

STATE OF MICHIGAN
COURT OF APPEALS

LINELL DERRICKSON,

Plaintiff-Appellant,

v

DAVID STONE,

Defendant-Appellee.

UNPUBLISHED
November 9, 2010

No. 290727
Oakland Circuit Court
LC No. 2008-090673-NO

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's final judgment entered February 13, 2009. We affirm.

On July 2, 2007, plaintiff and his two friends were leaving a nightclub. Plaintiff stopped to urinate on a utility box. Defendant, a police officer, thought plaintiff was a suspect who had thrown a rock at him. When plaintiff would not respond to defendant's commands, defendant fired three pepper balls at the utility box. Defendant handcuffed plaintiff and subsequently released him when he realized that plaintiff was not the rock-throwing suspect. Plaintiff sued defendant for gross negligence and assault and battery. Defendant raised a governmental immunity defense. The circuit court granted defendant's motion for summary disposition based on governmental immunity.

Plaintiff first argues that because defendant used extreme and excessive force against him, defendant was not entitled to the governmental immunity privilege. We disagree. The applicability of governmental immunity is a question of law that is reviewed de novo on appeal. *Co Rd Ass'n of Mich v Governor*, 287 Mich App 95, 117-118; 782 NW2d 784 (2010). The circuit court relied on *Odom v Wayne Co*, 482 Mich 459, 478-479; 760 NW2d 217 (2008), which set forth the test for evaluating a claim for governmental immunity.

There is no evidence in the record that the circuit court improperly applied the test for governmental immunity under *Odom* and *Ross v Consumers Power Co*, 420 Mich 567; 363 NW2d 641 (1984). In *Odom*, 482 Mich at 478-479, our Supreme Court clarified the burden of proof for governmental immunity. The Court set forth the following steps that must be followed when a defendant raises a governmental immunity defense:

(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:

(a) the individual was acting or reasonably believed that he was acting within the scope of his authority,

(b) the governmental agency was engaged in the exercise or discharge of a governmental function, and

(c) the individual's conduct amounted to gross negligence that was the proximate cause of the injury or damage.

(4) If the plaintiff pleaded an intentional tort, determine whether the defendant established that he is entitled to individual governmental immunity under the *Ross* test by showing the following:

(a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,

(b) the acts were undertaken in good faith, or were not undertaken with malice, and

(c) the acts were discretionary, as opposed to ministerial. [*Id.* at 479-480.]

In this case, plaintiff pled both a negligent tort of "gross negligence" and an intentional tort of assault and battery.¹ The circuit court properly applied both the *Odom* and *Ross* tests as mentioned above and found that defendant met the standard for governmental immunity.

Plaintiff first argues that defendant acted with gross negligence because he used extremely excessive and unreasonable force against plaintiff. Applying the *Odom* factors to plaintiff's case, defendant was a lower-ranking governmental employee and plaintiff pled a negligent tort. Because plaintiff pled a negligent tort, we proceed under MCL 691.1407(2) and determine if defendant caused an injury while acting in the course of his employment and if:

¹ Plaintiff in his complaint pled other claims, which he is not addressing on appeal: intentional infliction of emotional distress and false imprisonment/false arrest.

(a) the individual was acting or reasonably believed that he was acting within the scope of his authority;

(b) the governmental agency was engaged in the exercise or discharge of a governmental function; and

(c) the individual's conduct amounted to gross negligence that was the proximate cause of the injury or damage.

First, there is no dispute that defendant was acting during the course of his employment—defendant was on patrol in downtown Pontiac on July 2, 2006. Next, defendant was acting and reasonably believed he was acting within the scope of his authority. Defendant was on crowd control duty outside the nightclub. Defendant saw a vehicle stopped in the road. The driver was talking to a pedestrian. The pedestrian picked up a large rock and threw it at defendant, then ran into the crowd. Defendant ran through the crowd looking for the rock-thrower. Defendant saw plaintiff standing and facing an electrical box. Defendant announced himself as a police officer and commanded plaintiff to turn around and show his hands. Defendant fired three pepper balls toward the utility box when plaintiff did not respond. Defendant said he hit the utility box all three times. Defendant observed that plaintiff did not have a weapon and that he was just urinating on the electrical box. Defendant picked up plaintiff and noticed that his pants were sliding down. Defendant pulled up plaintiff's pants but did not buckle them. Defendant handcuffed plaintiff and arrested him for public urination.

