STATE OF MICHIGAN

COURT OF APPEALS

DHIA GULLY,

Plaintiff-Appellant,

v

CITY OF SOUTHFIELD, OFFICER LAWRENCE PORTER, OFFICER MARK WOOD, and OFFICER TRACY KRETTLIN,

Defendants-Appellees.

UNPUBLISHED
November 13, 2001

No. 223080
Oakland Circuit Court
LC No. 98-009027-NO

Before: Hoekstra, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Plaintiff brought this action alleging violation of 42 USC 1983, violation of the Michigan Constitution, assault and battery, and gross negligence, after one of the defendant officers allegedly injured him during an altercation surrounding plaintiff's son's arrest. The trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) and (10), on the basis of governmental immunity. Plaintiff appeals as of right. We affirm.

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Romska v Opper*, 234 Mich App 512, 515; 594 NW2d 853 (1999). Likewise, we review de novo the applicability of governmental immunity, which is a question of law. *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

> 'Summary disposition is proper under MCR 2.116(C)(7) for a claim that is barred because of immunity granted by law.' When reviewing a grant of summary disposition based on governmental immunity, this Court considers all documentary evidence submitted by the parties. 'All well-pleaded allegations are accepted as true and construed in favor of the nonmoving party.' To survive a motion for summary disposition under MCR 2.116(C)(7), the plaintiff must allege facts warranting application of an exception to governmental immunity.
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> A motion for summary disposition brought under MCR 2.116(C)(10), based on the lack of a genuine issue of material fact, tests whether there is factual support for the claim. In ruling on the motion, the trial court must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties. The opposing party must show that a genuine issue of material fact exists. The opposing party may not rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing the existence of a genuine issue for trial. If the opposing party fails to make such a showing, summary disposition is appropriate. [*Dampier v Wayne Co,* 233 Mich App 714, 720-722; 592 NW2d 809 (1999) (citations omitted).]

In deciding a motion under MCR 2.116(C)(10), the trial court must consider the evidence submitted in the light most favorable to the nonmoving party and determine whether there is a genuine issue of material fact. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The trial court is not permitted to make factual findings or weigh the credibility of the evidence presented. *Lytle v Malady (On Rehearing),* 458 Mich 153, 176; 579 NW2d 906 (1998). "However, if, on the basis of the evidence presented, reasonable minds could not differ, then the motion for summary disposition should be granted." *Jackson v Saginaw County*, 458 Mich 141, 146-147; 580 NW2d 870 (1998), quoting *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992).

Plaintiff argues that the trial court erred in granting summary disposition to Officer Wood on the assault and battery claim, on the gross negligence claim, and on the excessive force under the Fourth Amendment claim. We disagree. We first address these three theories of liability and then apply them to the present case.

Although governmental employees are not immune from liability for intentional torts such as assault and battery, *Sudul v City of Hamtramck,* 221 Mich App 455, 458; 562 NW2d 478 (1997), governmental actions that would normally constitute intentional torts are protected by governmental immunity if those actions are justified. *Brewer v Perrin*, 132 Mich App 520, 528; 349 NW2d 198 (1984). "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 defined as "the wilful and harmful or offensive touching of another person which results from an act intended to cause such contact." *Id.* In Michigan, an arresting officer may use such force as is reasonably necessary to effect a lawful arrest. *Young v Barker,* 158 Mich App 709, 723; 405 NW2d 395 (1987); *Brewer, supra* at 528. "[T]he measure of necessary force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary." *Brewer*, *supra*, quoting *Barrett v United States*, 62 US App DC 25, 26; 64 F2d 148, 149 (1933). This Court has also recognized that "[w]hether officers hypothetically could have used less painful, less injurious, or more effective force in executing an arrest is simply not the issue." *People v Hanna,* 223 Mich App 466, 474; 567 NW2d 12 (1997), quoting *Forrester v San Diego*, 25 F3d 804, 807-808 (CA 9, 1994).

An exception to the broad immunity granted by the governmental tort liability act, MCL 691.1401 *et seq.*, is if the governmental employee was grossly negligent. Gross negligence means "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); *Jackson, supra* at 147-152.

A claim that a police officer used excessive force in making an arrest is analyzed under the Fourth Amendment's "objective reasonableness" standard. G*raham v Connor*, 490 US 386, 395-397; 109 S Ct 1865; 104 L Ed 2d 443 (1989). The inquiry is whether the officer's actions were 'objectively reasonable' in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation. *Id.* at 397.

> The "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. . . . 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. [*Id*. at 396-397 (citations omitted).]

Here, although conflicting deposition testimony was presented concerning the circumstances surrounding the arrest of plaintiff's son, viewing the evidence in the light most favorable to plaintiff the evidence does not support a conclusion that Officer Wood used more force than was "reasonably necessary" to effect a lawful arrest. Plaintiff testified that as the officers were handcuffing his son, he took one step closer to one of the officers with open hands held up at about stomach-level and asked the officer why he was doing that to his son. Plaintiff claimed that the officer then "held my arm, twisted it behind my back, and tried to throw me on the concrete." This alleged encounter occurred during a highly charged incident where family members were siding with the person that the officers were attempting to arrest. The alleged actions taken here to accomplish the arrest do not rise to the level of unnecessary force to destroy the protection of governmental immunity, or to constitute gross negligence or excessive force. Without the benefit of hindsight and in light of the facts and circumstances confronting Officer Wood, his actions were objectively reasonable. At most, the alleged actions of Officer Wood involved poor judgment. Even accepting plaintiff's version of what happened when defendant police officers were in the process of arresting his son, reasonable minds could not differ regarding whether Officer Wood's actions rose to the level of unjustified acts, gross negligence, and excessive force. See *Jackson, supra*; *Vermilya, supra*. Because the actions of Officer Wood do not rise to an actionable claim, the trial court did not err in granting summary disposition to Officer Wood.

Plaintiff further argues that the trial court erred in granting summary disposition in favor of Officers Porter and Krettlin on the gross negligence count. Plaintiff contends that summary disposition was improper because the officers failed to separate the family members when plaintiff's son was going to be arrested in order to prevent inflaming the situation, even though they expected the son to be violent, thereby showing a reckless lack of concern as to whether injury would occur to the bystanders. We disagree. The evidence did not establish a question of

fact with regard to whether Officers Porter and Krettlin were so reckless as to demonstrate a substantial lack of concern for whether an injury results. There was testimony that, in domestic violence situations, the officers are trained to separate the involved parties so they cannot inflame each other further. The reason for separating the family members is for the safety of the officers, *not* the bystanders. Officer Wood testified that they took plaintiff's son off the porch to get him away from where the conflict was developing. There was testimony that, as Officers Krettlin and Wood were handcuffing plaintiff's son, Officer Porter stepped in between them and the advancing household members and told them to stay back. The testimony also indicated that the officers immediately left the scene because they wanted to get away from the hostile occupants of the house. Plaintiff did not introduce any contrary evidence. Accordingly, the trial court did not err in granting summary disposition to defendants Porter and Krettlin on the gross negligence count.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Brian K. Zahra