

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RONALD GRAVES,

Plaintiff-Appellant,

v

SERGEANT GARY HEDGER, DEPUTY KURT  
POTRATZ, DEPUTY CHARLES MYERS, and  
DEPUTY MELISSA CRAIN,

Defendants-Appellees.

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UNPUBLISHED

November 24, 2020

No. 346257

Monroe Circuit Court

LC No. 17-140310-NO

Before: BECKERING, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Plaintiff, Ronald Graves, appeals as of right the trial court’s order granting summary disposition in favor of defendants, Sergeant Gary Hedger, Deputy Kurt Potratz, and Deputy Charles Myers, employees of the Monroe County Sheriff’s Department, in this action for gross negligence against Hedger and assault and battery against Hedger, Potratz, and Myers, arising from a police shooting.<sup>1</sup> We affirm in part, reverse in part and remand.

I. BACKGROUND

This case arises from a police shooting on July 16, 2015, at the mobile home that plaintiff shared with his grandmother in Erie Township, Michigan. Plaintiff, who had a history of mental illness, drug abuse, and alcohol abuse, had recently stopped drinking alcohol in the days leading up to the shooting because his grandmother had suffered a heart attack and plaintiff knew he would need to be sober to care for her. Enduring the effects of alcohol withdrawal, plaintiff was in a delusional state and hearing voices in the days before the shooting. On the day of the shooting, plaintiff called his grandmother, who had just arrived home from the hospital, to the bathroom of their mobile home, purportedly to look at a bug. When she bent over to look at the bug in the bathtub, plaintiff attacked her from behind with an eight-inch kitchen knife, stabbing her in the

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<sup>1</sup> The parties stipulated to dismiss another defendant employee, Deputy Melissa Crain.

head. Plaintiff's grandmother was able to break free and wield the knife blade away from plaintiff, and she fled to the home of her neighbors who called the police. Plaintiff, who later claimed he could not recall the attack on his grandmother, remained in the mobile home after the attack.

Hedger was the first officer to arrive at the scene, and then was joined by Deputy Melissa Crain, Myers, and Potratz. Crain was able to secure the knife blade that plaintiff had used to attack his grandmother. Hedger was informed that there was another possible victim being held hostage inside the mobile home with plaintiff. The team initially knocked on the doors to the mobile home and announced their presence, but received no response. They then entered the home through the north door in an attempt to locate and apprehend plaintiff. Potratz remained outside, keeping watch on the south door of the mobile home. Because of the amount of clutter inside the mobile home, the officers did not have clear sight lines. Hedger and Crain exited the north door of the mobile home with Hedger planning to gain entry through the south door. Potratz was armed with an AR-15 rifle at his station outside the south door. Myers remained inside the mobile home to hold the front area. After prying open the south door, Hedger and Potratz were able to see plaintiff sitting in a bathtub in the bathroom. His legs were hanging over the bathtub, but his hands were not visible. Plaintiff did not comply with multiple verbal commands to show his hands and he did not otherwise interact or engage with the officers. Hedger and Crain stated that they were concerned that plaintiff was contemplating "suicide by cop," a term that refers to when a person intentionally provokes the police to use lethal force against them. Plaintiff later claimed that he believed the police were intruders in his home and were there to kill him.

As Myers approached the bathroom area from inside the mobile home, he either began to fall or maneuvered around the clutter by leaning; at which point both Myers and Potratz saw plaintiff raise his arm toward Myers, holding an object that they both believed was a weapon. Myers fired his weapon at plaintiff later stating he was in fear for his life. Potratz, stationed at the south door with the AR-15 rifle, also fired two shots contemporaneously; one of which hit plaintiff in the face. During his deposition, plaintiff acknowledged that he raised his hand while holding a comb, intending to scare the persons whom he thought were intruders. After plaintiff was shot, he did not comply with the officers' verbal commands to show his hands and Hedger deployed his Taser against plaintiff in order to secure the weapon they thought plaintiff was holding. The officers subsequently discovered that plaintiff had been holding the handle to the knife that he used to attack his grandmother. Plaintiff was left seriously disfigured as a result of the rifle shot to his face.

