STATE OF MICHIGAN

COURT OF APPEALS

JASON FLATT,

Plaintiff-Appellee,

v

DETECTIVE J. THORNBURN,

Defendant-Appellant,

and

DETECTIVE SHARPES, DETECTIVE MYDLARZ, DETECTIVE SERGEANT SHAW, and OFFICER UNTERBRINK,

Defendants.

UNPUBLISHED
December 15, 2015

No. 323141
Wayne Circuit Court
LC No. 13-007868-NO

Before: JANSEN, P.J., and CAVANAGH and GLEICHER, JJ.

PER CURIAM.

Defendant Detective J. Thornburn[1] appeals as of right the trial court's order granting in part and denying in part his motion for summary disposition. We affirm.

A team of Downriver Area Narcotics Organization (DRANO) officers led by defendant executed a search warrant at plaintiff's house. Plaintiff testified that he was sleeping upstairs when the officers arrived. He got up and stood at the top of the stairs. Officers approached him and told him to get on his knees with his hands behind his neck. He was then handcuffed, dragged down the stairs, and thrown headfirst onto a wooden floor. At least two officers held him down while others severely beat him. Plaintiff could not identify any of the officers because they were wearing masks, and during much of the beating he was held face-down on the floor. After the officers left, pictures were taken of some of his injuries.

[1] According to Thornburn's brief on appeal, and his deposition, his name is "James Thorburn," but the order appealed from and the lower court register of actions list him as "J. Thornburn." And because he is the only party defendant to appeal, we refer to him as "defendant."

Defendant, on the other hand, testified that he entered the house and went up the stairs to search the upper floor. Plaintiff was standing at the top of the stairs, and defendant went past him to search the upper story of the house for people. Finding nobody except plaintiff, defendant searched the basement for people, and then helped the other officers search for evidence. Defendant did not handcuff plaintiff, carry him down the stairs, touch him, beat him, or speak to him, except to ask if he had a medical marijuana card.

Detective Sergeant Michael Shaw gave an account similar to defendant's, but he heard defendant tell someone, presumably plaintiff, to put his hands behind his back. He also heard defendant argue with someone about handcuffing. Shaw testified that defendant handcuffed plaintiff.

Detective Starzec testified that he handcuffed plaintiff. He then walked plaintiff down the stairs and to the living room, where Shaw questioned plaintiff about the marijuana in the house. Plaintiff did not resist handcuffing, and Starzec did not converse with or mistreat plaintiff.

Plaintiff sued all of the DRANO officers involved in the search except Starzec. He alleged gross negligence, assault and battery, and intentional infliction of emotional distress. Eventually defendant moved for summary disposition of plaintiff's claims pursuant to MCR 2.116(C)(7) and (C)(10), arguing that there was no genuine issue of material fact to be decided at trial because there was no evidence that defendant was one of the officers who allegedly beat plaintiff. Defendant also argued that he was entitled to governmental immunity. The trial court granted the motion as to the gross negligence claim, but denied it as to the claims of assault and battery and intentional infliction of emotional distress. The trial court reasoned that between plaintiff's testimony that he was handcuffed and immediately beaten, and Shaw's testimony that defendant handcuffed plaintiff, there was enough evidence to create a genuine issue of material fact on the issue whether defendant was one of the officers who allegedly beat plaintiff. Regarding governmental immunity, the trial court held that whether plaintiff was beaten while handcuffed was a disputed issue of material fact which was sufficient to create a genuine issue of material fact on whether defendant acted with malicious intent; thus, the motion was denied.

On appeal, defendant argues that he was entitled to governmental immunity under MCL 691.1407 and, thus, his motion for summary disposition should have been granted because the trial court improperly relied on speculative testimony to conclude that a genuine issue of material fact existed regarding his purported involvement in the alleged beating. We disagree.

We review de novo questions of statutory interpretation, including the applicability of governmental immunity. *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004). A trial court's decision on a motion for summary disposition is also reviewed de novo to determine if the moving party is entitled to judgment as a matter of law. *Odom v Wayne Co*, 482 Mich 459, 466-467; 760 NW2d 217 (2008). A motion brought under MCR 2.116(C)(7) should be granted if the plaintiff's claims are barred by immunity. *Id*. (citation omitted). Although not required, the moving party may file documentary evidence in support of the motion and, unless contradicted by such documentation, the contents of the plaintiff's complaint are accepted as true. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and should be granted if,

considering the evidence submitted by the parties in the light most favorable to the nonmoving party, there is no genuine issue regarding any material fact. *Id*. at 120. "Speculation and conjecture are insufficient to create an issue of material fact." *Ghaffari v Turner Const Co (On Remand)*, 268 Mich App 460, 464-465; 708 NW2d 448 (2005). In contrast, circumstantial evidence may be sufficient. *Libralter Plastics, Inc v Chubb Group of Ins Co's*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

