

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN LEWKOWICZ,

Plaintiff-Appellant/Cross-Appellee,

v

DARYL POE, JOHN LEACHER, RAYMOND
WHEELER and DONALD SMITH,

Defendants-Appellees/Cross-
Appellants.

UNPUBLISHED

May 15, 2001

No. 216307

Wayne Circuit Court

LC No. 97-735453-NO

Before: Zahra, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's orders granting summary disposition for defendants on plaintiff's claims of gross negligence arising from plaintiff's arrest, denying plaintiff's motion for reconsideration, and denying plaintiff's motion to "correct" his complaint. We affirm.

Plaintiff was a member of a civic group called RECAP, Romulus Environmentalists Care About People, and attended a Romulus City Council meeting on November 6, 1995, to voice opposition to proposed development of a deep injection well in the city.¹ Defendant Daryl Poe was the Chief of Police for the City of Romulus and was in attendance at the city council meeting at the request of the mayor. Defendants John Leacher and Donald Smith were police officers for the City of Romulus. Defendant Raymond Wheeler was a custodian employed by the city.

It is undisputed that plaintiff became upset when he discovered that the city council meeting was not being broadcast on Romulus' local government access cable channel. Plaintiff entered the cable TV control room, which was located in the same building and questioned the cable coordinator as to why the meeting was not being broadcast. Chief Poe was requested to intervene when plaintiff repeatedly refused to leave the control room. Wheeler assisted Chief Poe in escorting plaintiff out of the room. Thereafter, a violent struggle ensued. The struggle

¹ Apparently, an injection well would enable hazardous waste to be injected several thousand feet underground.

ended with plaintiff being handcuffed and carried from the building. As a result of that incident, plaintiff was eventually convicted of attempted resisting and obstructing a police officer, MCL 750.479; MSA 28.747, MCL 750.92; MSA 28.287. Thereafter, plaintiff filed the present lawsuit, alleging the defendants acted with gross negligence during the incident. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). The trial court granted that motion. The court denied plaintiff's subsequent motion for reconsideration and motion to "correct" his complaint. This appeal ensued.

I

Plaintiff first argues that the trial court erred in granting summary disposition for Chief Poe based on the court's determination that Poe was entitled to absolute immunity from tort liability. We disagree.

The applicability of governmental immunity is a question of law, which we review de novo. *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000). Likewise, we review a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(7) based on governmental immunity may be supported by affidavits, depositions, admissions or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The court must consider such material if it is submitted, MCR 2.116(G)(5), and the party opposing the motion may not rest upon his pleadings alone, MCR 2.116(G)(4); *Patterson*, *supra* at 432, 434 n 6. We review the record in the same manner as the trial court to determine whether the movants were entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

The highest executive officials of all levels of government, including a chief of police, are absolutely immune from tort liability when acting within their executive authority. MCL 691.1407(5); MSA 3.996(107)(5); *American Transmission, Inc v Attorney General*, 454 Mich 135, 144; 560 NW2d 50 (1997); *Payton v Detroit*, 211 Mich App 375, 394; 536 NW2d 233 (1995); *Meadows v Detroit*, 164 Mich App 418, 426-427; 418 NW2d 100 (1987). Whether an official acted within his authority depends upon the nature of the specific acts alleged, the position held by the official, the laws defining the official's authority, and the structure and allocation of powers in that level of government. *American Transmission*, *supra* at 141, quoting *Marrocco v Randlett*, 431 Mich 700, 711; 433 NW2d 68 (1988).

Here, plaintiff asserts that Chief Poe was acting as an ordinary police officer during plaintiff's arrest, not in his executive capacity as chief of police. As such, plaintiff contends, Poe is not entitled to absolute immunity under MCL 691.1407(5); MSA 3.996(107)(5). Police officers have authority to "pursue, arrest and detain" persons suspected of committing crimes. MCL 117.34; MSA 5.2114. Notwithstanding a police chief's executive position within a city's police department, a police chief is a police officer and, therefore, possesses the authority to pursue, arrest and detain persons suspected of committing crimes. We hold that a police chief's "executive authority" includes his duties as a high ranking executive as well as his ordinary duties as a police officer. See *American Transmission*, *supra*. By all indications, Chief Poe was directed by the city's mayor to attend the city council meeting in his official capacity as police chief. Chief Poe acted within the authority granted him by law as a police officer when he

arrested and detained plaintiff, and was entitled to absolute immunity under MCL 691.1407(5); MSA 3.996(107)(5) by virtue of his status as the highest law enforcement official for the City of Romulus. *Id.*; *American Transmissions, supra*; *Payton, supra*. Accordingly, the trial court properly granted summary disposition for Chief Poe. MCR 2.116(G)(4); *Patterson, supra*.²

II

Plaintiff next argues that the trial court should have determined that all defendants, particularly Officers Leacher and Smith, were equally liable because they acted jointly in a wrongful assault and battery upon plaintiff. We disagree.