Plaintiff filed a two-count complaint against the involved officers, alleging claims for gross negligence and assault and battery.<sup>2</sup> Defendants moved for summary disposition, arguing that plaintiff's claims were barred by governmental immunity. The trial court granted defendants' motion, concluding that they were entitled to immunity with respect to plaintiff's intentional-tort claim for assault and battery. The court found that there was no material question of fact as to whether each of the officers acted in good faith when they deployed their weapons. The court further ruled that the evidence did not support a claim for gross negligence against Hedger. Plaintiff now appeals.

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<sup>2</sup> Plaintiff abandoned claims of gross-negligence against Potratz and Myers.

## II. STANDARD OF REVIEW

A trial court's decision regarding summary disposition is reviewed de novo. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). Although defendants moved for summary disposition under alternate grounds, it is apparent from the record that the trial court granted summary disposition under MCR 2.116(C)(7). Summary disposition is appropriate under MCR 2.116(C)(7) if the plaintiff's claims are precluded because of governmental immunity. *Odom*, 482 Mich at 466.

The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence, the substance of which would be admissible at trial. The contents of the complaint are accepted as true unless contradicted by the evidence provided. [*Id.* at 466 (quotation marks omitted).]

If factual disputes do not arise, the inquiry whether a plaintiff's claim is barred by a principle established in MCR 2.116(C)(7) is a question of law reserved to the trial court. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012).

## III. INTENTIONAL TORT CLAIMS

Plaintiff argues that the trial court erred by granting defendants' motion for summary disposition with respect to the intentional-tort claims against them because factual disputes existed regarding whether defendants acted in good faith when they discharged their firearms and deployed the Taser against him. We agree with the trial court's decision to grant summary disposition as to defendants Myers and Potratz, but disagree as to Hedger.

In *Odom*, 482 Mich at 461, our Supreme Court held that "MCL 691.1407(3) of the governmental tort liability act (GTLA), which explicitly maintains 'the law of intentional torts as it existed before July 7, 1986,' grants immunity to governmental employees from intentional-tort liability to the extent allowed by the common law before July 7, 1986." The Court further observed that its earlier decision in *Ross v Consumers Power Co*, 420 Mich 567; 363 NW2d 641 (1984), "clearly provides governmental employees qualified immunity from intentional-tort liability at common law." *Odom*, 482 Mich at 473. The Court reaffirmed and restated the *Ross* test for determining immunity from liability for intentional torts. *Id.* As pertinent to this appeal, to be immune from liability for an intentional tort, a governmental employee must demonstrate that he was acting in "good faith."<sup>3</sup> *Odom*, 482 Mich at 473. In *Odom*, the Court stated that an officer will be held to have not acted in good faith if he or she had a malicious intent, acted capriciously, or engaged in corrupt conduct. *Odom*, 482 Mich at 474. The Court noted that this standard is consistent with other decisions holding that an action against a police officer may proceed only if

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<sup>3</sup> The other two prongs of the test set forth in *Ross* are that the governmental employee's 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[.]" and the employee's "acts were discretionary, as opposed to ministerial." *Odom*, 482 Mich at 480. Plaintiff concedes that these elements of the *Ross* test are not at issue.

the officer has employed “ ‘wanton or malicious conduct or demonstrated a reckless indifference to the common dictates of humanity.’ ” *Id.* at 474, quoting *Dickey v Fluhart*, 146 Mich App 268, 276; 380 NW2d 76 (1985). The *Odom* Court stated that “willful and wanton misconduct is made out only if the conduct alleged shows an intent to harm, or, if not that, such indifference as to whether harm will result as to be the equivalent of a willingness that it does.” *Id.*, quoting *Burnett v Adrian*, 414 Mich 448, 455; 326 NW2d 810 (1982). Additionally, the good-faith prong of the *Ross* test is “subjective in nature[,]” and it will insulate a defendant from liability if he acted with an honest belief and engaged in good-faith conduct, but will allow a defendant to face liability if he acted with malicious intent. *Odom*, 482 Mich at 481-482. “Malice” is defined as “[t]he intent, without justification or excuse, to commit a wrongful act.” *Black’s Law Dictionary* (9th ed). “[T]he proponent of individual immunity must establish that he acted without malice.” *Odom*, 482 Mich at 475.

