

STATE OF MICHIGAN
COURT OF APPEALS

DEON GENTRY,

Plaintiff-Appellee,

v

WAYNE COUNTY DEPUTY SHERIFF DANIEL
CARMONA,

Defendant-Appellant.

UNPUBLISHED

October 11, 2011

No. 296580

Wayne Circuit Court

LC No. 08-115139-NO

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

This appeal deals with the denial of summary disposition premised on governmental immunity for injuries incurred by Deon Gentry after being shot by Wayne County Sheriff Deputy Daniel Carmona while resisting arrest. We reverse.

Carmona and his partner, Richard G. Merrow, were dispatched to an apartment at approximately 10:45 a.m. on a reported assault and battery. They were met at the scene by two other Wayne County Sheriff deputies, Sylvester Bruce Evans and William Thompson as back-up and all four officers proceeded to enter the apartment building. They were met on the stairs by the complainant, Surphae Thomas. Surphae indicated she had phoned the 9-1-1 operator regarding a physical altercation that occurred with Gentry around 4:00 a.m. that morning.

Surphae brought the officers into her apartment and indicated that Gentry was asleep in a bedroom. Carmona entered the bedroom followed by Merrow and the other officers. All of the officers concur that Gentry appeared to be asleep and was face down on the bed with a sheet or blanket covering him completely to the neck area. Carmona testified that he announced the presence of police twice while walking to the bed, but that Gentry was not responsive. Carmona also instructed Gentry to show his hands but received no response. Holding his handcuffs, Carmona yelled that Gentry was “under arrest” and pulled back the covers. Gentry was observed to be nude and “immediately jumped out of the bed.” Gentry swung at Carmona as he rose from the bed causing him to drop his handcuffs. On initial removal of the sheet and observing that Gentry’s hands were hidden beneath his body, Merrow unholstered his service revolver and held it in a ready position pointed toward the floor. When he saw that Gentry was not armed, Merrow reholstered his weapon but could not recall whether he “locked” the weapon in his holster. Merrow testified that Gentry also swung at him as he jumped off the bed, striking him in the

face. Gentry pushed past Evans into the living room. Gentry's actions were described as running "right through like he was playing football."

Gentry was physically taken down by the officers several times. During these incidents, Gentry was "kicking and punching" at officers but was able to break free. Several of the officers assert they were struck by Gentry during the ensuing melee and that less restrictive alternatives for physical restraint were attempted and failed. Gentry, despite knowing the individuals he engaged were police officers, continued to physically struggle, disobey their commands to cease and desist and attempted to evade arrest. Gentry broke away from officers several times and finally, when he ran to the stairwell he was tackled for the final time by Merrow. When they fell, Merrow ended up face down on the floor with Gentry on top of him.

The officers continued their attempts to pull Gentry off Merrow. Carmona was positioned to "the right side of Officer Merrow on the ground" and "facing the back of Mr. Gentry." Evans was on the left side of Gentry and Thompson was positioned to the right of Carmona. Carmona attempted to grab Gentry's upper right arm and shoulder area as Gentry's forearms and hands were underneath Merrow and allegedly not visible. Carmona indicated that he "was almost standing between . . . I don't know where [Merrow's] feet were. . . .Gentry's totally blocking my view of Richard other than I could hear his voice coming from this area, and I know when he fell his head was there."

At this point, Merrow verbally indicated that Gentry was attempting to grab his "shoulder mic," which was positioned on Merrow's left side. Merrow then indicated verbally that Gentry was attempting to grab his weapon. Carmona continued his efforts to pull Gentry off Merrow with Evans also trying to grab Gentry on the opposite side. Merrow then stated several times that Gentry had his weapon. Carmona asserted that he observed Gentry's "hands on Officer Merrow's gun within the holster" but did not see it "completely" removed from the holster. Carmona released his hold on Gentry, "leaned back, pulled out my revolver, and I could see Mr. Gentry's hand on Merrow's gun. And I could see Merrow and Gentry coming off the ground." All of the officers and Gentry concurred that events transpired rapidly. Carmona was standing, facing Gentry's back. Carmona "yelled for him to let the gun go, and then I shot." Carmona fired one shot, striking Gentry in the back. Almost simultaneously, Thompson verbally indicated he "was hit" when he was struck in the facial area by the spent cartridge. Carmona indicated that when Gentry was struck he released the weapon and it "went back into the holster."

