

STATE OF MICHIGAN
COURT OF APPEALS

MAURICE DARDEN,

Plaintiff-Appellant,

v

CITY OF ANN ARBOR, OFFICER KEVIN
HARDING, and OFFICER PAUL CURTIS,

Defendants-Appellees.

UNPUBLISHED

March 15, 2002

No. 227063

Washtenaw Circuit Court

LC No. 99-010511-CZ

Before: Sawyer, P.J., and Murphy and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's judgment granting defendants' motion for summary disposition. We affirm.

This civil action arises out of plaintiff's arrest for failing to identify himself in violation of Ann Arbor Ordinance 9:62(28), and hindering and opposing a police officer in violation of Ann Arbor Ordinance 9:62(16). Plaintiff's appeal focuses on the constitutionality of Ann Arbor Ordinance 9:62(28). In his complaint, plaintiff sought money damages on the basis that the ordinance violated his right to be free from unreasonable searches and seizures and his right to due process of law under the Michigan Constitution. Const 1963, art 1, §§ 11, 17. Plaintiff also sought money damages based on assault and battery, false arrest, false imprisonment, and malicious prosecution.

We find it unnecessary to address plaintiff's constitutional challenge to the ordinance, because, regardless of the constitutionality of the ordinance, defendants are shielded by governmental immunity, except for the tort claims against the individual defendants, which were also properly dismissed for reasons stated *infra*.

An order granting summary disposition under MCR 2.116(C)(7) on the basis of governmental immunity is reviewed *de novo* on appeal, giving consideration to affidavits, depositions, admissions, and other documentary evidence filed by the parties, to determine whether they indicate that the defendant is in fact entitled to immunity. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82-83; 635 NW2d 323 (2001). The contents of the complaint are accepted as true unless they are contradicted by documentation. *Id.* at 82.

In *Jones v Powell*, 462 Mich 329, 335; 612 NW2d 423 (2000), our Supreme Court held that there is no “damage remedy for a violation of the Michigan Constitution in an action against a **municipality or an individual government employee.**” Emphasis added. The *Jones* Court explained as follows:

Smith [v Dep’t of Public Health, 428 Mich 540; 410 NW2d 749 (1987), *aff’d* sub nom *Will v Dep’t of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989)] only recognized a narrow remedy against the state on the basis of the unavailability of any other remedy. Those concerns are inapplicable in actions against a municipality or an individual defendant. Unlike states and state officials sued in an official capacity, municipalities are not protected by the Eleventh Amendment. [*Lake Country Estates, Inc v Tahoe Regional Planning Agency*, 440 US 391, 400-401; 99 S Ct 1171; 59 L Ed 2d 401 (1979)]. A plaintiff may sue a municipality in federal or state court under 42 USC 1983 to redress a violation of a federal constitutional right. . . . Further, a plaintiff may bring an action against an individual defendant under § 1983 and common-law tort remedies.

Here, plaintiff sought damages for an alleged violation of the Michigan Constitution by a municipality and employees of the municipality, and plaintiff’s complaint does not allege a cause of action under § 1983. Therefore, pursuant to the holding in *Jones*, plaintiff’s constitutional damage claim is barred and cannot be maintained against any of the defendants.¹ We affirm the trial court’s dismissal of plaintiff’s constitutional claim, albeit on different grounds. *Griffey v Prestige Stamping, Inc*, 189 Mich App 665, 669; 473 NW2d 790 (1991).

We now turn to plaintiff’s tort claims. As indicated in *Jones, supra* at 337, the possible action against defendant city would be through a § 1983 claim, and not a tort claim. MCL 691.1407(1) provides, in part, that “a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.” In *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 625; 363 NW2d 641 (1984), our Supreme Court, citing *Sherbutte v Marine City*, 374 Mich 48, 50; 130 NW2d 920 (1964), noted that a “city cannot be held vicariously liable for torts of its police officers committed during the course of an arrest because the officers were engaged in police activity, which is a governmental function entitled to immunity.” Additionally, this Court has stated, “even if the officers were not engaged in the exercise of a governmental function within the scope of their employment, the city is nonetheless entitled to immunity because it cannot be held liable for the intentional torts

