STATE OF MICHIGAN

COURT OF APPEALS

BILLY ROWE and ROBIN ROWE,

Plaintiffs-Appellees/Cross-Appellants,

v

DETECTIVE/SERGEANT RONALD AINSLIE,

Defendant-Cross-Appellee,

and

TROOPER STEVE LAMB,

Defendant,

and

TROOPER DENNIS MILBURN,

Defendant-Appellant.

UNPUBLISHED
March 21, 2017

No. 332566
Calhoun Circuit Court
LC No. 2013-001488-NO

Before: CAVANAGH, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Defendant-appellant, Trooper Dennis Milburn, appeals as of right the trial court's April 7, 2016 order denying his motion for summary disposition under MCR 2.116(C)(7) (governmental immunity). On cross-appeal, plaintiffs, Billy Dean Rowe and Robin Rowe, appeal as of right the trial court's April 7, 2016 order granting summary disposition under MCR 2.116(C)(7) (governmental immunity) as it related to Defendant/Cross-Appellee, Detective/Sergeant Ronald Ainslie.[1] We affirm.

[1] As noted by the April 7, 2016 order, defendant, Trooper Steve Lamb, was dismissed based on stipulation of the parties.

This appeal arises out of an unfortunate case of mistaken identity. The relevant underlying facts in this case are set forth in a previous appeal. See *Rowe v Ainslie*, unpublished opinion per curiam of the Court of Appeals, issued February 6, 2015 (Docket No. 317748).

We review a trial court's grant or denial of summary disposition de novo. *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010). In *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011), this Court further explained the relevant test under MCR 2.116(C)(7):

> Under MCR 2.116(C)(7), an order granting a motion for 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 submitted for purposes of a motion brought under MCR 2.116(C)(7) relative to governmental immunity 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 relevant 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 Servs, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995). If, however, a pertinent factual dispute exists, summary disposition is not appropriate. *Id.*

With respect to Trooper Milburn, plaintiffs' second amended complaint alleged various constitutional violations under 42 USC 1983. A person is liable under 42 USC 1983 if he or she, "under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . ." 42 USC 1983. "Section 1983 itself is not the source of substantive rights; it merely provides a remedy for the violation of rights guaranteed by the federal constitution or federal statutes." *York v Detroit (After Remand)*, 438 Mich 744, 757-758; 475 NW2d 346 (1991). "A cause of action under § 1983 is stated where a plaintiff shows (1) that the plaintiff was deprived of a federal right, and (2) that the defendant deprived the plaintiff of that right while acting under color of state law." *Davis v Wayne Co Sheriff*, 201 Mich App 572, 576-577; 507 NW2d 751 (1993). However, "[a] police officer may invoke the defense of qualified immunity to avoid the burden of standing trial when faced with a claim that the officer violated a person's constitutional rights." *Lavigne v Forshee*, 307 Mich App 530, 542; 861 NW2d 635 (2014). Qualified immunity applies to discretionary acts. *Conn v Gabbert*, 526 US 286, 290; 119 S Ct 1292; 143 L Ed 2d 399 (1999).

In *Lavigne*, 307 Mich App at 542, this Court explained the doctrine of qualified immunity as follows:

> Although classified as an affirmative defense that must be pleaded, *Harlow v Fitzgerald*, 457 US 800, 815; 102 S Ct 2727; 73 L Ed 2d 396 (1982), a plaintiff has the burden of overcoming the assertion of qualified immunity at the pretrial stage, *Pearson v Callahan*, 555 US 223, 231-232; 129 S Ct 808; 172 L Ed 2d 565 (2009). "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Id*. at 231, quoting *Harlow*, 457 US at 818. Thus, in the case of a police officer, qualified immunity will not apply if the officer transgresses a right that was " 'clearly established,' " meaning that " 'it would be clear to a reasonable officer that [her] conduct was unlawful in the situation [she] confronted.' " *Groh v Ramirez*, 540 US 551, 558-559, 563; 124 S Ct 1284; 157 L Ed 2d 1068 (2004), quoting *Saucier v Katz*, 533 US 194, 202; 121 S Ct 2151; 150 L Ed 2d 272 (2001); see also *Walsh*, 263 Mich App at 636. When the law is clearly established, "the immunity defense ordinarily should fail, since a reasonably competent [police officer] should know the law governing his [or her] conduct." *Harlow*, 457 US at 818-819. [Alterations in *Lavigne*.]