In the present case, for plaintiff to prevail on his claims for assault and battery, he must prove that Potratz and Myers were not justified in using lethal force in shooting at him, and that Hedger was not justified in deploying his Taser after plaintiff had been shot. See *Latits v Phillips*, 298 Mich App 109, 115; 826 NW2d 190 (2012).

In *Latits*, the defendant police officer shot the plaintiff’s decedent multiple times after the decedent led the police on a high-speed pursuit. The plaintiff argued that the defendant’s use of deadly force was not justified. In rejecting that argument, this Court explained that “the standard in evaluating the governmental immunity question is not whether, when viewing the facts objectively with the benefit of hindsight, the use of deadly force was justified.” *Id.* at 116. Instead, the pivotal inquiry is whether, gauged from the defendant police officer’s subjective standpoint, he was acting in good faith when he engaged in the challenged action. *Id.* “What is relevant [to this inquiry] was whether defendant, in good faith, believed that he needed to fire his weapon to protect himself and others.” *Id.* If it is “uncontroverted” that the defendant police officer acted in good faith at the time he engaged in the challenged action, summary disposition is properly granted. *Id.* at 118. We will now apply these principles to each of the three defendants at issue in this appeal.

#### A. DEPUTY POTRATZ

Plaintiff argues that Potratz’s bad faith is demonstrated by (1) his failure to “assess the situation” before shooting plaintiff, (2), his failure to consider whether plaintiff presented a danger to his fellow officers when plaintiff only held a knife, and (3) his decision to arm himself with an AR-15 rifle in the mobile home park.

In his deposition, Potratz stated that he understood that another victim might be present in the mobile home that plaintiff occupied, and he knew that plaintiff had already attacked his grandmother with a knife. Potratz armed himself with the AR-15 rifle because he did not know what type of weapon plaintiff might have had and opined that a rifle would be beneficial if it was necessary to make a distant shot. Once the south door to the mobile home was opened to allow Potratz to see plaintiff inside, he trained his rifle on plaintiff because he knew his fellow officers were inside and he did not know if plaintiff had a weapon. Plaintiff never complied with commands to show his hands. Potratz fired his rifle at plaintiff when Myers was approaching the bathroom door and plaintiff raised his hands in Meyers’ direction with an unknown object in his

hands. Potratz stated that he shot plaintiff to protect Myers. He characterized the situation as “fluid” and moving quickly. Immediately after the shooting, Potratz engaged in a conversation with Myers in which Potratz expressed his belief that plaintiff was holding a gun.

During an interview with a Michigan State Police (MSP) investigator, Potratz stated that he retrieved his rifle at the request of Hedger because the plan was for him to cover the back of the mobile home. His MSP interview was consistent with his deposition testimony. In that interview, Potratz noted that Myers was approximately three to four feet away from plaintiff at that point, plaintiff raised his hand holding the object, and that because the mobile home was so cramped, “there was nowhere for [Myers] to go.”

The focus of our inquiry is whether Potratz acted in good faith, considering the circumstances as they were known to Potratz at the time he acted. *Latits*, 298 Mich App at 116. There is no evidence that, under the circumstances, Potratz acted maliciously or with improper motives, that he abused his authority as a police officer, or that he acted wantonly or with reckless disregard for plaintiff’s rights. *Odom*, 482 Mich at 474.

Plaintiff presented the testimony of an expert witness, Ernest Burwell, who was critical of Potratz’s decisions. However, Burwell offered no evidence that challenged the essential facts surrounding the shooting: the proximity of Meyers to the plaintiff when plaintiff raised his hands in Meyers’ direction holding an unknown object. Burwell also presented no evidence that Potratz acted with malice or bad faith. Accordingly, the trial court did not err by ruling that Potratz is entitled to immunity.

## B. DEPUTY MYERS

Myers testified that when he arrived at the mobile home Hedger informed him that plaintiff had attacked his grandmother by stabbing her in the eye or the back of the head. He was not aware that the knife blade had been secured, but he did know that there was a concern that plaintiff was mentally ill and that another hostage could possibly be inside the mobile home. He testified that he drew his firearm because he knew that plaintiff had stabbed his grandmother. He asked plaintiff to show his hands with no response. He continued in the plaintiff’s direction in the cluttered motor home. As he moved forward, he attempted to move a chair and either lost balance or fell. Myers fired his weapon when plaintiff raised his hand in Meyers’ direction holding an object that Myers perceived to be a firearm.