As defendant acknowledges on appeal, to be immune from liability for the intentional torts at issue in this case, he must have acted in good faith, i.e., without malice, in executing the search warrant at plaintiff's house. See *Odom*, 482 Mich at 473-475. Defendant argues that the record evidence does not demonstrate he participated in the alleged beating of plaintiff; thus, there was no evidence to refute his claim that he acted in good faith. In that regard, defendant challenges the trial court's reliance on Shaw's testimony and claims that it was speculative. However, as recognized by the trial court, the nature of only one of Shaw's statements is legally relevant: whether he was speculating when he said that he heard defendant telling plaintiff to put his hands behind his back. Shaw's recognition of defendant's voice is based on personal knowledge and is therefore admissible. See MRE 602.

Shaw testified that he recognized defendant's voice while defendant was speaking to someone. The record indicates that Shaw had personal knowledge of this:

> I heard [defendant] yell 'State Police, search warrant," I heard another voice which I assume was [plaintiff] since he was the only one in the house I'm going to assume it was him, bicker back and forth. . . .

When asked if he heard any other voices, Shaw testified: "I only recall those two [defendant and somebody else, presumably plaintiff]." In each case, Shaw indicates unequivocally that he recognized defendant's voice. Viewing the testimony in the light most favorable to the plaintiff, the nonmoving party, there is no question that Shaw's testimony indicates he had personal knowledge that defendant spoke the words Shaw attributed to defendant. See *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007).

In addition, defendant quotes the following exchange from Shaw's deposition:

> *Q.* And earlier you talked about [plaintiff] struggling.
>
> *A.* Uh-huh.
>
> *Q.* Can you describe his struggle?
>
> *A.* Most people don't like getting handcuffed. [Plaintiff] until probably the middle of the interaction was pretty agitated, he wasn't one to take orders from a lot of folks. I mean he made it pretty clear he was a kick boxer and he was going to sue people, and that's how – you know, sometimes you get a response when you do these doors that you can't really – you don't take it personally but eventually they're going to have to get handcuffed and that's what happened to him.

> *Q.* So his mentioning suing and kick boxing, would that have been what you would consider verbal sort of resistance?
>
> *A.* Some of it was verbal but [plaintiff] was also struggling. [Plaintiff] wouldn't put his hands behind his back. Because you kept hearing [defendant] saying put your hands behind your back, put your hands behind your back.

Defendant argues that, based on this testimony, "it is clear that Shaw was simply speculating that it was [defendant] he had heard based on his assumption of what [defendant] would have been doing." However, the testimony above does not support defendant's assertion. Again, Shaw directly states that he recognized defendant's voice. There is no indication that he assumed it was defendant's voice based on his expectation of what defendant would have been doing at that point in the search.

When responding to a question about which officer "picked up" plaintiff and moved him to the area of the house where police interviewed him, Shaw did at one point say that he was speculating:

> I would say, and I'm speculating here, I don't know if I'm allowed to do that or not, but I would say more than likely it would be [defendant who picked up plaintiff] because those were the two that made contact with each other the very first time. So I imagine it would be [defendant] who would take [plaintiff] out there.

Shaw stated that he was "speculating" that defendant picked up plaintiff, but the record does not indicate he was speculating about which officer handcuffed plaintiff. Rather, as discussed below, Shaw inferred that defendant handcuffed plaintiff because he recognized plaintiff's voice. That is, Shaw heard plaintiff complaining about police coming into the house, heard defendant and plaintiff bickering, and heard defendant repeatedly telling plaintiff to put his hands behind his back. While there might by other plausible theories to explain what Shaw heard, the evidence is sufficient to create a genuine issue of material fact about whether defendant handcuffed plaintiff. And Shaw further testified that, based on his personal knowledge of police procedure for searches of houses, he expected that defendant would have been in the role of going up the stairs first, and thus, would have first encountered plaintiff. This strengthens the inference, drawn from what Shaw heard, that defendant handcuffed plaintiff.