Stated differently, "[i]f no [material] facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law." *Willett v Charter Twp of Waterford*, 271 Mich App 38, 45; 718 NW2d 386 (2006) (quotation marks and citation omitted; second alteration in *Willett*).

Trooper Milburn's actions did not knowingly violate the law. See *Messerschmidt v Millender*, ___ US ___; 132 S Ct 1235, 1244; 182 L Ed 2d 47 (2012) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law.") (quotation marks and citation omitted). Trooper Milburn stated that, when he wrote his report, he believed that Billy Dean Rowe was the suspect and believed that there was child pornography on the computer based on the images that he saw. Potentially, Trooper Milburn could have done more to try to correctly identify the suspect. However, the test for qualified immunity is not whether hindsight reveals that an officer could have or should have done more. See generally *Roy v Inhabitants of City of Lewiston*, 42 F3d 691, 696 (CA 1, 1994) ("The police may have done the wrong thing but they were not 'plainly incompetent' nor were their actions 'clearly proscribed.' ").[2] Trooper Milburn explained that the true suspect did not provide him identification and only provided a first and last name. Trooper Milburn further explained that his search yielded several people with the name "Billy Rowe" but did not yield a "Billy Rowe" who lived in Mt. Morris; thus, Trooper Milburn used identifying features such as approximate age, race, and gender to narrow down the search for the correct Billy Rowe. As a result, Trooper Milburn came up with plaintiff

[2] "[L]ower federal court decisions may be persuasive" but "are not binding on state courts." *Bienenstock & Assoc, Inc v Lowry*, 314 Mich App 508, 515; 887 NW2d 237 (2016) (quotation marks and citation omitted).

Billy Rowe, whom he believed to be the suspect. Although Trooper Milburn interviewed the true suspect where he was residing at that time (i.e., at his mother's apartment), Trooper Milburn explained that people did not always have their updated addresses on their driver's licenses. And, as previously noted, the search did not yield any people named Billy Rowe with an address in Mt. Morris. Based on this evidence, a reasonable mind could conclude that Trooper Milburn's actions were not plainly incompetent and were reasonable under the circumstances, see *Messerschmidt*, ___ US at ___; 132 S Ct at 1244, and that it would not be clear to a reasonable officer that Trooper Milburn's conduct was unlawful under the circumstances, *Lavigne*, 307 Mich App at 542.

However, in response to the motion for summary disposition, plaintiffs attached the register of actions from a Genesee County case involving child support. The register of actions listed Billy Joe Rowe as the defendant and contained an address for him in Mt. Morris. It is unclear from the record whether this address would have been Billy Joe Rowe's address when Trooper Milburn performed his search and whether the address would have been in the system used for the search. Thus, it is unclear whether this information contradicts Trooper Milburn's assertion that his search did not yield a person named "Billy Rowe" who lived in Mt. Morris. If Billy Joe Rowe with a Mt. Morris address would have, in fact, been yielded by Trooper Milburn's search, a reasonable mind could conclude that his actions were plainly incompetent. There are additional questions whether Trooper Milburn could have made further contact with the suspect once the identity was in question: Trooper Milburn interviewed the suspect at his residence, and the suspect subsequently left Trooper Milburn a message recanting his statement that he would take a polygraph. In sum, there are some material facts surrounding Trooper Milburn's actions in dispute and reasonable minds could differ as to whether his actions were plainly incompetent. *Willett*, 271 Mich App at 45. The trial court did not err in denying Trooper Milburn's motion for summary disposition pursuant to MCR 2.116(C)(7).[3]

In contrast to the allegations against Trooper Milburn, the second amended complaint specifically set forth intentional torts against Detective/Sergeant Ainslie in addition to claims under 42 USC 1983.[4] Plaintiffs alleged false imprisonment and intentional infliction of

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[3] In addition, plaintiffs argue that Trooper Milburn's actions were ministerial in nature. "A ministerial officer has a line of conduct marked out for him, and has nothing to do but to follow it . . . . Ministerial acts constitute merely an obedience to orders or the performance of a duty in which the individual has little or no choice." *Odom*, 482 Mich at 475-476 (quotation marks and citation omitted). "Discretionary acts require personal deliberation, decision and judgment." *Id.* at 476 (quotation marks and citation omitted). Trooper Milburn was faced with a situation where he had to use deliberation, decision, and judgment to identify a suspect out of several people with the same name. These actions do not reflect a duty in which Trooper Milburn had little or no choice. Thus, his actions were discretionary.