Second, the circuit court properly found that defendant was acting as a police officer during his scheduled shift. He was engaged in the exercise of his police duties of crowd control at the time of the incident. Lastly, the court properly found that defendant's conduct did not amount to gross negligence.

Under MCL 691.1407(7)(a), gross negligence is defined as conduct so reckless that it demonstrates a substantial lack of concern if an injury results. Plaintiff claims that there are issues of fact as to whether defendant's use of force in his arrest was reasonable. Plaintiff adds that shooting him with the pepper ball gun, while his back was turned, was not objectively reasonable, and that defendant acted recklessly in failing to render help or medical attention from the pepper ball chemicals. We disagree. There is no evidence from the record that would suggest that defendant acted recklessly. Defendant identified himself as a police officer, commanded plaintiff to turn around, and plaintiff's friend heard defendant yell "hey." When plaintiff did not respond, defendant fired pepper balls. Defendant aimed for the upper corner of the electrical box and did not aim for plaintiff's head. The box was about one to two feet away from plaintiff's head. Defendant stated that it would not surprise him if after impact with the electrical box, a fragment of a pepper ball struck plaintiff. Defendant stated that if plaintiff had been struck directly from the pepper ball, he would have likely suffered much more serious injuries.

Accordingly, there is no evidence that the circuit court misapplied the Odom factors to plaintiff's gross negligence claim. Summary judgment was appropriate and we affirm the circuit court's granting of defendant's motion for summary judgment on this issue.

Next plaintiff argues that the circuit court did not properly apply the *Odom* factors to his intentional tort claim. We disagree. The record shows that the circuit court properly relied on the *Odom* factors in evaluating plaintiff's intentional tort claims. The Court in *Odom* stated that the proper test for determining if immunity would apply to intentional torts is the *Ross* test. 420 Mich at 567. The Court stated that employees enjoy a qualified right to immunity if:

- (1) the employee's challenged acts were undertaken during the course of employment and the employee was acting, or reasonably believed he was acting, within the scope of his authority;
- (2) the acts were undertaken in good faith, or not with malice; and
- (3) the acts were discretionary, rather than ministerial, in nature.

First, there is no dispute that defendant was on duty on the night of the incident. Second, plaintiff claims that shooting citizens from the back was not in good faith. Plaintiff claims that defendant came up to him while his back was turned and fired pepper balls at him. The pepper balls struck his neck and ear and back, causing his injuries. The circuit court found that defendant acted in good faith and his use of force was objectively reasonable. We agree. The circuit court observed that:

The uncontroverted testimony from defendant was that the shots were fired at the utility box, not at plaintiff directly. . . . Second, plaintiff's own testimony was that he did not hear Stone and was unaware of Stone's presence until the shot hit him in the neck. . . . The court finds that, based on defendant's testimony that he had just been assaulted with a rock by a subject who ran to a location where plaintiff was spotted, and plaintiff did not respond to defendant's commands to show his hands, the actions taken by firing the pepper balls at the utility box were objectively reasonable under the circumstances to secure the individual, in this case, plaintiff.

The only error the circuit court might have committed was that it found that defendant's conduct was justified and "objectively reasonable." As noted in *Odom*, the Court stated that the good faith element of *Ross* is subjective in nature. *Id.* at 481-482. It protects a defendant's honest belief and good-faith conduct. In this case, the court's objective standard was more favorable to plaintiff. So even if the court applied a subjective standard to judge defendant's conduct, the court would have still found that defendant acted in good faith.