Carmona sought summary disposition in accordance with three separate subsections of the applicable court rule.¹ The standard of review for motions pursued under these subrules has recently been addressed by this Court.² Specifically:

¹ MCR 2.116(C)(7), (8) and (10).

² *Driver v Naini*, 287 Mich App 339; 788 NW2d 848 (2010), aff'd in part, rev'd in part on other grounds *Driver v Naini*, 490 Mich 239 (2011).

This Court reviews summary disposition rulings de novo. Issues of statutory construction are questions of law, reviewed de novo. . . .

In reviewing a motion under subrule [MCR 2.116](C)(7), a court accepts as true the plaintiff's well-pleaded allegations of fact, construing them in the plaintiff's favor. The Court must consider affidavits, pleadings, depositions, admissions, and any other documentary evidence submitted by the parties, to determine whether a genuine issue of material fact exists. But these materials are considered only to the extent that they are admissible in evidence.

A motion for summary disposition under (C)(8) tests the legal sufficiency of the pleadings. The pleadings are considered alone, without consideration of evidence. Where the parties rely on documentary evidence, appellate courts proceed under the standards of review applicable to a motion made under MCR 2.116(C)(10).

A motion made under MCR 2.116(C)(10) tests the factual support for a claim, and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. But such evidence is only considered to the extent it is admissible. A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ.³

"A plaintiff can overcome . . . a motion for summary disposition [premised on governmental immunity] by alleging facts that support the application of an exception to governmental immunity."⁴

Gentry raised two negligence claims along with the intentional tort claim of assault and battery and the intentional infliction of emotional distress in his complaint. He contends that Carmona's actions in discharging his weapon were reckless, comprising willful misconduct amounting to gross negligence, and were the proximate result of his injury. Carmona pleaded the affirmative defense of governmental immunity and asserts the trial court erred in denying him summary disposition as Gentry failed to establish a genuine issue of material fact or demonstrate that he failed to act in good faith or with malicious intent. Neither party challenges the dismissal of Gentry's claims of negligence by the trial court at summary disposition.

³ *Id.* at 343-344 (internal citations omitted).

⁴ *Burise v City of Pontiac*, 282 Mich App 646, 650; 766 NW2d 311 (2009).

The Governmental Tort Liability Act (GTLA)⁵ delineates the applicability of qualified immunity to governmental employees as follows:

(2) 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, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force 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 or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

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

* * *

(7) As used in this section:

(a) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Our Supreme Court has ruled that the above statutory provision⁶,

[G]ives immunity for acts taken while in the course of employment or service if (a) the employee is acting or reasonably believes he or she is acting within the scope of his or her authority, (b) the agency that the employee serves is engaged in the exercise or discharge of a governmental function, and (c) the employee's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.⁷

⁵ MCL 691.1407.

⁶ MCL 691.1407(2).

⁷ *Odom v Wayne Co*, 482 Mich 459, 470; 760 NW2d 217 (2008) (internal quotation marks omitted).

Consequently, this subsection⁸ has been found to “encompass[] only *negligent* tort liability” as separate subsections of the statute⁹ demonstrate that “the Legislature unambiguously expressed its intent to maintain the law of *intentional* torts. . . .”¹⁰

As the trial court’s dismissal of Gentry’s negligent tort claims is not challenged by the parties, the above analysis, specifically with regard to the claim of gross negligence, is inapplicable as the grouping of claims within this count of Gentry’s complaint is an attempt to plead in avoidance of governmental immunity. Specifically, in his complaint Gentry identifies “Count I” as comprising the “Negligence, Gross Negligence, Wilful and Wanton Misconduct of Defendant Carmona.”

Gentry’s allegations pertaining to “gross negligence” comprised the following:

25. Defendant Carmona was the proximate cause of Plaintiff Gentry’s injuries.

26. That Defendant Officer Carmona owed Deon Gentry a duty to not act grossly negligent and to act prudently and with reasonable care, and otherwise to avoid the use of unnecessary and/or unreasonable force.

27. That Defendant Carmona breached the above duties and was grossly negligent, acted intentionally and so recklessly as to demonstrate a substantial lack of concern as to whether injury or death would result, and/or Defendant Carmona’s acts of willful and wanton misconduct toward Deon Gentry breached the above duties in a number of ways, including, but not limited to:

- a. Improper use of reasonable, unnecessary and excessive force when Deon Gentry posed no threat or harm to Defendant Carmona;
- b. Failure to obtain prompt and immediate emergency medical attention; and
- c. Any and all additional acts of gross negligence and/or willful and wanton misconduct as may become known through the course of discovery.