[4] As noted by Detective/Sergeant Ainslie on appeal, the "second amended complaint does not state a negligence cause of action, but there are references to 'gross negligence' in the 1983 allegations." Plaintiffs argue on appeal that Detective/Sergeant Ainslie "stood accused of three causes of action: constitutional claims, gross negligence claims and intentional torts." As

emotional distress as the intentional torts. With respect to state-law tort claims, "[t]he governmental immunity act, MCL 691.1401 *et seq*., generally provides immunity from tort claims to governmental agencies engaged in a governmental function, as well as governmental officers, agents, or employees." *Niederhouse v Palmerton*, 300 Mich App 625, 631; 836 NW2d 176 (2013). In *Odom*, 482 Mich at 479-480, the Michigan Supreme Court set forth the following protocol that courts must follow when individual government immunity is raised:

> (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).
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> (2) If the individual is a lower-ranking governmental employee or official, determine whether the plaintiff pleaded an intentional or a negligent tort.
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> (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:
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> (a) the individual was acting or reasonably believed that he was acting within the scope of his authority,
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> (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* [*v Consumers Power Co*, 420 Mich 567; 363 NW2d 641 (1984), superseded by statute as stated in *Jones v Bitner*, 300 Mich App 65, 74; 832 NW2d 426 (2013)] 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.

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discussed below, Detective/Sergeant Ainslie is entitled to immunity even if the complaint was liberally construed to include a negligent-tort claim.

Following this protocol provided by *Odom*, Detective/Sergeant Ainslie is a lower-ranking governmental employee who is not entitled to absolute immunity under MCL 691.1407(5). False imprisonment and intentional infliction of emotional distress are intentional torts. It was alleged that Detective/Sergeant Ainslie's actions of investigating the crime and seeking the arrest warrant caused plaintiff Billy Rowe's false imprisonment and infliction of emotional distress. Detective/Sergeant Ainslie undertook the actions in the course of his employment and was acting within the scope of his authority when he investigated the crime and sought an arrest warrant.

Next, "[t]he good-faith element of the *Ross* test is subjective in nature," and "[i]t protects a defendant's honest belief and good-faith conduct with the cloak of immunity while exposing to liability a defendant who acts with malicious intent." *Id*. at 481-482. In *Odom*, the Michigan Supreme Court noted that *Ross* did not elaborate on the good-faith element, but *Ross* relied on Prosser on Torts, which in turn relied on cases that "indicate[d] that there is no immunity when the governmental employee acts *maliciously* or with a *wanton or reckless disregard of the rights of another*." *Id*. at 473-474. Subsequently, the *Odom* Court stated that this standard was consistent with Michigan's caselaw. *Id*. at 474. Here, there is no indication that Detective/Sergeant Ainslie had malicious intent. Detective/Sergeant Ainslie indicated that plaintiff Billy Rowe was the suspect listed in the report and that he relied on the report, which contained plaintiff Billy Rowe's information. Moreover, Detective/Sergeant Ainslie stated that he believed plaintiff Billy Rowe was the suspect when he sought the warrant and that he did not have any indication that plaintiff Billy Rowe was the wrong person at that time. The record simply does not demonstrate malicious intent on behalf of Detective/Sergeant Ainslie. Nor does the record indicate that Detective/Sergeant Ainslie acted with a wanton or reckless disregard of plaintiffs' rights. Detective/Sergeant Ainslie investigated the evidence, relied on the report for the suspect's identification, and did not have an indication that plaintiff Billy Rowe was incorrectly identified in the report. Accordingly, reasonable minds could not differ in finding that Detective/Sergeant Ainslie acted in good faith.

Finally, Detective/Sergeant Ainslie's actions were discretionary. "Discretionary acts require personal deliberation, decision and judgment." *Id*. at 476 (quotation marks and citation omitted). Detective/Sergeant Ainslie was asked to evaluate the case and determine whether the case should be closed or proceed with an arrest warrant. Detective/Sergeant Ainslie investigated the evidence, learned that the evidence contained child pornography, and—using his judgment—made the decision to seek a warrant. These actions do not reflect a duty in which Detective/Sergeant Ainslie had little or no choice. Cf. *id*. at 475-476 ("A ministerial officer has a line of conduct marked out for him, and has nothing to do but to follow it . . . . Ministerial acts constitute merely an obedience to orders or the performance of a duty in which the individual has little or no choice.") (quotation marks and citation omitted). In sum, Detective/Sergeant Ainslie undertook the actions during the course of his employment, was acting within the scope of his authority, was acting in good faith, and the acts were discretionary. *Id*. at 479-480. Accordingly, Detective/Sergeant Ainslie was entitled to governmental immunity with respect to the intentional torts.

