STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH MAZUR, Personal Representative of the Estate of JOHN MAZUR,

Plaintiff-Appellee,

v

DETROIT DEPARTMENT OF TRANSPORTATION, BAILIFF JOHN DOE 1, and BAILIFF JOHN DOE 2,

Defendants,

and

BAILIFF FRED DIXON,

Defendant-Appellant.

UNPUBLISHED
February 23, 2012

No. 300519
Wayne Circuit Court
LC No. 09-028133-NO

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant Fred Dixon appeals as of right from an order denying his motion for summary disposition, which was based, in part, on alleged governmental immunity. We affirm.

In July 2008, a judge signed an order of eviction pertaining to a Detroit residence inhabited by Deborah and John Mazur. On July 21, 2008, Dixon and others carried out the eviction. Plaintiff alleged in her complaint that Dixon or another bailiff threw John Mazur against a telephone pole, causing him to strike his head and fall to the ground. John died as the result of an acute subdural hematoma, which plaintiff contends was incurred during the eviction. In the complaint, plaintiff alleged counts of (1) negligence or gross negligence and (2) assault and battery.

Dixon moved for summary disposition under MCR 2.116(C)(4) (lack of subject-matter jurisdiction) and (7) (immunity), alleging first that "[d]efendant Dixon's position as a court officer qualifies him as a state officer pursuant to the five part test described in *Burnett v Moore*,

111 Mich App 646, 649; 314 NW2d 458 (1981)." Dixon alleged that the Court of Claims thus had jurisdiction over the matter. Dixon further alleged that (1) plaintiff's negligence and assault and battery claims did not fall within an applicable exception to governmental immunity,[1] (2) the gross negligence claim was untenable because Dixon did not act recklessly and because plaintiff could not even show that Dixon was involved in the altercation or that the altercation caused John's death, and (3) Dixon was entitled to quasi-judicial immunity.[2]

The trial court ruled:

> 1. Defendant Fred Dixon's Motion for Summary Disposition pursuant to MCR 2.116(C)(4) is denied. The Court is persuaded that Court Officer Fred Dixon is not a state official, but more akin to a "prison guard" or an off-duty state trooper[] and thus the matter is properly before the Wayne County Circuit Court and not the Court of Claims.
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> 2. Defendant Fred Dixon's Motion for Summary Disposition pursuant to MCR 2.116(C)(7) is also denied. Defendant Fred Dixon would not be entitled to quasi-judicial immunity while he was allegedly committing an assault on the decedent, and therefore he is not entitled to quasi-judicial immunity.
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> 3. Defendant Fred Dixon's Motion for Summary Disposition pursuant to MCR 2.116(C)(7) is further denied as to the argument that he is entitled to governmental immunity under the law. Defendant Fred Dixon would not be entitled to governmental immunity while he was allegedly committing an assault on the decedent. Further, there are issues of fact which preclude summary judgment on Plaintiff's gross negligence claim.

On appeal, Dixon argues that the Court of Claims has subject-matter jurisdiction in this case. We review de novo issues of subject-matter jurisdiction. *Todd v Dep't of Corrections*, 232 Mich App 623, 627; 591 NW2d 375 (1998). "When reviewing a motion under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs show there was no genuine issue of material fact." *Jones v Slick*, 242 Mich App 715, 718; 619 NW2d 733 (2000).

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[1] Dixon did not elaborate on this point.

[2] The city of Detroit was initially a party to this case. The city moved for summary disposition, stating, in part, that Dixon was employed by the state, not the city. The trial court granted summary disposition to the city, and this ruling has not been appealed. The lawsuit also initially involved two "John Does." However, plaintiff later alleged that it was Dixon who had harmed John Mazur and filed affidavits to that effect.

The Court of Claims has power and jurisdiction "[t]o hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies." MCL 600.6419(1)(a). "This jurisdiction also extends to suits against state officers where the officer was acting in an official capacity when committing the acts complained of." *Carlton v Dep't of Corrections*, 215 Mich App 490, 501; 546 NW2d 671 (1996).

In *Burnett v Moore*, 111 Mich App 646, 648-650; 314 NW2d 458 (1981), this Court considered whether a state police trooper was a state officer. The Court stated:

> It is necessary, therefore, to determine whether a state police trooper is a "state official" for purposes of the Court of Claims' jurisdiction. . . . "State officials" are the executive officers of state departments and commissions. *People v Freedland*, 308 Mich 449, 457-458; 14 NW2d 62 (1944), . . . sets forth the elements which distinguish a "public official" from an ordinary government employee:
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> > "'After an exhaustive examination of the authorities, we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional.'"
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> It is our opinion that the position of state police trooper is not a state office within the meaning of *Freedland* . . . . A state police officer has some discretion in the performance of his job, but an officer has to answer to authorities in addition to the law itself. A police officer must answer to the Commissioner of the State Police and other officials in the chain of command in the state police. [*Burnett*, 111 Mich App at 648-649.]

Similarly, in this case Dixon had a division supervisor to which he had to answer. He stated in an affidavit: "My normal procedure is to contact my division supervisor, Carolyn Cobb, of any [sic] unusual circumstances at the evictions. I did not contact Ms. Cobb to report anything regarding this eviction, because there was nothing to report." As noted by the trial court, Dixon was analogous to a prison guard and not to a prison warden. See *Lowery v Dep't of Corrections*, 146 Mich App 342, 349; 380 NW2d 99 (1985) ("we do not believe that the unknown guards were 'state officers', given their limited degree of discretion and independence"). The trial court did not err in its ruling under MCR 2.116(C)(4), and, contrary to Dixon's implication, we find no

basis on which to conclude that the trial court was obligated to offer a step-by-step exposition of each *Burnett* factor.