“The governmental immunity statute does not itself create a cause of action called ‘gross negligence,’”¹¹ and this Court has consistently “rejected attempts to transform claims involving

⁸ MCL 691.1407(2).

⁹ MCL 691.1407(3).

¹⁰ *Odom*, 482 Mich at 470 (emphasis in original).

¹¹ *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009).

elements of intentional torts into claims of gross negligence.”¹² Gentry’s claim of “gross negligence” is based on the same facts and allegations that underlie his claim of assault and battery as evidenced by his reference in both counts to Carmona’s alleged use of “excessive force.” As recognized previously by this Court, “the tort of assault and battery by gross negligence does not exist.”¹³ As Gentry’s assertion of “gross negligence” is “fully premised on [the] claim of excessive force,” it is subsumed within the intentional tort claim.¹⁴ It is well recognized that how a party chooses to characterize or label his or her cause of action is not dispositive and would effectively result in placing form over substance.¹⁵ Summary disposition is not avoidable simply because of artful pleading.¹⁶ As the gravamen of Gentry’s claim is premised on the alleged assault by Carmona, the trial court should have dismissed his claim of gross negligence at summary disposition.

The portion of the statutory language dealing exclusively with intentional torts comprises our primary focus.¹⁷ The analysis to be followed to determine whether a governmental employee is entitled to statutory immunity for an intentional tort has recently been provided by our Supreme Court. The Court cited as authority and adopted the method previously outlined in case law, stating:

Under *Ross*, to be immune from liability for intentional torts, the governmental employee must first establish that the acts were taken “during the course of . . . employment and” that the employee was “acting, or reasonably believe[d] [he was] acting, within the scope of [his] authority[.]” This requirement ensures that a governmental employee will not be afforded immunity when committing ultra vires acts, as these are outside the scope of the employee’s authority. However, it also protects a governmental employee who reasonably believes that he was authorized to take certain actions, but later learns that he was mistaken.

The governmental employee must also establish that he was acting in “good faith.” *Ross* did not elaborate on this element, relying instead on Prosser on Torts and the cases cited therein. Prosser noted that the “considerable majority of the state courts take the position that there is no immunity where the inferior officer does not act honestly and in good faith, but maliciously, or for an improper

¹² *VanVorous v Burmeister*, 262 Mich App 467, 483-484; 687 NW2d 132 (2004), citing *Smith v Stolberg*, 231 Mich App 256, 258-259; 586 NW2d 103 (1998); *Sudul v Hamtramck*, 221 Mich App 455, 458, 477; 562 NW2d 478 (1997).

¹³ *Sudul*, 221 Mich App at 461.

¹⁴ *VonVorous*, 262 Mich App at 483.

¹⁵ *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989).

¹⁶ *Maiden v Rozwood*, 461 Mich 109, 135; 597 NW2d 817 (1999).

¹⁷ MCL 691.1407(3).

purpose.” “[O]fficial immunity should not become a cloak for malicious, corrupt, and otherwise outrageous conduct on the part of those guilty of intentional abuse of power. . . .” The cases cited by Prosser indicate that there is no immunity when the governmental employee acts maliciously or with a wanton or reckless disregard of the rights of another.

* * *

The final *Ross* element to be considered when determining whether an individual is entitled to governmental immunity is whether the challenged “act” was ministerial or discretionary in nature. As explained in *Ross*, “‘A ministerial officer has a line of conduct marked out for him, and has nothing to do but to follow it; and he must be held liable for any failure to do so which results in the injury of another.’” Ministerial acts “constitute merely an obedience to orders or the performance of a duty in which the individual has little or no choice.” The execution of an act once a decision has been made is also ministerial in nature. “Discretion,” on the other hand, “‘implies the right to be wrong.’” Discretionary acts “require personal deliberation, decision and judgment.” Although the decision need not be extraordinary, governmental immunity is not afforded for “every trivial decision” an actor may make. Granting immunity to an employee engaged in discretionary acts allows the employee to resolve problems without constant fear of legal repercussions.¹⁸

The Court summarized the test for an individual’s entitlement to governmental immunity when an intentional tort has been pleaded as encompassing 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.¹⁹

There is no dispute, in the circumstances of this case that Carmona was acting in the course of his employment and within the scope of his authority as a police officer. Based on the distinctions of our Supreme Court in defining ministerial and discretionary acts, while Carmona’s execution of his decision to use deadly force was ministerial, his actions in

¹⁸ *Odom*, 482 Mich at 473-476, citing *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984), superseded in part by statute, see *Alexander v Riccinto*, 192 Mich App 65, 70; 481 NW2d 6 (1991) (footnotes omitted).

