

STATE OF MICHIGAN  
COURT OF APPEALS

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DANYELLE BURRELL,

Plaintiff-Appellee,

v

COUNTY OF MACOMB and CITY OF  
WARREN,

Defendants,

and

OFFICER BOOMS, OFFICER MICHAEL  
ANDERSON, AND OFFICER JOHN DOE,

Defendants-Appellants.

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UNPUBLISHED

May 17, 2011

No. 295637

Macomb Circuit Court

LC No. 2008-003621-NI

Before: K.F. KELLY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. (*concurring in part and dissenting in part*)

I agree with the majority in all respects other than their resolution of plaintiff's assault and battery claim. My review of the record reveals that the trial court properly denied summary disposition at this stage of the proceedings. I would affirm the denial of summary disposition as to plaintiff's intentional tort claim.<sup>1</sup>

I agree with the majority's recitation of the elements of assault and battery. See *Smith v Stolberg*, 231 Mich App 256, 260; 586 NW2d 103 (1998). Governmental immunity from

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<sup>1</sup> As the majority states, defendants failed to preserve this argument, but because it is a question of law and all of the necessary facts are presented, this Court may nevertheless choose to address it. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). I further note defendants' contention that plaintiff did not address intentional tort immunity in her response to defendants' motion for summary disposition, but find it meritless because neither did defendants, so there was nothing to which plaintiff would have been obligated to respond.

intentional torts is governed by the common law. MCL 691.1407(3). Defendants are entitled to governmental immunity from intentional torts 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.” *Oliver v Smith (After Remand)*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (2010), citing *Odom v Wayne Co*, 482 Mich 459, 480-481; 760 NW2d 217 (2008) (slip op at 5). Generally, a lack of good faith requires conduct showing an intent to cause harm or such indifference to harm that it is effectively an intent to cause harm. *Odom*, 482 Mich at 474-475. There is no dispute that the alleged acts here were undertaken in the course of defendants’ employment and were discretionary in nature. It is also not disputed that defendants used physical force against plaintiff and injured her in the process. The question is whether the use of that force was lawful and done without malice.

The majority rejects plaintiff’s assault and battery claim by concluding that she merely made conclusory statements in her deposition. I have read plaintiff’s deposition, and I cannot comprehend how the majority arrives at such a conclusion. Plaintiff testified with some specificity about particularized hostile, malicious, and threatening comments defendants made to her, in addition to racial slurs, during her stay at the police station. These were not mere conclusory assertions, but rather unambiguous and detailed descriptions of threats and targeted racial epithets contemporaneous with otherwise unmotivated acts like push-punching plaintiff, forcibly tearing out her hair extensions, threatening to “give her a charge of Vicodin” simply because “this bitch is pissing me the fuck off,” and, in response to her complaints after her wrist was broken, telling her, “nigger, you got what you deserved” and calling her “a black cunt.” Upon arrival at the police department one of the officers said to her, “you black bitch, you piss me the fuck off,” and at some point an officer told her, “you people make me sick.”

Admittedly, plaintiff did not provide the most eloquent timeline, and portions of her deposition are confusing because portions of it were inexplicably not provided. Nevertheless, plaintiff did provide an actual and detailed narrative, rather than simply making conclusory assertions to the effect that she had been subjected to hostile commentary. If plaintiff is to be believed, racially motivated threats and hostility suggest that defendants did intend to cause harm or were recklessly indifferent to whether harm occurred, and that defendants had no lawful reason for using force against plaintiff. Whether plaintiff should be believed turns on her credibility, which is an issue for the jury. See *Oliver*, \_\_\_ Mich App at \_\_\_ (slip op at 4). At this stage of proceedings, this Court cannot and should not attempt to evaluate whether a jury is likely to believe plaintiff’s version of events. This evidence of intent or reckless indifference is sufficient to raise a genuine question of fact whether defendants acted in good faith or without malice. Summary disposition was properly denied on this claim.

I agree with the majority’s decision to reverse in all respects other than as to plaintiff’s intentional tort claim. The trial court’s denial of summary disposition as to the claim of assault and battery should be affirmed.

/s/Amy Ronayne Krause