STATE OF MICHIGAN

COURT OF APPEALS

K. J. LIM, Trustee on behalf of DAVID KATULIC and PATRICIA KATULIC,

Plaintiff-Appellee,

v

CITY OF ROCHESTER and CITY OF ROCHESTER POLICE DEPARTMENT,

Defendants,

and

DAVID ZEMENS and KENNETH BUCHAN,

Defendants-Appellants.

UNPUBLISHED
December 22, 2009

No. 289154
Oakland Circuit Court
LC No. 2008-092448-NO

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendants Zemens and Buchan[1] appeal as of right the trial court's order denying their motion for summary disposition based on governmental immunity. This action arises out of a traffic stop that led to citations being issued against Patricia Katulic and the arrest of David Katulic, both of whom were the subjects of outstanding arrest warrants. Plaintiff, the Katulics' bankruptcy trustee, alleged that the police were engaged in an improper investigation and misused the Law Enforcement Information Network (LEIN). We reverse and remand for entry of judgment in favor of defendants. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

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[1] The City of Rochester Police Department was dismissed as a defendant on the basis that it was not a proper party to the suit, and the City of Rochester was dismissed based on governmental immunity. These decisions have not been appealed. Thus, for purposes of this opinion, "defendants" will refer to Zemens and Buchan.

Plaintiff's single count complaint alleged gross negligence/invasion of privacy. The trial court ruled that plaintiff failed to plead or prove any of the requisite elements of invasion of privacy. The dismissal of the invasion of privacy claim is not the subject of a cross-appeal, nor does plaintiff argue the merits of such a claim in the response brief. The trial court proceeded to address what it viewed as a separate cause of action for gross negligence. The court found that an issue of fact existed regarding whether defendants were acting within the scope of their authority in running a large number of checks through the LEIN system. Accordingly, the trial court denied summary disposition to defendants with respect to a claim of gross negligence.

Under MCR 2.116(C)(7), summary disposition in favor of a defendant is proper when the plaintiff's claim is "barred because of . . . immunity granted by law." See *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Id.* The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Id.* This Court must consider the documentary evidence in a light most favorable to the nonmoving party. *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995). If a factual dispute exists, however, summary disposition is not appropriate. *Id.*

With respect to immunity for governmental officers or employees, MCL 691.1407(2) provides as follows:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer [or] employee . . . while in the course of employment or service . . . if all of the following are met:
>
> (a) The officer [or] employee . . . 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 [or] employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Consistent with the statutory language, in *Odom*, 482 Mich at 479-480, our Supreme Court set forth the proper analytical framework in addressing the issue of gross negligence, stating:

> To summarize and simplify the application of our decision, we provide these steps to follow when a defendant raises the affirmative defense of individual governmental immunity. The court must do the following:

> (1) Determine whether the individual is a judge, a legislator, or the highest-ranking appointed executive official at any level of government who is entitled to absolute immunity under MCL 691.1407(5).
>
> (2) If the individual is a lower-ranking governmental employee or official, determine whether the plaintiff pleaded an intentional or a negligent tort.
>
> (3) If the plaintiff pleaded a negligent tort, proceed under MCL 691.1407(2) and determine if the individual caused an injury or damage while acting in the course of employment or service or on behalf of his governmental employer and whether: [The Court proceeded to recite subsections (a)-(c) of MCL 691.1407(2) as quoted above.]

Defendants, individual police officers, were not protected by absolute immunity; rather, they are lower-ranking governmental employees. Additionally, although we agree with defendants that MCL 691.1407 does not itself create a cause of action for gross negligence, *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009), plaintiff indeed pleaded a negligent tort. And the references to "gross" negligence in the complaint were evidently plaintiff's attempt to plead in avoidance of governmental immunity.[2] Pursuant to MCL 691.1407(7)(a), "gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

We first note that, despite defendants' appellate arguments attacking any claim of gross negligence and despite the trial court's ruling that was premised solely on gross negligence, plaintiff presents no argument whatsoever in support of a claim for negligence or gross negligence, nor does plaintiff contend that the gross negligence exception to governmental immunity applies. Rather, plaintiff argues that the complaint's single count, which, again, was entitled gross negligence/invasion of privacy, suggested claims of abuse of process and intentional infliction of emotional distress. However, nowhere under this count is there any express language claiming abuse of process or intentional infliction of emotional distress. Such claims are not contained in separately numbered counts, MCR 2.113(E)(3), nor are they pled in a manner that would reasonably inform defendants that they were being called upon to defend claims of abuse of process and intentional infliction of emotional distress, MCR 2.111(B)(1). The elements of these causes of action were not pled. See *Friedman v Dozorc*, 412 Mich 1, 30; 312 NW2d 585 (1981) (abuse of process elements); *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004) (elements of intentional infliction of emotional distress). Furthermore, abuse of process and intentional infliction of emotional distress are intentional torts, and in *Odom*, 482 Mich at 480, the Supreme Court set forth the proper analysis when addressing the question whether governmental immunity protects a governmental employee from liability for an alleged intentional tort. However, plaintiff fails to address the analysis with respect to the "suggested" intentional torts, and defendants never raised the issue because they of course focused their appeal on the ruling of the trial court.

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[2] We do note that the burden falls on the governmental employee to raise and prove entitlement to immunity as an affirmative defense. *Odom*, 482 Mich at 479.

Given plaintiff's appellate arguments, she has apparently abandoned any claim or argument based on gross negligence. Nevertheless, on substantive examination of the trial court's decision to deny defendants' motion for summary disposition, we hold that the trial court erred in its ruling. Under the circumstances presented, including the undisputed facts that the Katulics were legitimately pulled over for a malfunctioning brake light, that they both had outstanding warrants, and that Mrs. Katulic was operating the vehicle on a suspended and expired license, defendants' conduct, as a matter of law, did not amount to "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). Indeed, plaintiff's case does not even appear to be one involving "negligent" acts, and the only intentional tort alleged was invasion of privacy. See *VanVorous v Burmeister*, 262 Mich App 467, 483; 687 NW2d 132 (2004) ("this Court has rejected attempts to transform claims involving elements of intentional torts into claims of gross negligence"). Furthermore, we find as a matter of law that defendants, in conducting surveillance and using the LEIN system under the circumstances presented, were acting in the course of their employment, were acting within the scope of their authority, and were engaged, on behalf of a governmental agency, in the exercise of a governmental function. MCL 691.1407(2); *Odom*, 482 Mich at 479-480; *Payton v Detroit*, 211 Mich App 375, 392; 536 NW2d 233 (1995) (general nature of an employee's activity must be considered as opposed to the specific conduct alleged to have constituted a tort, as it would be difficult to envision any tortious act that would qualify as being part of a governmental function). And, once again, plaintiff presents no argument to the contrary.

Reversed and remanded for entry of judgment in favor of defendants. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Brian K. Zahra