STATE OF MICHIGAN

COURT OF APPEALS

MARY E. SLEEPER,

Plaintiff-Appellant,

v

LARRY WALKER, KENNETH CLARK, KAREN ANN LANGWORTHY, DIANA SANTHANY, and COUNTY OF TUSCOLA,

Defendants-Appellees.

UNPUBLISHED
November 18, 2008

No. 278206
Tuscola Circuit Court
LC No. 05-022790-NI

Before: Zahra, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right a final order granting summary disposition in favor of defendants Kenneth Clark and Karen Langworthy, and a prior order that granted summary disposition in favor of defendants Tuscola County, Larry Walker, and Diana Santhany. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff's first argument on appeal is that the trial court abused its discretion when it dismissed her case against Kenneth Clark and Karen Langworthy after her attorney was late returning from a lunch break during trial. We agree. We review a trial court's decision to dismiss an action for an abuse of discretion. *Donkers v Kovach*, 277 Mich App 366, 368; 745 NW2d 154 (2007).

A trial court must consider a number of factors before dismissing a case with prejudice. In *Vicencio v Ramirez*, 211 Mich App 501; 536 NW2d 280 (1995), the trial court dismissed plaintiff's action because plaintiff failed to appear at trial. This Court reversed the trial court decision, reasoning that the drastic step of dismissal is appropriate only when the trial court has considered all available options on the record. Moreover,

> [t]his court summarized some of the factors that a court should consider before imposing the sanction of dismissal: (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would

> better serve the interests of justice. [*Id*. at 507, citing *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

Further, this Court noted that our legal system favors disposition of litigation on the merits and determined that dismissal would also not have been appropriate after considering the relevant factors. *Vicencio, supra*, citing *North v Dep't of Mental Health*, 427 Mich 659, 662; 397 NW2d 793 (1986).

Unlike the trial court in *Vicencio*, the trial court here eventually did consider other sanction options available on the record. However, the trial court did not consider any of the options in deciding whether dismissal would initially be appropriate. Instead, the court reached the decision sua sponte after plaintiff's attorney had been absent for 20 minutes. There was no consideration of any of the above factors. On the contrary, when given the opportunity to discuss the reason for the dismissal with prejudice, or possible alternate sanctions, the trial court stated that the case lacked merit. We conclude that the trial court abused its discretion by failing to consider any of the factors before dismissing plaintiff's case with prejudice. Further, it is clear that the trial court's imposition of the drastic sanction of dismissal with prejudice was unreasonable. Thus, the dismissal of this case must be reversed and the matter remanded for trial as to the relevant claims against Clark and Langworthy.

Second, plaintiff argues that the summary dismissal of her civil rights claims against Larry Walker and Diana Santhany was erroneous because neither governmental nor statutory immunity were available with regard to their negligence in filing a false affidavit. We disagree. We review a trial court's decision on a motion for summary disposition de novo. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003).

A motion for summary disposition under MCR 2.116(C)(7) is appropriate when a claim is barred by immunity granted by law. MCR 2.116(C)(7). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone and should be granted if no factual development could justify recovery. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001); *Johnson v Detroit*, 457 Mich 695, 701; 579 NW2d 895 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition should be granted under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

Government officials performing discretionary functions are generally shielded from liability for mistakes with regard to the legality of their actions. *Morden v Grand Traverse Co*, 275 Mich App 325, 340; 738 NW2d 278 (2007). Qualified immunity is distinct from the merit of the underlying claim and immunity ought not to be denied because there is an issue of fact on the merits. *Id*. at 342. Moreover, "[q]ualified immunity shields an officer from suit when she makes a decision that, *even if constitutionally deficient*, reasonably misapprehends the law governing the circumstances she confronted." *Id*. at 342, quoting *Brosseau v Haugen*, 543 US 194, 198; 125 S Ct 596; 160 L Ed 2d 583 (2004) (emphasis added in *Morden*).

Here, the trial court found that defendants Walker and Santhany acted on credible information in a justifiable and reasonable manner given the situation. We agree with that

decision. Walker and Santhany acted reasonably within their government positions and based on credible information in attempting to protect plaintiff from harm. Although there may be some question regarding whether the actions could have been performed differently in hindsight, Walker and Santhany sought assistance in filling out the affidavit form and made a notation on the petition that they feared that plaintiff would be placed in danger if approached prior to hospitalization. Walker and Santhany next carried out plaintiff's detention in a reasonable manner. The trial court correctly concluded that Walker and Santhany were entitled to immunity.

Third, plaintiff argues that she had a viable civil rights claim against defendant Tuscola County for its failure to train its employees. We disagree. We review a trial court's decision on a motion for summary disposition de novo. *Collins*, *supra* at 631.

Under *City of Canton, Ohio v Harris*, 489 US 378, 388; 109 S Ct 1197; 103 L Ed 2d 412 (1989), the failure to properly train employees may be considered a "policy" for purposes of an action under 42 USC 1983 where the failure to train amounts to deliberate indifference. However, "a municipality can be liable under § 1983 only where its policies are the 'moving force [behind] the constitutional violation.'" *Id*. at 389 (citations removed). Moreover, for liability to attach, the training program must be closely related to the ultimate injury. *Id*. at 391. The relevant question is whether the injury would have been avoided had the employee been trained in the identified respect.

Plaintiff cannot establish that the training program was closely related to the ultimate injury or that the injury would have been avoided had the employee been trained differently. Here, the county and its employees, including the detective/sergeant, the patient advocate, and the prosecutor collaborated to discuss plaintiff's situation and the petition for hospitalization was signed according to the information obtained from Langworthy and Clark. The facts presented demonstrate that the city employees acted in the best interest of plaintiff in an attempt to protect her and not in an effort to deprive her of her rights. Although the involuntary commitment order policy may not be as robust as it could be, plaintiff has not shown that the failure to train was a factor in any injury that she may have received.

Finally, plaintiff argues that defendants Clark and Langworthy engaged in multiple intentional torts and should be held liable. Plaintiff has not preserved this issue for appeal as it was not raised in and decided by the trial court. See *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006). Nevertheless, it is apparent that the merits of plaintiff's claims against Clark and Langworthy are properly addressed at trial on remand and, accordingly, it would be premature and inappropriate for us to consider these claims.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter