

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UNPUBLISHED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.

WHITBECK, J. (*concurring in part and dissenting in part*).

I. OVERVIEW

I concur with the majority's conclusion that the trial court did not abuse its discretion in denying plaintiff Linell Derrickson's discovery request. I also concur that summary disposition was not premature due to a need for further discovery.

However, I respectfully dissent from the majority's opinion on the issue of whether summary disposition was appropriate on the issue of governmental immunity. In this case, Derrickson sued defendant Pontiac Police Department Officer David Stone for gross negligence, and assault and battery. Derrickson alleged that Officer Stone injured him when Officer Stone fired three pepper balls at him. The circuit court granted Officer Stone's motion for summary disposition, concluding that Officer Stone's conduct (1) satisfied the elements of the *Ross*¹ test and that he was entitled to governmental immunity for intentional tort of assault and battery, and (2) was not so reckless as to demonstrate a substantial lack of concern for whether an injury resulted and therefore was not grossly negligent. The majority affirms, concluding that the circuit court properly held that Officer Stone was entitled to governmental immunity. I respectfully disagree with the majority's conclusion. I would instead rule in favor of Derrickson. In my view, there were genuine issues of material fact that precluded the trial court's grant of summary disposition. Accordingly, I would reverse.

¹ *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 614 (1984).

II. BASIC FACTS

In the early morning hours of July 2, 2007, Officer Stone and Officer Scott Kendrick were patrolling the downtown bar area in Pontiac, Michigan. Officer Stone was carrying a pepper ball launcher, a crowd-control instrument. As the officers were walking down the sidewalk, they noticed a vehicle stopped in the street with a pedestrian talking to an occupant of the vehicle. The officers directed the driver of the vehicle to move along. The pedestrian walked away, but then picked up a rock and threw it at the officers. The pedestrian then ran into the crowd. Officer Kendrick chased the pedestrian into the crowd, but Officer Stone went around the crowd, hoping to intercept him on the other side.

As Officer Stone came around the crowd, he noticed a man standing alone by a utility box, with his back to Officer Stone. Officer Stone did not notice anyone else standing nearby. Officer Stone thought that the man could be the pedestrian who had thrown the rock at him. Officer Stone testified that the man's hands were near his front waistline, but he could not see what the man was doing. Therefore, according to Officer Stone, he announced himself as a police officer and told the man to turn around and show his hands. When the man did not respond, Officer Stone became concerned for his safety: "I had no idea if he was grabbing another rock, loading a firearm, anything like that." So, in an effort to gain the man's compliance, he fired three pepper balls in quick succession at the upper left corner of the utility box. Officer Stone admitted that he only waited a couple seconds after he announced himself before he fired the pepper balls. However, he explained that such a quick response was appropriate "based on the totality of the circumstances," including that there had been a recent shooting in the area. Officer Stone testified that he hit the utility box all three times. Officer Kendrick confirmed that he heard a pepperball hit the utility box.

After Officer Stone fired the shots, the man fell to his knee, right into the pepper ball powder cloud that had been released from the impact. Officer Stone admitted that it was not unreasonable to think that a fragment from one of the pepper balls could ricochet and strike a nearby person. Officer Stone then handcuffed the man, but shortly thereafter realized that the man did not have a weapon and was not the pedestrian who threw the rock. In fact, the man was Derrickson, who, after leaving a nearby bar, had simply stopped to urinate. Officer Stone subsequently released Derrickson.

According to Derrickson, on the night in question, he and two of his friends, Nate Stephenson and Damon Devasher, were leaving a nightclub in Pontiac, Michigan. The street in front of the club was congested with pedestrians and vehicles. Derrickson and his friends began walking toward their vehicle, but at some point, Derrickson stopped to urinate near a bush and a utility box. Derrickson chose to urinate outdoors because all of the nearby establishments were closing. Stephenson and Devasher also stopped to urinate nearby.

Derrickson testified that he had just finished urinating and was pulling up his pants to buckle them when he "felt a hit on my—directly on my ear, right behind it, two rapid hits—because I was facing to the left—hit right in the ear and right behind in the back of my neck here." Derrickson stated that the shots occurred rapidly; they were less than a second apart. Derrickson maintained that he felt two separate, successive hits: one on his ear and the other on his neck. The pepper balls left a white-colored substance on Derrickson. Derrickson turned

around to see Officer Stone approaching him from about 10 feet away and then he dropped to his knee. Derrickson was choking from the pepper ball powder cloud created by the impact of the shots. Officer Stone picked Derrickson up from the ground and handcuffed him.

Although Derrickson testified that the noise level was low where he was standing, he did not hear any commands from Officer Stone before he was hit. However, Devasher attested in an affidavit that he heard Officer Stone yell, “Hey.” According to Devasher, Officer Stone then “walked up behind . . . [Derrickson] and shot at him twice and hit him in the head from no more than 30 feet away[.]”