Although not specifically set forth in the second amended complaint as a separate cause of action, even if we determined that the nature of plaintiffs' claims included a negligent tort, Detective/Sergeant Ainslie would still be entitled to immunity. It is undisputed that Detective/Sergeant Ainslie was acting within the scope of his authority and was discharging a

governmental function when investigating the case and seeking a warrant. As noted above, "gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). Here, Detective/Sergeant Ainslie used Trooper Milburn's report to seek an arrest warrant for plaintiff Billy Rowe. Trooper Milburn's report does not indicate that he had any difficulty in ascertaining or uncertainty about the identity of the suspect. The incident report specifically identifies plaintiff Billy Rowe as the suspect and provides his identifying information. The difference between Mt. Morris and Homer would not necessarily raise a red flag for Detective/Sergeant Ainslie because suspects do not always have their updated or correct address listed in LEIN or on their driver's license. On this record, Detective/Sergeant Ainslie's conduct was not "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). Thus, Detective/Sergeant Ainslie was entitled to governmental immunity with respect to negligent torts.

With respect to the constitutional claims, Detective/Sergeant Ainslie also argued that he was entitled to qualified immunity. As explained by the United States Court of Appeals for the Tenth Circuit, reasonableness determines whether an officer is entitled to rely on a fellow officer's flawed conclusions:

> "A police officer who acts in reliance on what proves to be the flawed conclusions of a fellow police officer may nonetheless be entitled to qualified immunity as long as the officer's reliance was objectively reasonable." *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 882 (10th Cir. 2014) (internal quotation marks omitted), *cert. denied*, ___ U.S. ___, 135 S. Ct. 975, 190 L.Ed.2d 890 (2015); *accord, e.g., Baptiste*, 147 F.3d at 1260 ("Police work often requires officers to rely on the observations, statements, and conclusions of their fellow officers. An officer who is called to the scene to conduct a search incident to arrest is not required to reevaluate the arresting officer's probable cause determination in order to protect herself from personal liability."). This rule makes sense, because "[e]ffective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and . . . officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information." *Oliver v. Woods*, 209 F.3d 1179, 1191 (10th Cir. 2000) (*quoting United States v. Hensley*, 469 U.S. 221, 231 (1985)). "Accordingly, the 'good faith' defense shields objectively reasonable good faith reliance on the statements of a fellow officer, but does not protect deliberate, reckless, or grossly negligent reliance on the flawed conclusions of a fellow officer." *Felders*, 755 F.3d at 882. [*Maresca v Bernalillo Co*, 804 F3d 1301, 1312 (CA 10, 2015).]

Here, Detective/Sergeant Ainslie relied on Trooper Milburn's report in seeking an arrest warrant for plaintiff Billy Rowe. Nothing in the incident reports indicates that Trooper Milburn had any difficulty or uncertainty of the identity of the suspect. The incident report specifically identifies plaintiff Billy Rowe as the suspect and provided his race, sex, date of birth, height, weight, hair color, eye color, and driver's license number. As indicated above, the record does not indicate that Detective/Sergeant Ainslie deliberately relied on flawed conclusions by Trooper Milburn or was reckless or grossly negligent in his reliance. Thus, Detective/Sergeant Ainslie was entitled to qualified immunity with respect to the constitutional claims. His actions were not

plainly incompetent, and he did not knowingly violate the law. *Messerschmidt*, ___ US at ___; 132 S Ct at 1244; *Roy*, 42 F3d at 696. The trial court properly granted Detective/Sergeant Ainslie's motion for summary disposition pursuant to MCR 2.116(C)(7).[5]

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Deborah A. Servitto

[5] On cross-appeal, plaintiffs argue that the trial court made inadequate findings of law and employed erroneous reasoning in reaching its conclusion for Detective/Sergeant Ainslie. However, reviewing the issue de novo, we conclude that the trial court ultimately reached the right result. See *Michigan Ed Employees Mut Ins Co v Karr*, 228 Mich App 111, 115 n 1; 576 NW2d 728 (1998) ("We will not reverse when the trial court reaches the correct result regardless of the reasoning employed.").