Plaintiff questions the trial court’s conclusion that factual disputes did not exist regarding whether Myers acted in good faith, and criticizes the trial court for not considering all of the surrounding circumstances. He highlights the fact that Potratz did not recall in either his deposition testimony or his MSP interview whether Myers had moved a chair or tripped before Myers discharged his weapon. Plaintiff asserts that Meyers’ version of the facts is belied by forensic evidence. Specifically, he argues that that evidence contradicts Myers’ testimony that when he fired at the plaintiff, he was in anything other than an upright position with a clear view of the plaintiff and whatever was in plaintiff’s hand. In support of these assertions, plaintiff relies on a forensic laboratory report analyzing the trajectory of the shot fired by Myers, which missed plaintiff and struck a wall inside the mobile home. Plaintiff’s expert was critical of Meyers’ conduct in several respects. However, neither the forensic report which addresses whether Meyers

was in an upright position when the second shot was fired, nor the expert's testimony create factual disputes regarding the essential facts noted in the discussion of Potratz: that a non-complaint plaintiff raised his hand holding an object in Meyers' direction within minutes of having lodged a lethal attack on his grandmother. Indeed, even if plaintiff acknowledged that he raised his hand while holding an object for the purpose of scaring the officer whom he thought was an intruder, plaintiff does not point to any evidence contravening these facts, which demonstrates that Myers acted in good faith when he used lethal force during the encounter with plaintiff. Accordingly, the trial court correctly granted summary disposition in favor of Myers with regard to assault and battery.

### C. SERGEANT HEDGER

Plaintiff argues that summary disposition was improperly granted in favor of Hedger because the trial court did not consider the specific circumstances that led to Hedger deploying his Taser against plaintiff. Plaintiff contends that Hedger acted out of anger and frustration, which is inconsistent with good faith. Plaintiff also questions Hedger's decision to deploy his Taser against plaintiff after plaintiff had been shot, asserting that this too demonstrates that Hedger acted in bad faith.

Hedger testified in his deposition that he was familiar with plaintiff, who had called 911 in the past threatening to commit suicide. Hedger was aware that plaintiff had attacked his grandmother with a knife and that the grandmother had disabled the knife by breaking off the blade. Hedger was shown the blade by neighbors who had called 911. Neighbors informed him that plaintiff was still in the mobile home, but that plaintiff had been walking around the trailer park, delusional and talking to people that were not there in the hours leading up to the stabbing. Central dispatch informed Hedger that there was possibly another person in the mobile home with plaintiff. Hedger testified that he believed that he was dealing with someone who had just tried to kill his grandmother, was mentally ill or intoxicated, was possibly contemplating "suicide by cop", and might not be alone in the mobile home.

After having gained entry, searching the front part of the mobile home and finding no one, Hedger determined it was too dangerous to proceed down a cluttered hallway to further search for plaintiff and sought entry from a side door. The side door was pried open and Hedger saw plaintiff, just feet in front of him, sitting in the bathtub with his feet dangling over the side. Hedger testified that no one else was in the small bathroom and he did not see any weapons. From outside the trailer, he called to plaintiff several times to show his hands, but plaintiff was unresponsive and stared straight past the officers. Hedger testified that he was not worried about plaintiff escaping when Potratz was standing outside the mobile home with an assault rifle pointed at plaintiff and Myers had the other door blocked with a firearm. Because he then knew exactly where plaintiff was, Hedger decided to walk around the mobile home, come through the other door and down the hallway where he was in a position to use his Taser on plaintiff. Hedger testified that he made it into the trailer and saw that Potratz had moved into the trailer and was blocking the doorway while Myers had proceeded down the hallway. Shots were fired and Hedger heard Myers yell that plaintiff had a gun. Plaintiff admitted that he pointed what he thought was a comb at people inside the trailer to scare them away.

