¹ The trial court granted summary disposition based on governmental immunity, and plaintiff appeals.

II Government Immunity for the Municipality

Michigan's governmental immunity statute bars tort liability against government agencies. MCL 691.1407(1); MSA 3.996.107(1). It is well established that there is no governmental immunity exception for intentional tort claims against government agencies. *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987); *Sudul v Hamtramck*, 221 Mich App 455, 482; 562 NW2d 478 (1997) (concurring/dissenting opinion by Judge Murphy). The trial court properly granted summary disposition to the city on the common law intentional tort claims.

III Claims Against the Individual Officers

The officers moved for summary disposition under both MCR 2.116(C)(7) (governmental immunity) and (C)(10) (no genuine issue of material fact). The trial court granted the motion pursuant to (C)(7).

The law of governmental immunity and alleged intentional torts by government agents is beset by confusion.² Rather than attempt to unravel this tangle, we will affirm on the alternate ground that the officers were entitled to summary disposition under (C)(10).

We review a motion for summary disposition de novo. *Hall v Hackley Hospital*, 210 Mich App 48, 53; 532 NW2d 893 (1995). A motion under MCR 2.116(C)(10) is granted "when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* This Court must consider the pleadings, affidavits, deposition, admissions, and documentary evidence in the light most favorable to the nonmoving party. *Id.*

Plaintiff's assault and battery claim must fail because he has failed to adduce evidence that any of the officers made an unlawful offer of corporal injury to plaintiff, or that they engaged in a harmful or offensive touching of plaintiff's person. *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991). Even if the officers used force when arresting him, plaintiff has presented no facts to indicate that the officers used more force than was reasonably necessary to effect a lawful arrest. *Young v Barker*, 158 Mich App 709, 723; 405 NW2d 395 (1987).

Plaintiff also failed to establish a material factual dispute regarding his false arrest and imprisonment claims because the undisputed facts establish that plaintiff's arrests were legal and based on probable cause. *Young, supra*, 158 Mich App 720. On each occasion, the officers had reason to believe that plaintiff had assaulted Kindle and/or that he had violated a condition of his bond by contacting Kindle. The officers' entry into plaintiff's residence without a warrant was not illegal because they had reason to fear for Kindle's safety on each occasion. See *People v Cartwright*, 454 Mich 550, 559; 563 NW2d 208 (1997). Further, the false imprisonment claim is not supported by the stalking charges because there is no evidence that any officers knowingly misrepresented facts to the prosecutor regarding the stalking charges filed against plaintiff.

Next, plaintiff's malicious prosecution claim must fail. There is no evidence that any officers knowingly swore to false facts in the aggravated stalking complaint filed against plaintiff. *Payton v Detroit*, 211 Mich App 375, 395; 536 NW2d 233 (1995). The mere fact that plaintiff or Kindle may have told certain purported facts to Officer Carroll, who signed the complaint, does not establish that Carroll did not have a valid reason to believe something other than what plaintiff or Kindle told him. There is no indication that Carroll failed to make a full and fair disclosure of the facts to the prosecutor. *Id.*

Plaintiff's abuse of process claim must fail because plaintiff has failed to adduce evidence of an ulterior purpose and act in the use of process that is improper in the regular prosecution of the proceeding. *Young, supra*, 158 Mich App 721. Plaintiff has also failed to identify an act which corroborates the ulterior motive. *Id.* There is no evidence that any of the officers had an ulterior purpose with respect to the filing of the aggravated stalking charges.

IV Constitutional Rights Violation Claim

Finally, plaintiff's claim for violation of constitutional rights must fail because he has failed to present facts to establish that his constitutional rights were violated by virtue of a municipal custom or policy. *Johnson v Wayne County*, 213 Mich App 143, 150; 540 NW2d 66 (1995).

Affirmed.

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

¹ Although plaintiff also alleged a conspiracy cause of action, that claim has been abandoned on appeal.

² The governmental immunity statute provides an exception for gross negligence. MCL 691.1407(2); MSA 3996(107)(2). The statute also contains the cryptic provision that "[s]ubsection (2) shall not be construed as altering the law of intentional torts as it existed before July 7, 1986." MCL 691.1407(3); MSA 3996(107)(3). Researching the interplay between these two provisions, we encountered two seemingly contradictory authorities on immunity for officers charged with intentional torts. *Bell v Fox*, 206 Mich App 522; 522 NW2d 869 (1994), held that officers sued for false arrest were entitled to immunity because they had acted within the scope of their authority (implicitly referring to Subsection [2]) and stated that "contrary to plaintiff's argument, there is no intentional tort exception to the doctrine of governmental immunity." *Id.* at 525. In contrast, in *Sudul v Hamtramck*, 221 Mich App 455, 482; 562 NW2d 478 (1997), this Court held that "an individual employee's intentional torts are not shielded by our governmental statute, a proposition that too frequently is mired in confusion." *Id.* at 458. The *Sudul* Court held that allegations of intentional tort should be evaluated according to pre-1986 common law, i.e., the three-pronged governmental immunity test set forth in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 633-634; 363 NW2d 641 (1984). Because we affirm under MCR

2.116(C)(10), it is unnecessary to divine Michigan law on this point. In any event, we note that the officers would be entitled to summary disposition under either test, as they acted in good faith, within the scope of their authority.

Furthermore, we believe the nomenclature of “intentional tort” is hardly helpful in the context of arrests by police officers. The officer’s *conduct* in effecting the arrest is, per se, intentional; the real inquiry is whether he has *the right* to engage in that conduct. In this category of case the critical issue is the officer’s *good faith/reasonable belief* that he is properly discharging his duty, not whether the conduct in question is “intentional”. The term “intentional” is relevant only as to whether the officer intended to violate the plaintiff’s rights.