NO. COA14-656
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

JOSEPH LEDBETTER,
Plaintiff,

v.

Durham County
No. 12 CVS 005955

CITY OF DURHAM, DURHAM POLICE DEPARTMENT, DURHAM POLICE OFFICER D.M. WALKER, Individually and in his official capacity, DURHAM POLICE OFFICER J.C. HUSKETH II, Individually and in his official capacity, DURHAM POLICE OFFICER M.B. GRADY, Individually and in his official capacity, DURHAM POLICE OFFICER JOHN DOE, Individually and in his official capacity a/k/a NICHOLAS SCHNEIDER,
Defendants.

Appeal by Defendant from an order entered 31 March 2014 by Judge Howard E. Manning, Jr., in Durham County Superior Court.

Heard in the Court of Appeals 21 October 2014.

Willie R. Perry, Jr., for the Plaintiff-Appellee.

Office of the City Attorney, by Kimberly M. Rehberg, for the Defendant-Appellant.

DILLON, Judge.

Nicholas Schneider ("Defendant") appeals from an order denying summary judgment on claims asserted against him in his individual capacity for assault and battery and the use of excessive force in the arrest of Joseph Ledbetter ("Plaintiff"), in violation of Plaintiff's rights under North Carolina law and the United States Constitution. We affirm.

I. Background

Police for the City of Durham received a tip that Plaintiff was selling drugs and conducted an open-air drug bust on 20 June 2007, tackling him as he was walking down the street near his home and seizing over two ounces of cocaine. Defendant was the officer tasked with arresting Plaintiff. He pulled up next to Plaintiff in an unmarked SUV, jumped out of the driver side rear door, and knocked Plaintiff onto the ground which resulted in injuries to Plaintiff.

Plaintiff filed this civil action, asserting claims for assault and battery and the use of excessive force in violation of his Fourth Amendment rights against Defendant and three other police officers in their individual and official capacities, and against the City of Durham. Defendant filed a timely answer and a properly noticed motion for summary judgment.

The matter came on for hearing in Durham County Superior Court. The trial court granted the motion for summary judgment in favor of the defendants on all claims except those asserted against Defendant in his individual capacity. Defendant timely appealed.

II. Jurisdiction

We have jurisdiction over this interlocutory appeal because the trial court's order denied a dispositive motion based on Defendant's immunity as a public official. *Epps v. Duke University, Inc.*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849, *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996).

III. Standard of Review

Summary judgment is only appropriate where no triable issue of fact exists and one party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2014). "The nonmoving party is entitled to the most favorable view of the affidavits, pleadings and other materials and all reasonable inferences to be drawn therefrom." *Turner v. City of Greenville*, 197 N.C. App. 562, 565, 677 S.E.2d 480, 483 (2009).

IV. Analysis

Defendant argues that the trial court erred in denying his motion for summary judgment because the forecast of evidence

demonstrated that the force he used to gain control of Plaintiff was reasonable under the circumstances and that he was therefore entitled to public official and qualified immunity. However, while there is conflicting evidence on this issue, when viewing the evidence in the light most favorable to Plaintiff, we believe that a triable issue of fact existed as to whether Defendant's actions in taking control of and subduing Plaintiff were objectively reasonable under the circumstances. Therefore, we affirm the trial court's order denying Defendant's motion for summary judgment.

Under N.C. Gen. Stat. § 15A-401(d)(1)(a) (2007), the use of force by a law enforcement officer is authorized "when and to the extent that he reasonably believes it necessary . . . [t]o prevent [an] escape from custody or to effect an arrest[.]" However, that statute also provides that it does not "constitute[] justification for willful, malicious or criminally negligent conduct . . . , nor shall it be construed to excuse or justify the use of unreasonable or excessive force." *Id.* § 15A-401(d)(2). As the official commentary to subdivision (d) explains, a "law-enforcement officer cannot act with indifference to the safety of others in the use of force." *Id.* § 15A-401 (official commentary). We have observed that implicit

in the statute "is the notion that [the] unjustified use of [] force may lead to civil liability." *Wilcox v. City of Asheville*, ___ N.C. App. ___, ___, 730 S.E.2d 226, 231 (2012), *disc. review denied*, 366 N.C. 574, 738 S.E.2d 401-02 (2013).