Hedger was able to see into the bathroom after the shots were fired. He testified that plaintiff was in the same position sitting in the bathtub, hands down, still staring. He could see that plaintiff had been shot in the right side of his face. Hedger testified that plaintiff's face "was hanging off." There was blood all over. While he believed plaintiff to be in shock, Hedger again ordered plaintiff to show his hands. When plaintiff did not comply, Hedger tased him. He testified that he allowed the Taser to run for one, five-second cycle. He testified that normally in the case of passive resistance or immediate compliance, he would shut the taser off, but he allowed it to run a full cycle in plaintiff's case to give him time to approach plaintiff. Hedger testified that plaintiff fell over on his right side. Hedger lifted him up and saw only the handle of the knife where the blade had been broken off. When Hedger was asked whether plaintiff was then handcuffed, he testified that plaintiff "was in no position to be fighting" and "[a]t that point now we are trying to save his life."

We understand that "[o]fficers who put themselves in danger to keep our communities safe 'are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.'" *Braswell v McCamman*, 256 F Supp 3d 719, 725 (WD Mich, 2017) quoting *Graham v Connor*, 490 US 386, 396–97; 109 S Ct 1865; 104 L Ed 2d 443 (1989). Still, "[e]ven a split-second decision, if sufficiently wrong, may not be protected by qualified immunity." *Bougress v Mattingly*, 482 F 3d 886, 896 (6th Cir 2007). Where an officer "uses more force than is reasonably necessary to effect a lawful arrest, [he or she] commits a battery upon the person arrested." *White v City of Vassar*, 157 Mich App 282, 293; 403 NW2d 124 (1987).

Summary disposition as to Hedger was inappropriate where a question of fact existed as to whether Hedger was justified in deploying his Taser after plaintiff had been shot. Hedger testified that his initial concerns were that plaintiff was armed, that plaintiff had a hostage, or might have wanted to commit "suicide by cop." Once Hedger got a look at plaintiff in the bathtub, he knew plaintiff was alone, plaintiff could not escape, and there was no longer a possible hostage situation. After plaintiff had been shot and his face was "hanging off", the circumstances were such that reasonable minds could differ on whether Hedger proceeded to act in good faith in tasing plaintiff seconds later. In fact, a jury could conclude that plaintiff was no longer a threat after he was shot. Plaintiff's hands were no longer raised, he was not pointing anything at officers, no weapons could be seen, no one else was in the bathroom, he was in a deep sitting position, he had no means of escape, and the deputies were not hurt when Hedger decided to tase him. Hedger testified that he tased plaintiff for a full five-second cycle because plaintiff disobeyed the command to raise his hands, but at the same time he acknowledged that plaintiff was likely in shock from having just been shot in the face, and that in cases of passive resistance, he should manually shut off the taser. Thus, there is a question as to whether deployment of the taser for a full cycle was to use excessive force such as to demonstrate a deliberate indifference for likely harm to the plaintiff. See *Scozzari v Miedzianowski*, 454 Fed Appx 455, 466 (CA 6, 2012). We cannot find as a matter of law that Hedger did not act "with such indifference as to whether harm [would] result as to be the equivalent of a willingness that it [did]." *Odom*, 482 Mich at 474.

In sum, the trial court properly determined that defendants Potratz and Myers were immune from tort liability because there were no factual disputes regarding whether they acted in good faith when they shot plaintiff, however a question of fact exists as to whether Hedger acted in good faith when he deployed his Taser against plaintiff.

### III. GROSS NEGLIGENCE

Plaintiff also challenges the trial court's decision to grant Hedger's motion for summary disposition with respect to plaintiff's claim for gross negligence.<sup>4</sup> We disagree.

#### A. ANALYSIS

Initially, Hedger argues, as he did below, that plaintiff's gross-negligence claim is actually an intentional-tort claim that is impermissibly labeled as one for gross negligence. To the extent that plaintiff's claim is premised on the officers' conduct of shooting at plaintiff and deploying the Taser against him during the encounter, we agree. In *Latits*, 298 Mich App at 118, 120, this Court explained that it is necessary to review the allegations in the plaintiff's complaint to determine the substance of the claim. See also *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011) (recognizing that the elements of an intentional tort cannot be altered into a gross-negligence claim). Count I of plaintiff's complaint alleged that defendants were grossly negligent in the following manner:

- a. Potratz, Myers and Crain drew firearms to approach an unarmed individual;
- b. Potratz, Myers and Crain approached [plaintiff's] home with their firearms drawn before they fully understood the circumstances within [plaintiff's] home;
- c. Hedger either ordered Potratz, Myers, and Crain to draw their firearms or failed to order them to put their firearms away in this situation;
- d. Hedger armed himself with a [T]aser to approach an unarmed man before he fully understood the circumstances;
- e. All four officers organized their approach and seizure of [p]laintiff in a way that did not allow for them to deescalate or back down from the confrontation and risk of injury to [p]laintiff; and;
- f. All four officers took positions for aggressive siege of [plaintiff's] home without a full view of [plaintiff] and without full knowledge of the situation within.