¹ Regarding plaintiff’s claim that the ordinance violates MCL 764.15, the statute covering arrests without a warrant, we find that the ordinance does not authorize the arrest of a person for the commission of a misdemeanor outside the presence of an officer as prohibited by the statute. The probable cause provision of the ordinance only extends to the right of the officer to request identification. Once there is probable cause under the ordinance, if a suspect fails to accurately identify himself, the officer could make an arrest because the act of failing to identify oneself is a misdemeanor under the ordinance, and it necessarily would have been committed in the presence of an officer. The officer is not making a probable cause determination in order to arrest a suspect on the underlying misdemeanor. Therefore, there is no violation of MCL 764.15, and the true nature of plaintiff’s argument is that the ordinance is unconstitutional, which we decline to address for the reasons stated above.

of its employees.” *Payton v Detroit*, 211 Mich App 375, 393; 536 NW2d 233 (1995), citing *Alexander v Riccinto*, 192 Mich 65, 71-72; 481 NW2d 6 (1991). Therefore, as to the tort claims, defendant city is shielded from liability based on governmental immunity in the present case, and the trial court properly dismissed the claims.

As to the tort claims against the individual defendants, *Jones, supra* at 337, indicated that, along with a § 1983 action, a municipal employee may be subject to liability based on common-law tort theories. Pursuant to MCL 691.1407(2), a governmental employee is immune from tort liability while in the course of employment 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 . . . 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.

However, plaintiff’s tort claims qualify as intentional torts, see *Adams v National Bank of Detroit*, 444 Mich 329, 334 n 6; 508 NW2d 464 (1993), which are torts not shielded from the governmental immunity statute as to government employees. *Sudul v City of Hamtramck*, 221 Mich App 455, 458; 562 NW2d 478 (1997). The premise of plaintiff’s claims for false arrest and imprisonment, and malicious prosecution, as found in the complaint, is that the individual defendants arrested plaintiff pursuant to an unconstitutional ordinance. We hold that those claims were properly dismissed for reasons other than the trial court’s reliance on governmental immunity. *Griffey, supra* at 669. Specifically, there is no genuine issue of material fact, and the claims are subject to dismissal pursuant to MCR 2.116(C)(10).

The individual defendants were enforcing an ordinance that the parties agree, they were mandated to enforce by those in authority over them. The individual defendants reasonably believed that they were acting within the scope of their authority when they arrested plaintiff for violating the ordinance. There is no evidence suggesting that the individual defendants believed that they were enforcing an unlawful ordinance. Plaintiff argues that the police officers knew the ordinance to be unconstitutional because of previous court rulings. There is no support in the record indicating that there exists any local lower court decisions specifically finding the ordinance to be unconstitutional, nor is there any evidence that the individual defendants were aware of any “dicta” contained in a decision. To the contrary, the defendant officers submitted affidavits indicating that they had no knowledge of court rulings rejecting the ordinance.

Further, the record indicates that the individual defendants had probable cause to approach and question plaintiff based on the complainant’s statements, and the officers had probable cause to arrest plaintiff for violating the ordinance; a misdemeanor committed in their presence. This Court has stated that a police officer, acting in good faith with probable cause, is not liable for false arrest or false imprisonment even though the arrest is subsequently found to be baseless. *Blackman v Cooper*, 89 Mich App 639, 643; 280 NW2d 620 (1979). Moreover, a

claim for malicious prosecution requires a finding of malice and lack of probable cause, *Cox v Williams*, 233 Mich App 388, 391; 593 NW2d 173 (1999), and here, once again, there is no evidence suggesting that the individual defendants arrested plaintiff out of malice, but rather on a good faith belief that they were upholding the law through application of the ordinance. There is no evidence to support a claim for false arrest, false imprisonment, or malicious prosecution; therefore, summary disposition pursuant to MCR 2.116(C)(10) is appropriate.

We finally turn to the assault and battery claim, which was not based on the legality of the arrest, but on the basis that the individual defendants, in arresting plaintiff, used excessive force. The reasonableness of the 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. *Alexander, supra* at 72. Here, the overwhelming evidence indicated that plaintiff was physically and aggressively resisting arrest, and plaintiff was attempting, successfully, to incite a crowd that had gathered, which gave the officers reasonable fear that the situation may grow out of control should they not swiftly remove plaintiff from the scene. Under the circumstances, viewed from the perspective of a reasonable officer at the scene, the actions of the individual defendants, as a matter of law, was reasonable and justified, thereby justifying summary disposition pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Joel P. Hoekstra