Defendant next argues that he could not have handcuffed plaintiff because Starzec actually handcuffed plaintiff. However, as discussed above, Shaw testified that defendant handcuffed plaintiff. The evidence must be viewed in the light most favorable to the nonmoving party. *Brown*, 478 Mich at 552. Shaw's testimony is more favorable to plaintiff because plaintiff testified that he was handcuffed and immediately beaten. A trier of fact could thus reasonably infer that the officer that handcuffed plaintiff participated in the beating.

Later in Shaw's deposition defendant's attorney engaged in the following cross-examination of Shaw:

Q. So that if [defendant] would have testified that he remained upstairs to secure the upstairs while [plaintiff] was brought downstairs would you have any reason to dispute that?

MR. ROBINSON: [plaintiff's attorney] Let me object to the form of the question and foundation.

MR. FEDYINSKI: [Shaw's and Unterbrink's attorney] Go ahead and answer.

A. I would not. He would know where he was better than I would.

Q. And if similarly he was to testify that he was not involved in the actual handcuffing activities of [plaintiff] would you have any reason to dispute that?

A. I would not.

MR. ROBINSON: objection, foundation

Q. Similarly if he were to testify that he was not involved in lifting [plaintiff] from the floor at the base of the stairs to his feet would you have any reason to dispute that?

MR. ROBINSON: Same objection.

A. I would not.

Q. And if [defendant] were to testify that he was not the officer involved in escorting [plaintiff] from the upstairs to the downstairs would you have any reason to dispute that?

MR. ROBINSON: Same objection.

A. I would not.

Q. The individual that you heard admonishing [plaintiff] to put your hands behind your back I trust was the officer who was involved in trying to handcuff [plaintiff], correct?

A. I would agree with that, yes.

Q. And again, if [defendant] were to testify that he was not involved in that activity you'd have no reason to dispute his denial that it was [defendant's] voice that you heard making those statements?

MR ROBINSON: Objection, foundation.

A. I would not.

Defendant argues that this cross-examination testimony supports his argument that the portions of Shaw's testimony that plaintiff relies upon are speculative and inadmissible.

At most, this portion of Shaw's deposition undermines Shaw's credibility, and this Court must not consider credibility when deciding a motion for summary disposition. See *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Because portions of Shaw's testimony appear to conflict, and because this Court must view the facts in the light most favorable to the nonmoving party, we accept the portions of Shaw's testimony that indicate defendant handcuffed plaintiff. See *Brown*, 478 Mich at 552.

And viewing Shaw's testimony in this light, it is not clear there is a conflict. When asked if he would dispute defendant's testimony about where defendant was, Shaw testified: "I would not. He would know where he was better than I would." He answers all subsequent questions that reference defendant's testimony with what appears to be a short form of his first answer: "I would not." One reasonable way to read this testimony, in a light favorable to plaintiff, is that Shaw stands by his testimony that defendant handcuffed plaintiff, but is willing to defer to other officers' accounts of their activities, because they would know of their own activities better than Shaw. See *id*. Again, in the light most favorable to plaintiff, a trier of fact might not be so deferential to Shaw's fellow officers, especially if the trier thought those officers had motive to lie or otherwise lacked credibility. See *id.* Alternately put, the trier of fact need not accept Shaw's evaluation of his own credibility compared to that of other witnesses, and a court may not decide credibility when considering a motion for summary disposition. *Skinner*, 445 Mich at 161.

In sum, when viewed in the light most favorable to plaintiff, Shaw's testimony that he believed defendant handcuffed plaintiff is a reasonable inference based on what he had personal knowledge of: police procedure and his recognition of defendant's voice. A trier of fact could reasonably make that same inference. Plaintiff testified that he was handcuffed, immediately dragged down the stairs, and beaten. Viewing these facts in the light most favorable to plaintiff, the nonmoving party, a reasonable trier of fact could credit Shaw's testimony and infer that defendant was one of the officers who beat plaintiff. See *Brown*, 478 Mich at 552. This is precisely what the trial court held. While Starzec and other witnesses gave accounts that conflict with Shaw's, this court will not consider credibility when deciding a motion for summary disposition. See *Skinner*, 445 Mich at 161. And defendant is not entitled to governmental immunity if he engaged in the alleged conduct. Beating a handcuffed man who is not resisting is malice, as it shows intent to cause harm. See *Odom*, 482 Mich at 475. Thus, as the trial court held, between plaintiff's and Shaw's testimony, there is sufficient evidence to create a genuine issue of material fact about whether defendant was involved in the alleged tortious activity, and

if he was, he would not be entitled to governmental immunity. Accordingly, the trial court did not err in partially denying defendant's motion for summary disposition.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Elizabeth L. Gleicher