State law affords law enforcement officers immunity from personal liability for actions undertaken within the scope of their office so long as they are acting without malice or corruption and within the scope of their discretionary duties. *Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890-91 (1984). An officer acts with malice, losing this immunity under our law, when he or she "does that which a [person] of reasonable intelligence would know to be contrary to his [or her] duty," intending to prejudice or injure another. *Id.* at 313, 321 S.E.2d at 890. Proof of actual intent to injure is not required. *Wilcox*, ___ N.C. App. at ___, 730 S.E.2d at 232. Instead, a plaintiff asserting an excessive force claim against a police officer may "prove malice based on constructive intent to injure . . . [where] the level of recklessness of the officer's action was so great as to warrant a finding equivalent in spirit to actual intent." *Id.*

Plaintiff has forecast sufficient evidence of a triable issue of fact regarding Defendant's entitlement to immunity as a

public official under State law. Viewing the evidence in the light most favorable to Plaintiff and giving him the benefit of all reasonable inferences arising from that evidence, as we are required to do, the evidence at the very least shows that Defendant tackled Plaintiff with a degree of recklessness great enough to be "equivalent in spirit to actual intent," *see id.*, and that he did so wantonly and while exceeding the scope of his lawful authority to use force under the circumstances. Specifically, there was evidence which tended to show that the impact of Plaintiff's face hitting and dragging against the sidewalk cut part of his face to the bone, cut the bridge of his nose deeply and broke it in two places, injured the skin under his eyebrow, immediately knocked out one of his teeth and resulted in the eventual loss of eight more, and caused Plaintiff to bleed profusely from the eye and mouth.

We note that Defendant testified that in the police briefing before he executed the takedown of Plaintiff, he was informed that his target sold cocaine and was "known to run"; that after receiving the signal to execute the takedown, he exited the vehicle, yelling "Police. Get on the ground," and Plaintiff "bladed" his body and turned "as if to run"; that there is a direct correlation between the presence of drugs and

firearms; that in conducting open-air drug busts, it is imperative that officers take control of suspects immediately, and the surface on which a suspect is standing is not generally considered a relevant consideration; and that he did not intend to hurt Plaintiff in executing the takedown, only to prevent his escape and take him into custody.

However, in his affidavit, Plaintiff described himself as an unarmed, 140 pound, five foot six inch tall man who was standing still when the unmarked SUV pulled up on the day of the bust. He raised his open hands over his head when he saw Defendant exit the SUV, never started running, never "bladed his body to run," never resisted arrest, and had never run from or been charged with fleeing the scene or running away from a police officer in his life. Sworn affidavits by other eyewitnesses corroborate Plaintiff's account of events. Therefore, there is a triable issue of fact as to whether Defendant is entitled to public official immunity under State law. Accordingly, Defendant's argument based on the State law of public official immunity is overruled.

The doctrine of qualified immunity operates similarly to public official immunity under State law, insulating "government officials performing discretionary functions . . . 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." *Roberts v. Swain*, 126 N.C. App. 712, 718, 487 S.E.2d 760, 765, *cert. denied*, 347 N.C. 270, 493 S.E.2d 746 (1997). Whether the doctrine of qualified immunity will shield a police officer from liability for the use of force in the line of duty depends on the objective reasonableness of the officers' conduct. *See id.* at 718-19, 487 S.E.2d at 765. "Claims that law enforcement officers used excessive force in the course of an arrest should be analyzed under the Fourth Amendment and its 'reasonableness' standard because the Fourth Amendment protects against such physically intrusive conduct." *Id.* at 727, 487 S.E.2d at 770.

Again, viewing the evidence in the light most favorable to Plaintiff, as we are required to do, we hold that a triable issue of fact existed as to whether the force Defendant used was objectively reasonable under the circumstances. Whether the force Defendant used was the force a reasonable officer would have used under the circumstances and thus whether it was excessive and in violation of Defendant's Fourth Amendment rights depends upon unresolved issues of fact properly reserved

for trial. *See id.* Accordingly, Defendant's argument based on qualified immunity is overruled.

V. Conclusion

The trial court did not err in denying Defendant's motion for summary judgment.

AFFIRMED.

Judge HUNTER, Robert C. and Judge DAVIS concur.

Report per Rule 30(e).