Third, plaintiff claims defendant's actions were not lawfully discretionary, because he did not follow proper protocol before firing the pepper balls. We disagree. Defendant identified himself as an officer and commanded plaintiff to turn around. One of plaintiff's friends heard the officer yell "hey," and defendant did not aim for plaintiff's head. The circuit court found that defendant's use of force was discretionary, and his use of the pepper gun was justified. We agree.

Accordingly, there is no evidence that the circuit court misapplied the *Odom* factors to plaintiff's intentional tort claims. Summary judgment was appropriate and we affirm the circuit court's granting of defendant's motion for summary judgment on this issue.

Plaintiff next argues that the circuit court abused its discretion when it denied plaintiff's discovery request contrary to *Great Lakes Media, Inc v City of Pontiac*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2000 (Docket No. 208306). Plaintiff claims that the City of Pontiac had the burden of proving why discovery should not have been given. We disagree. Granting or denying discovery is reviewed for an abuse of discretion. *Mercy Mt Clemens Corp v Auto Club Ins Ass'n*, 219 Mich App 46, 50-51; 555 NW2d 871 (1996). The trial court's factual findings are reviewed for clear error. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 98; 535 NW2d 529 (1995). Additionally, a trial court's decision on a motion for summary disposition is reviewed de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006).

Plaintiff relies on *Great Lakes Media, Inc*, as the basis for his argument. However, *Great Lakes Media, Inc*, is unpublished and, therefore, of no precedential value. In any event, on December 8, 2008, the circuit court entered an opinion and order concerning plaintiff's motion to enter a protective order relating to plaintiff's discovery requests.

The court found that:

- (1) The documents from Defendant's personnel file should go back five years;
- (2) The documents should be similar and relevant to the case;
- (3) A privilege log should be created by Defendant for any documents not released to Plaintiff;
- (4) The privilege log shall describe with specificity the contents of the documents which are not release [sic];
- (5) A copy of the privilege log shall be given to Plaintiff;
- (6) If there is a dispute regarding the contents of the privilege log, the information shall be submitted to this Court for an in camera review;
- (7) This Court will determine how to proceed with the questioned material after review.

Plaintiff claims that defendant did not comply with this order. However, the record shows that defendant submitted to plaintiff letters indicating that he was complying with the protective order, along with the privilege logs. Based on that, it is reasonable to conclude that defendant was in full compliance with the court's order. Because plaintiff had access and did not utilize the process laid out by the court, the circuit court did not abuse its discretion when it granted defendant's motion for summary disposition. We affirm the circuit court's granting of defendant's motion for summary disposition on this issue.

Plaintiff finally argues that summary disposition was inappropriate because discovery was still outstanding. We disagree. Summary disposition is premature if granted before discovery on a disputed issue is complete, *Marilyn Froling Revocable Living Trust v Bloomfield*

Hills Country Club, 283 Mich App 264, 292; 769 NW2d 234 (2009), unless further discovery does not present a fair likelihood of uncovering factual support for the opposing party's position, *Liparoto Constr Co v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009).

The circuit court issued a final order concerning discovery and the procedure plaintiff was to utilize in order to get discovery from defendant. Plaintiff claims that he was prejudiced because he did not have adequate discovery concerning defendant. Because the court had ruled on discovery, there was no need for the court to address or explain why plaintiff's motion to compel discovery was denied. As mentioned above, plaintiff had the option of obtaining discovery from defendant, but he did not utilize the procedure set up by the parties and the court.

Because the circuit court had an established procedure for which plaintiff could obtain discovery, the court did not err in granting defendant's motion for summary disposition. In addition, the court did not have to address or explain discovery in its opinion granting defendant's motion for summary disposition. Summary disposition was appropriate, and we affirm the circuit court's granting of defendant's motion for summary disposition on this issue.

Affirmed. Defendant may tax costs.

/s/ David H. Sawyer

/s/ Richard A. Bandstra