Plaintiff further alleged that defendants were grossly negligent by:

- a. Failing to choose the least dangerous option available to apprehend [plaintiff];

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<sup>4</sup> Although plaintiff's complaint alleged that all of the defendants were grossly negligent, he conceded below that he was only pursuing a claim for gross negligence with respect to Hedger.



b. Failing to discuss prior to their siege of [plaintiff's] home his current mental status and failing to develop a plan that could be conducted with regard to [p]laintiff's safety;

c. Failing to comply with policing policies and regulations that forbid the use of firearms when approaching unarmed and mentally ill individuals;

d. Failing to abide by policing policies and regulations that require officers to approach and engage suspects in ways that reduce the use of force and prevent the risk of injury; and

e. Pointing guns at [p]laintiff when he was unarmed and in a nonresponsive state.

As in *Latits*, 298 Mich App at 111-112, in which the plaintiff's decedent was shot following a police pursuit, to the extent that plaintiff's allegations relate to the shooting of plaintiff and the deployment of the Taser, these allegations involve intentional decisions by the officers involved. Plaintiff does not allege that the Taser or the firearms were deployed negligently or by accident, and his claims regarding the choices that were made by the officers in the moments leading up to the shooting are related to the ultimate *intentional* decisions by the officers to shoot plaintiff and deploy a Taser against him. Indeed, there is no disagreement in this case that Potratz and Myers intentionally shot plaintiff, and that Hedger intentionally deployed his Taser against plaintiff. Thus, to the extent that the gross-negligence claim is premised on the officers' conduct related to the shooting of plaintiff and the deployment of the Taser against him, the claim is one for an intentional tort and not gross negligence.

To the extent that plaintiff's claim for gross negligence is predicated on Hedger's conduct in supervising and directing the police encounter, summary disposition was properly granted because there was no factual dispute with regard to whether Hedger's conduct constituted gross negligence.

To demonstrate a *prima facie* claim of negligence, a plaintiff is required to establish that the defendant owed him a legal duty, that he breached that legal duty, and that the breach proximately caused the plaintiff's damages. *Nyman v Thomson Reuters Holdings, Inc.*, 329 Mich App 539, 552; 942 NW2d 696 (2019). Preliminarily, although plaintiff alleges that Hedger failed to comply with various internal policies of the Sheriff's Department during his handling of the situation (e.g., policies addressing the use of firearms, deadly force, and appropriate responses to potentially dangerous situations), we agree with the trial court that the department's internal policies do not establish a legal duty owed to plaintiff. See *Buczowski v McKay*, 441 Mich 96, 99 n 1; 490 NW2d 330 (1992), and *Zdrojewski v Murphy*, 254 Mich App 50, 62; 657 NW2d 721 (2002); see also *Frye v CSX Transportation, Inc.*, 933 F3d 591 (CA 6, 2019), and *Brent v Wayne Co Dep't of Human Servs.*, 901 F3d 656, 701 (CA 6, 2018). In any event, to the extent that Hedger owed plaintiff a legal duty of care, the evidence did not establish a factual issue concerning whether Hedger acted in a grossly negligent manner.

In *Odom*, 482 Mich at 480, our Supreme Court explained that if a plaintiff pleads a *negligent* tort against a governmental employee, the following framework should be followed:

If the plaintiff pleaded a negligent tort, proceed under MCL 691.1407(2)<sup>5</sup> 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.* [Emphasis added.]