Plaintiff, as the party opposing defendants' motion for summary disposition under MCR 2.116(C)(7) and (10), had the burden of showing by evidentiary materials that a genuine issue of disputed fact existed. Plaintiff could not rest upon mere allegations or the promise to subsequently offer factual support. MCR 2.116(G)(4), *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Despite that burden, plaintiff failed to submit documentary evidence to show there was a genuine issue for trial in regard to whether defendants were grossly negligent. While plaintiff set forth portions of the criminal trial record to support his motion for *reconsideration* as to Officers Leacher and Smith, that documentary evidence was in support of a legal theory that was not previously presented by plaintiff, was not specifically pleaded in his complaint, and which was significantly different from the position plaintiff held at the time of the hearing on the motion for summary disposition. Plaintiff does not argue that the evidence and his theory of liability based on a "common venture" could not have been presented to the trial court before its original order of dismissal. Under these circumstances, the trial court properly dismissed plaintiff's claims against Officers Leacher and Smith, and acted within its discretion in denying plaintiff's motion for reconsideration as to these defendants. See *Churchman, supra*; *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 709-710; 609 NW2d 607 (2000), *Brown v Libbey-Owens-Ford Co*, 166 Mich App 213, 217; 420 NW2d 106 (1987), and *Charbeneau v Wayne Co General Hospital*, 158 Mich App 730, 733; 405 NW2d 151 (1987).

III

To the extent that plaintiff claimed below that any of the defendants committed an assault and battery by gross negligence against plaintiff, the trial court correctly dismissed the claim pursuant to MCR 2.116(C)(8). There is no tort of "assault and battery by gross negligence." *Sudul v Hamtramck*, 221 Mich App 455, 458; 562 NW2d 478 (1997).

² The trial court also did not abuse its discretion in denying plaintiff's motion for reconsideration with respect to Chief Poe where plaintiff merely presented the same issues regarding Chief Poe that were previously ruled on by the trial court. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). Plaintiff did not demonstrate that the court committed a palpable error in granting summary disposition on plaintiff's claims as to this defendant. MCR 2.119(F)(3).

Also, to the extent that plaintiff argued below or on appeal that there was not probable cause to arrest him, giving rise to purportedly viable claims of false arrest and imprisonment, plaintiff's arguments lack merit. Plaintiff's contention that probable cause for his arrest was lacking is a collateral claim that should have been raised before or during his criminal trial. *People v Sparks*, 53 Mich App 452, 454-456; 220 NW2d 153 (1974); see generally, *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 381-382; 572 NW2d 603 (1998). Plaintiff's conviction is conclusive evidence of probable cause.³ *Blase v Appicelli*, 195 Mich App 174, 178; 489 NW2d 129 (1992).

IV

Finally, plaintiff argues that the trial court erred in denying his "motion to correct complaint." In that motion, plaintiff, in essence, asked the trial court to amend his initial complaint by re-designating Count I as Count II. We hold that the trial court did not abuse its discretion in denying plaintiff's motion to "correct" his complaint.

This Court will not reverse a trial court's decision regarding leave to amend unless it constituted an abuse of discretion which resulted in injustice. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Ordinarily, a court should freely grant leave to amend a complaint when justice so requires. MCR 2.118(A)(2); *Weymers, supra* at 658. However, leave to amend may be denied for a particularized reason, such as futility of the amendment. *Id.* An amendment to a complaint is futile if it merely restates the allegations already made. *Lane v Kindercare Learning Centers, Inc.*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

Each statement of a claim in a complaint must be stated in a separately numbered count. MCR 2.113(E)(3). Gross negligence was the only properly numbered count contained in plaintiff's complaint. In both the original complaint and the proposed "corrected" complaint, plaintiff had no numbered count designated for an assault and battery claim. The court specifically and correctly informed plaintiff that his complaint was deficient in that it did not follow the correct form of pleading and it did not clearly state the specific claims that were being made against each defendant. The court's decision concerning the meaning and scope of pleadings fell within its sound discretion. *Dacon v Transue*, 441 Mich 315, 328-329; 490 NW2d 369 (1992). We agree with the trial court that there was no properly pleaded claim of assault and battery set forth in plaintiff's complaint, as originally submitted or as "corrected."

Moreover, where plaintiff ignored the court's instructions to file an amended complaint to correctly set forth the specific claims he was making against each defendant, it cannot be said that the court's refusal to accept the "corrected" complaint resulted in injustice to plaintiff, *Weymers, supra* at 654, or that the court's decision was "'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Dacon, supra* at 329, quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). The

³ We note that plaintiff has not appealed his criminal conviction to this Court, and has not demonstrated that the conviction was procured by fraud or unfair means.

allegations in plaintiff's "corrected" complaint merely restated the deficient allegations already made and, as such, the "correction" to the complaint was futile and the motion to correct the complaint properly denied. *Lane, supra* at 697-698.

Affirmed.

/s/ Brian K. Zahra

/s/ Michael R. Smolenski

/s/ Hilda R. Gage