Derrickson sued Officer Stone for gross negligence, and assault and battery.² Officer Stone responded, raising a governmental immunity defense. In his motion for summary disposition, Officer Stone argued that the facts did not support that his conduct rose to the level of gross negligence; that is, that his conduct was not “so reckless as to demonstrate a substantial lack of concern for whether an injury result[ed].”³ Officer Stone contended that he aimed the pepper balls at the utility box and that the facts were merely consistent with a showing that a fragment from one of the balls flew off and hit Derrickson.

After a hearing on Officer Stone’s motion for summary disposition, the trial court issued a written opinion. With respect to the assault and battery claim, the trial court found that on July 2, 2007, Officer Stone was acting during the course of his employment as a police officer on duty and was acting within the scope of his authority to maintain crowd control at the time of the incident. The trial court also found that Derrickson failed to establish that a genuine issue of material fact existed regarding malice or a lack of good faith at the time that Officer Stone shot the pepper balls. Instead, the trial court found that based on the facts that Officer Stone had just been assaulted with a rock and that Derrickson failed to respond to his commands, Officer Stone’s conduct of firing the pepper balls at the utility box was objectively reasonable under the circumstances. The trial court also found that Officer Stone’s use of the pepper gun was discretionary. Accordingly, the trial court ruled that Officer Stone’s conduct satisfied the elements of the *Ross* test and that he was entitled to governmental immunity for the intentional tort of assault and battery.

Turning to the gross negligence claim, the trial court reiterated that Officer Stone was acting during the course and scope of his employment as a police officer. The trial court further found that Officer Stone was engaged in the exercise of a government function while serving as an on-duty police officer. And the trial court found that Officer Stone’s conduct of shooting the pepper balls at the utility box was not so reckless as to demonstrate a substantial lack of concern for whether an injury resulted. The trial court, therefore, ruled that Officer Stone’s conduct was

² As the majority notes, Derrickson is not appealing the circuit court’s dismissal of his claims for intentional infliction of emotional distress and false imprisonment/arrest.

³ MCL 691.1407(7)(a).

not grossly negligent and that he was entitled to governmental immunity. Accordingly, the trial court granted Officer Stone's motion for summary disposition.

III. GOVERNMENTAL IMMUNITY

A. STANDARD OF REVIEW

Derrickson argues that Officer Stone was not entitled to the governmental immunity privilege because his conduct was excessive and unreasonable, and there were numerous questions of fact still at issue, thus precluding summary disposition.

MCR 2.116(C)(7) provides that a motion for summary disposition may be raised on the ground that a claim is barred because of immunity granted by law.⁴ To survive a (C)(7) motion raised on this ground on a claim against a government agency, the plaintiff must allege facts warranting the application of an exception to governmental immunity.⁵ However, as here, when a plaintiff asserts a claim against a governmental employee, immunity is an affirmative defense, and the employee has the burden to raise and prove entitlement to immunity.⁶ This Court reviews de novo the applicability of governmental immunity.⁷

B. GROSS NEGLIGENCE

Where a plaintiff alleges a negligent tort against a lower-ranking governmental employee, like a police officer, the court analyzes the claim under MCL 691.1407(2),⁸ which provides:

Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer . . . of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer . . . while in the course of . . . service . . . if all of the following are met:

(a) The officer . . . 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.

⁴ See MCL 691.1401 *et seq.*

⁵ *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997).

⁶ *Odom v Wayne County*, 482 Mich 459, 479; 760 NW2d 217 (2008).

⁷ *Baker v Waste Mgt of Mich, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

⁸ See *Odom*, 482 Mich at 479-480.

(c) The officer's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

MCL 691.1407(7)(a) defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." If reasonable jurors could honestly reach different conclusions as to whether the conduct constitutes gross negligence, the issue is a factual question for the jury. However, if reasonable minds could not differ, the issue may be determined by summary disposition.⁹

I agree that, at the time of the incident, Officer Stone reasonably believed that he was acting within the scope of his authority while engaged in the exercise or discharge of a governmental function. He was an on-duty police officer assigned to patrol the downtown Pontiac area to perform crowd control.

However, I disagree with the majority that "[t]here is no evidence from the record that would suggest that [Officer Stone] acted recklessly." In my opinion, there were disputed issues of material fact regarding how the incident played out and which affected the reasonableness of Officer Stone's conduct.