Dixon next argues that the trial court erred in its analysis of governmental immunity.

> In analyzing a motion for summary disposition pursuant to MCR 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. If a party supports a motion under MCR 2.116(C)(7) by submitting affidavits, depositions, admissions, or other documentary evidence, those materials must be considered. The substance or content of the supporting materials must be admissible into evidence. We review de novo a trial court's grant of summary disposition. [*Pusakulich v City of Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001) (citation omitted).]

In *Odom v Wayne Co*, 482 Mich 459, 479-480; 760 NW2d 217 (2008), the Court stated:

> [W]e provide these steps to follow when a defendant raises the affirmative defense of individual governmental immunity. The court must do the following:
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> (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
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> (c) the individual's conduct amounted to gross negligence that was the proximate cause of the injury or damage.
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> (4) If the plaintiff pleaded an intentional tort, determine whether the defendant established that he is entitled to individual governmental immunity under the *Ross* test [*Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984)] by showing the following:
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> (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.

With regard to the assault and battery claim, step (4) from *Odom* is applicable. This step involves analyzing whether the alleged wrongful acts were undertaken in good faith. The *Odom* Court made clear that "there is no immunity when the governmental employee acts *maliciously* or with a *wanton or reckless disregard of the rights of another*." *Odom*, 482 Mich at 474 (emphasis in *Odom*). Here, although Dixon denied the allegations of assault and battery, there is nonetheless ample evidence that Dixon did act maliciously and with a wanton and reckless disregard for John Mazur's rights. John's daughter averred: "When my parents arrived, my father got out of the car and was asking for the papers when the head bailiff [Dixon] began beating up my father by pushing him into a telephone pole where he slammed his head against the pole[;] he fell to the ground and the head bailiff continued punching and kicking him." John's wife similarly averred that "[t]he head bailiff [Dixon] . . . began beating up my husband, including slamming his head up against a telephone pole, punching him in the head and face and kicking him about his body." Evidence showed that John died as a result of bruising to his brain. In light of the evidence presented, Dixon has not demonstrated that he is entitled to governmental immunity as a matter of law with respect to the assault and battery claim.[3]

Dixon claims that summary disposition is appropriate with regard to the claim of gross negligence because he was carrying out a valid eviction and because he has denied getting into an altercation with Mazur. Dixon claims that plaintiff's claim of gross negligence is based solely on intentional acts and that plaintiff cannot "transform" these acts into negligent acts simply by labeling them as grossly negligent. See *VanVorous v Burmeister*, 262 Mich App 467, 483; 687 NW2d 132 (2004).

However, in her complaint, plaintiff alleged that Dixon was negligent not only by using excessive force, but also by failing "to obtain prompt and immediate emergency medical attention for John . . . ." Plaintiff also stated that Dixon breached a duty to "act prudently with reasonable care," and she stated that Dixon was grossly negligent by "act[ing] so reckless as to demonstrate a substantial lack of concern as to whether injury or death would result . . . ." As in *Bell v Porter*, 739 F Supp 2d 1005, 1015 (WD Mich, 2010), there were sufficient additional allegations here to avoid the precepts of *VanVorous*, and plaintiff has set forth sufficient facts demonstrating gross negligence such that Dixon is not entitled to summary disposition.

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[3] While the trial court's findings could have been more detailed, we reject Dixon's implication that the trial court was obligated to set forth a detailed analysis of each *Odom* factor. We further note that in *Odom*, the Court stated that "the burden continues to fall on the governmental employee to raise and prove his entitlement to immunity as an affirmative defense." *Odom*, 482 Mich at 479. In *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995), this Court, in discussing MCR 2.116(C)(7), stated, "if a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate."

Dixon lastly argues that he is entitled to quasi-judicial immunity. Dixon cites *Maiden v Rozwood*, 461 Mich 109, 134; 597 NW2d 817 (1999), in support of his argument. In that case, the Court stated, "Further, witnesses who testify during the course of judicial proceedings enjoy quasi-judicial immunity. This immunity is available to those serving in a quasi-judicial adjudicative capacity as well as 'those persons other than judges without whom the judicial process could not function.' 14 West Group's Michigan Practice, Torts, § 9:393, p 9-131." *Maiden*, 461 Mich at 134. Dixon then cites a case, *Menken v 31st Dist Ct*, 179 Mich App 379, 382-383; 445 NW2d 527 (1989), which indicated that a writ of restitution may only be served by a sheriff, deputy sheriff, bailiff, or court officer appointed by the court that issued the writ. Dixon thus alleges that "[w]ithout the court officer or bailiff, the judicial process of eviction could not function." We decline to read the authorities cited by Dixon in such a broad manner. Indeed, the issue in *Maiden* was witness immunity, and the Court in that case did not attempt to define the phrase "those persons other than judges without whom the judicial process could not function." *Maiden*, 461 Mich at 134. Dixon has simply not presented sufficient persuasive authority to support his appellate argument, and his actions were not analogous to those of a judge. Cf. *Diehl v Danuloff*, 242 Mich App 120, 133 n 3; 618 NW2d 83 (2000) ("a psychologist appointed by the court to evaluate a family and make a recommendation in a custody dispute is performing a function intimately related and essential to the judicial process"). We find no basis on which to reverse the trial court's decision with regard to quasi-judicial immunity.[4]

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Patrick M. Meter
/s/ Pat M. Donofrio

[4] Even if the trial court's analysis concerning judicial immunity were deemed incorrect, we may affirm a trial court's decision on alternate grounds. See *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).