¹⁹ *Odom*, 482 Mich at 480.

determining how to respond to Gentry's physical resistance were clearly discretionary.²⁰ The actual point of contention, therefore, is whether Carmona's actions "were undertaken in good faith, or were not undertaken with malice. . . ." ²¹

Our Supreme Court has reviewed the concept of "good faith" in the context of case law²², and found:

In *Armstrong v Ross Twp*, the Court of Appeals described good faith simply as acting without malice. In *Blackman v Cooper*, the Court of Appeals held that a police officer is entitled to immunity when he is "acting in good faith with probable cause . . . even though the arrest is subsequently found to be baseless." In *Dickey v Fluhart*, the Court of Appeals held that an "action may lie only if the officer has utilized wanton or malicious conduct or demonstrated a reckless indifference to the common dictates of humanity."

This Court has described a lack of good faith as "malicious intent, capricious action or corrupt conduct"⁴⁴ or "willful and corrupt misconduct. . . ." In *Firestone v Rice*, in which the plaintiff brought an action for false imprisonment and assault and battery against a police officer for handcuffing him, the Court held:

There must be some discretion reposed in a sheriff or other officer, making an arrest for felony, as to the means taken to apprehend the supposed offender, and to keep him safe and secure after such apprehension. And this discretion cannot be passed upon by a court or jury unless it has been abused through malice or wantonness or a reckless indifference to the common dictates of humanity.

In addition, this Court has held that "willful and wanton misconduct is made out only if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does." Similarly, our standard civil jury instructions define "willful misconduct" as "conduct or a failure to act that was intended to harm the plaintiff" and "wanton misconduct" as "conduct or a failure to act that shows such indifference to whether harm will result as to be equal to a willingness that harm will result." These instructions are consistent with the negation of the common-law definition of "good faith" and can be a useful guide for a trial court considering a defendant's motion for summary disposition based on individual

²⁰ *Oliver v Smith*, 290 Mich App 678; ___ NW2d ___ (issued November 23, 2010), slip op at 6, citing *Watson v Quarles*, 146 Mich App 759, 764-765; 381 NW2d 811 (1985).

²¹ *Id.*

²² *Odom*, 482 Mich at 474-475 (internal footnotes and citations omitted).

governmental immunity. Thus, the proponent of individual immunity must establish that he acted without malice.

The stated intent or purpose underlying this factor is to “protect[] 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.”²³ By necessity, “[t]he good-faith element . . . is subjective in nature.”²⁴

Carmona contends that the trial court erred in determining that a question of fact existed regarding whether he acted in good faith or without malice. The trial court denied summary disposition because it questioned whether Carmona could, in good faith, discharge his weapon while Gentry was on top of and in such close proximity to Merrow. Specifically, the trial court denied summary disposition based on concerns that a determination of whether Carmona’s discharge of his weapon constituted “excessive force and recklessness” comprised “jury questions.”

As a starting point we note that this Court has previously determined:

It is well-settled in our state’s jurisprudence that a police officer may use reasonable force in making an arrest. The force reasonably necessary to make an arrest is the measure of force [] that [] an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary.²⁵

In addition, “[p]olice officers, especially when faced with a potentially dangerous situation, must be given a wide degree of discretion in determining what type of action will best ensure the safety of the individuals involved and the general public, the cessation of unlawful conduct, and the apprehension of wrongdoers.”²⁶ While an officer’s decision on how to effectuate a lawful arrest comprises a discretionary act, once that decision is made the officer is required to make the arrest in a proper manner.²⁷ When effectuating an arrest, “[a]n action may lie only if the officer utilized wanton or malicious conduct or demonstrated a reckless indifference to the common dictates of humanity.”²⁸ The officer’s discretion in determining the need to effectuate an arrest “cannot be passed upon by a court or jury unless it has been abused through malice or wantonness or a reckless indifference to the common dictates of humanity.”²⁹

²³ *Id.* at 481-482.