As this Court more recently recognized in *Wood v Detroit*, 323 Mich App 416, 423-424; 917 NW2d 709 (2018), § 7(8)(a) of the GTLA, MCL 691.1407(8)(a), defines “gross negligence” as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” In *Wood*, 323 Mich App at 424, this Court explained:

“Evidence of ordinary negligence is not enough to establish a material question of fact regarding whether a government employee was grossly negligent.” *Chelsea Investment Group LLC v Chelsea*, 288 Mich App 239, 265; 792 NW2d 781 (2010). Moreover, “[s]imply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result.” *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). This is true of “the most exacting standard of conduct, the negligence standard,” and even truer of the “much less demanding standard of care,” gross negligence. *Id.* The latter suggests “almost a willful disregard of precautions or measures to attend to safety and a singular

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<sup>5</sup> MCL 691.1407(2) provides:

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

(a) The officer [or] employee, . . . 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.

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

disregard for substantial risks.” *Id.* Although questions regarding whether a governmental employee’s conduct constituted gross negligence are generally questions of fact for the jury, if reasonable minds could not differ, summary disposition may be granted. *Briggs v Oakland Co*, 276 Mich App 369, 374; 742 NW2d 136 (2007). [Emphasis added.]

Plaintiff’s claim that Hedger was grossly negligent in his handling of the situation is based on allegations that Hedger: (1) ordered his team to use lethal force even as he knew that plaintiff was mentally ill, (2) sent Myers down a cluttered unsafe hallway with his firearm, rather than a Taser, even after deciding that a Taser should be used against plaintiff, (3) did not coordinate a plan with his team, (4) did not prudently wait for a trained negotiator to attempt to talk with plaintiff, (5) created a “suicide by cop” situation by provoking plaintiff, (6) yelled and screamed at plaintiff, (7) allowed Potratz to use an AR-15 rifle, and (8) did not call or wait for other available and necessary resources from the Sheriff’s Department.

We have reviewed the voluminous record to ascertain the validity of the plaintiff’s claims and we find them unavailing in part because the claims are not supported by that record. To the extent that the facts upon which the plaintiff relies are supported by the record those facts constitute, at best, a claim for ordinary negligence. Contrary to plaintiff’s assertion, there is record evidence that Hedger did consult with his team before they entered the mobile home albeit briefly. He informed team members, as had the dispatcher, that plaintiff had stabbed his grandmother, had a history of mental illness, had been behaving abnormally earlier that day and most importantly that there was a report that another person, possibly a hostage, could have been inside the mobile home. The information regarding the possibility that another person was in the mobile home was recorded on the transcript of the dispatcher’s communications. The evidence regarding whether Hedger informed the others that the knife blade plaintiff used to stab his grandmother had been secured is conflicting. There is no evidence to support plaintiff’s allegation that Hedger ordered his team to use lethal force. It is undisputed that he allowed the officers to enter the home armed, and in Potratz’s case, with an AR-15 rifle. Hedger admitted that he, like other officers, yelled at the unresponsive plaintiff. There is a dispute as to whether profanity was used but no dispute that the message conveyed was for plaintiff to show his hands.

The trial court acknowledged, as do we, that the situation that led to the discharge of police firearms and plaintiff’s serious injuries was tragic and perhaps could have been avoided. However, the standard for establishing gross negligence is whether Hedger engaged in “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(8)(a). Although plaintiff argues that Hedger could have acted differently or done more to avoid the shooting, and he presents Burwell’s opinions in support of his argument that other options could have been pursued, such allegations do not suffice, to establish gross negligence. The good faith belief that there was another person in the mobile home who was subject to harm defeats the gross negligence claim because it justifies rapid entry into the building out of concern for further injury rather than reckless disregard as to whether injury occurred. Had Hedger ordered his colleagues into a dimly lit unfamiliar space without weapons under the circumstances would have been reckless. The fact that there was a different or better course of conduct does not render Hedger’s actions grossly negligent. *Wood*, 323 Mich App at 424. Therefore, the trial court correctly granted summary disposition in favor of Sergeant Hedger with respect to plaintiff’s claim for gross negligence.

We affirm the part of the trial court's order granting summary disposition on plaintiff's intentional tort claim against Potratz and Myers based upon governmental immunity. We reverse the grant of summary disposition of plaintiff's intentional tort claim against Hedger and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. We affirm the trial court's order granting summary disposition on plaintiff's gross negligence claim.

/s/ Jane M. Beckering

/s/ Mark J. Cavanagh

/s/ Cynthia Diane Stephens