Officer Stone stated that, upon encountering Derrickson, he announced himself as a police officer and told Derrickson to turn around and show his hands. However, Derrickson's friend, Devasher, averred that Officer Stone merely yelled, "Hey." Derrickson stated that he did not hear anything. Moreover, although there is no dispute that Derrickson did not respond to Officer Stone, Officer Stone admitted that he only waited a couple seconds after he announced himself before he fired the pepper balls—he did not attempt to make any other verbal contact with Derrickson before resorting to physical force.¹⁰ Further, although Officer Stone testified that he intended to, and did, shoot the pepper balls at the utility box to gain Derrickson's compliance, Devasher averred that Officer Stone fired the shots at Derrickson's head. And the undisputed testimony showed that Derrickson suffered injuries after he was hit, at the very least, by a fragment from the pepper balls, or at worst with the pepper balls themselves.

⁹ *Jackson v Saginaw County*, 458 Mich 141, 146-147; 580 NW2d 870 (1998); *Stanton v Battle Creek*, 237 Mich App 366, 375; 603 NW2d 285 (1999).

¹⁰ I note that, although not directly determinative in this case arising in Pontiac, Derrickson submitted guidelines from other law enforcement agencies regarding use of non-lethal force. According to the Marquette County Sheriff's Office Non-Lethal Force Operating Guidelines, officers should only use non-lethal force as a last resort to overcome resistance and effectuate a lawful arrest. Further, according to the United States Border Patrol Pepper Ball Launcher Policy Statement, the pepper ball launcher is intended to be used against individuals who are offering active or assaultive resistance. And the Summit County Sheriff's Office Pepper Ball Launcher Procedures permit an officer to use the pepper ball launcher against combative or resisting individuals but require that an officer warn subjects in the immediate area that the pepper ball launcher is ready to be used.

Under the circumstances, I believe that the conflicting accounts create questions of fact regarding whether Officer Stone acted reasonably or recklessly under the circumstances. In one view, while patrolling a dangerous area, Officer Stone encountered a man whom he believed could be the pedestrian who had recently assaulted him with a rock. The man had his back to Officer Stone so that Officer Stone could not see what he was doing, and the man failed to comply with the officer's commands. So Officer Stone, concerned for his safety and seeking the man's compliance, fired three pepper balls at a utility box located near the man.

But in another view, Officer Stone was pursuing a man who had recently assaulted him with a rock when he came upon Derrickson, standing alone, with his back to the officer. Despite no indication at that time that Derrickson was the man he was pursuing or that Derrickson was actually a threat, Officer Stone yelled, "Hey," and then immediately fired three pepper balls at Derrickson's head.

Were a jury to believe the first account, it could reasonably conclude that Officer Stone's conduct was reasonable. However, were a jury to instead find the latter account more credible, then it could instead reasonably conclude that Officer Stone was acting recklessly with a substantial lack of concern for whether an injury resulted.

Therefore, I would reverse the trial court and hold that Officer Stone was not entitled to summary disposition on Derrickson's claim of gross negligence.

C. ASSAULT AND BATTERY

Where a plaintiff alleges an intentional tort, the court analyzes the claim under the *Ross* test, under which a governmental officer is entitled to immunity when:

- (a) the acts were undertaken during the course of employment and the [officer] 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.^[11]

As stated above, I agree that, at the time of the incident, Officer Stone reasonably believed that he was acting within the scope of his authority during the course of his employment. I also agree that his acts were discretionary. However, I disagree with the circuit court and the majority that there were no issues of fact regarding whether Officer Stone was acting in good faith and not malice.

¹¹ *Odom*, 482 Mich at 480.

According to the circuit court, “[t]he uncontroverted testimony from [Officer Stone] was that the shots were fired at the utility box, not at [Derrickson] directly.” However, Officer Stone’s testimony was not “uncontroverted.” In his witness statement, attached to Officer Stone’s motion for summary disposition, Devasher stated that Officer Stone “walked up behind . . . [Derrickson] and shot at him twice and hit him in the head from no more than 30 feet away[.]” Similarly, in his affidavit, attached to Derrickson’s response to Officer Stone’s motion for summary disposition, Devasher stated that Officer Stone “stood directly behind [Derrickson] and fired two shots at [Derrickson’s] head.” Further, Derrickson testified that he felt two separate, successive hits to his ear and neck. Therefore, in concluding that Officer Stone’s testimony was uncontroverted, the trial court clearly either ignored or dismissed Devasher’s contradictory statements. To the extent that the trial court considered but dismissed Devasher’s statements, it erred by engaging in impermissible fact finding. Summary disposition is not appropriate in cases involving questions of credibility, which are within the province of a jury.¹²

Therefore, I would reverse the trial court and hold that Officer Stone was not entitled to summary disposition on Derrickson’s claim of assault and battery.

In sum, I would reverse and remand for entry of an order denying Officer Stone’s motion for summary disposition.

/s/ William C. Whitbeck

¹² *Michigan Nat’l Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988); *Farm Bureau Mut Ins Co v Wood*, 165 Mich App 9, 18; 418 NW2d 408 (1987).