²⁴ *Oliver*, slip op at 5.

²⁵ *VanVorous*, 262 Mich App at 480-481 (citation omitted).

²⁶ *Ross*, 420 Mich at 659.

²⁷ *Oliver*, slip op at 6.

²⁸ *Dickey v Fluhart*, 146 Mich App 268, 276; 380 NW2d 76 (1985).

²⁹ *Firestone*, 71 Mich at 384.

All of the witnesses concur, and the record evidence confirms, that the situation involving the officers and Gentry was quickly evolving with only approximately 19 minutes having elapsed from the time the officers were dispatched to the scene until a call was placed indicating that a shot had been fired and requesting an ambulance. The officers and Gentry all agree that the interaction was extremely physical with the officers chasing Gentry, his ongoing struggle to avoid arrest and that the physical space in which these events transpired was restrictive and confining. Gentry admits he was aware that the individuals he was engaged with were police officers. While Gentry denies any effect from his ingestion of illegal substances, he admits that he smoked several blunts in the immediately preceding 24 hour period.

The trial court and parties in their appellate briefs mistakenly focus on whether Gentry actually had physical contact or control of Merrow's firearm. While there is conflicting testimony regarding Gentry's actual contact with the weapon and some discrepancy regarding the visibility of Gentry's hands and Merrow's exact position beneath Gentry, any disagreements in testimony on these factors is functionally irrelevant. All of the officers concur that Merrow stated, more than once, that Gentry had his gun. Gentry does not deny that Merrow made this statement, but merely asserts that he does not recall anything police said during the events.

What is relevant is the absence of any conflict regarding the very intense physical struggle that ensued between the officers and Gentry and the failure and lack of effectiveness of less restrictive means used to subdue Gentry. Everyone concurs that events transpired and evolved rapidly. Even if there is a factual question of whether Gentry had physical contact with Merrow's weapon, the only truly relevant fact is that Merrow verbally indicated to his fellow officers that he did not have control of his firearm and believed Gentry to have access to the weapon. It is at that moment that Carmona made a decision to draw his weapon and fire, weighing the potential risks of discharging his firearm against the possibility of harm to his partner, the other officers and himself if Gentry had control of Merrow's firearm. Supporting Carmona's election to fire is the undisputed fact that, upon hearing Merrow indicate Gentry had his weapon Evans released his grasp on Gentry's left arm, drew his service revolver, pointed it at Gentry's head and was also prepared to fire.

Our Supreme Court has recognized "that police officers are employed to work in a milieu of criminal activity where every decision is fraught with uncertainty."³⁰ As a result and "because of the unusual and extraordinary nature of police work it is unfair to allow a jury of laymen with the benefit of 20/20 hindsight to second-guess the exercise of a policeman's discretionary professional duty."³¹ Viewing the situation as a whole and in context, Carmona and his fellow officers were faced with an aggressive individual who was actively and persistently resisting arrest. Less restrictive alternatives were tried and failed to subdue Gentry or have any discernible impact on his level of resistance. Gentry acknowledged that his only concern was to escape the police. At least three of the officers were struck by Gentry during the struggle and pursuit and although Gentry asserts he lacked any intent to harm he does not deny that he made

³⁰ *White v Beasley*, 453 Mich 308, 321; 552 NW2d 1 (1996) (citation omitted).

³¹ *Id.* (citation omitted).

physical contact with the officers and struck or kicked them. Under these circumstances it is difficult to construe how the trial court determined that Carmona lacked good faith or acted with malice as at the time Carmona was involved in an ongoing physical struggle with Gentry and had been verbally told by his partner that Gentry had access to his firearm. There is no factual dispute that, despite the ongoing and violent struggle with Gentry, Carmona did not draw his weapon until Merrow indicated that Gentry had obtained access to his firearm. Carmona was faced with making a split second decision. Whether in retrospect his decision was mistaken is not the concern. Based on the undisputed factual situation that existed, Carmona's "actions, in deciding how to respond to [Gentry] . . . and effectuate a lawful arrest as [Gentry] resisted, were clearly discretionary. Accordingly, it is a decision to which governmental immunity applies."³²

Based on our determination that Carmona was entitled to governmental immunity and dismissal of Gentry's intentional tort claims, we need not address the remainder of Carmona's claims pursuant to the wrongful conduct rule as they are rendered moot.³³

We reverse.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

³² *Oliver*, slip op at 6.

³³ *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).