STATE OF MICHIGAN

COURT OF APPEALS

CORDELL D. WYATT and SUZANNE M. WYATT, Individually and as Next Friend of BIANCA WYATT, ALICIA WYATT, CHENTELLE WYATT, and MICHAEL SANDUSKY, Minors,

Plaintiffs-Appellees,

v

SERGEANT JOHN BLAIR, OFFICER ANTHONY CHICKO, CORPORAL JON GERSKY, and OFFICER ROBERT ROBINSON,

Defendants-Appellants,

and

SERGEANT HAROLD STOCKTON, DEPUTY MICHAEL ROYAL, DEPUTY MARK GRANT, DEPUTY ALLEN BERNZANSKY, DEPUTY MICHAEL PENTSIL, DEPUTY DAVID DE SAUTELS, OFFICER HUSSAIN FRAHAT, OFFICER WARREN JONES, SERGEANT COAGLIO, OFFICER CAROLYN HUGGINS, OFFICER GORDY MAY, STATE OF MICHIGAN, COUNTY OF WAYNE, CITY OF TAYLOR, TOWNSHIP OF BROWNSTOWN, and CITY OF ROMULUS,

Defendants.

UNPUBLISHED
August 1, 2006

No. 259750
Wayne Circuit Court
LC No. 02-212713-NI

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendants John Blair, Anthony Chicko, Jon Gersky and Robert Robinson, each of whom are officers of the Taylor Police Department, appeal as of right the trial court's order denying their motion for summary disposition based on governmental immunity, MCR

2.116(C)(7), and failure to create a genuine issue of material fact, MCR 2.116(C)(10). We reverse.

I. Basic Facts and Procedural History

This lawsuit arises from events that occurred during a search for suspects following the armed robbery of a southeast Michigan restaurant at approximately 9:45 p.m. on the night of September 18, 2001. Several police officers from the Michigan State Police, the township of Brownstown, the cities of Romulus and Taylor, and the Wayne County Sheriff's Department were involved in seeking out and apprehending four armed suspects, including either two African-American males or an African-American male and female, that had taken flight into a residential neighborhood. During an ensuing foot chase of the suspects, several officers were fired upon by at least one of the suspects. Plaintiffs Cordell and Suzanne Wyatt subsequently sought out and informed a city of Romulus police officer that a member of their household had spotted a suspicious individual in a neighboring yard. Officers from the various police agencies responded to the scene, where a canine tracking unit tracked a scent to the rear of plaintiffs' home.

After returning home to find a number of officers at the rear of his home, Cordell decided to observe the "commotion" through two sliding glass doors leading to a deck attached to the rear of the home. According to the complaint filed by plaintiffs, upon seeing Cordell, the police officers, "after having already seen Plaintiff Suzanne M. Wyatt, his wife, who is Caucasian, drew the conclusion that Mr. Wyatt, an African-American male, was the suspect, and announced . . . that the suspect was in the house and a hostage situation was underway." With assault rifles trained at the home, the officers then ordered the occupants of the house to exit the home, females first, onto the deck. After exiting the home, several of the plaintiffs, including sixteen-year-old Bianca Wyatt and eleven-year-old Chentelle Wyatt, were placed in handcuffs and taken to the front of the house. Bianca and Cordell, along with Michael Sandusky, were also placed in a patrol car until such time as the home was "cleared" and it was confirmed that none of the occupants of the home were in fact a suspect in the armed robbery.

Plaintiffs subsequently filed this lawsuit against the governmental entities and individual officers involved in the search for the robbery suspects, raising claims of assault and battery, violation of ministerial duties, false arrest and imprisonment, negligence, and both intentional and negligent infliction of emotional distress. Following dismissal of the various governmental entities on the ground of immunity, the individual officers of the Taylor Police Department moved for summary disposition of the claims against them, arguing that the evidence established that they too were entitled to immunity, or were otherwise not involved in the acts alleged by plaintiffs to form the basis for their claims, and were therefore entitled to summary disposition under MCR 2.116(C)(7) and (10). The trial court denied the motion, prompting this appeal.

II. Analysis

A. Standard of Review and Applicable Law

We review a trial court's determination regarding a motion for summary disposition de novo. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Spiek v Dep't of Transportation*, 456

Mich 331, 337; 572 NW2d 201 (1998). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

A motion under MCR 2.116(C)(7) "tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). In making this determination, well-pleaded allegations are accepted as true and construed in favor of the nonmoving party. *Dampier v Wayne Co*, 233 Mich App 714, 720; 592 NW2d 809 (1999). "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003).

An employee of a governmental agency acting within the scope of his or her authority is immune from tort liability unless the employee's conduct amounts to gross negligence that is the proximate cause of the injury. MCL 691.1407(2); see also *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). Actions of a governmental employee that would normally be considered an intentional tort are also shielded from liability if those actions were "justified," i.e., objectively reasonable under the circumstances. *Butler v Detroit*, 149 Mich App 708, 715; 386 NW2d 645 (1986); see also *VanVorous v Burmeister*, 262 Mich App 467, 480; 687 NW2d 132 (2004). Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results," MCL 691.1407(7)(a), and has been held to suggest an "almost willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks," *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). Accordingly, evidence of ordinary negligence does not create a material question of fact concerning gross negligence. *Maiden v Rozwood*, 461 Mich App 109, 122-123; 597 NW2d 817 (1999). Moreover, to satisfy the causation requirement, the defendant's conduct must be "the one most immediate, efficient, and direct cause" of plaintiffs' injuries. *Robinson*, *supra*.

Plaintiffs do not dispute that the officers responding to plaintiffs' house on September 18, 2001, were acting within the scope of their authority while engaged in a governmental function, i.e., tracking suspects following an armed robbery. See *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003); see also, e.g., *Payton v Detroit*, 211 Mich App 375, 393; 536 NW2d 233 (1995). Accordingly, we must determine whether the evidence, when viewed in a light most favorable to plaintiffs, would permit reasonable minds to differ regarding whether defendants' conduct was justified, or amounted to gross negligence that was "the" proximate cause of plaintiffs' injuries. *Robinson*, *supra*; *Butler*, *supra*.

B. Intentional Tort Claims

With respect to the intentional torts alleged by plaintiffs, defendants assert that they are entitled to governmental immunity for their actions on the night of September 18, 2001, because the circumstances giving rise to plaintiffs' claims justified the officers' decision to secure certain of the plaintiffs. Defendants argue that the evidence leaves little doubt that for the safety of the

police officers and plaintiffs, it was necessary to quickly remove plaintiffs from the house, move them to a safe location, and determine whether any one in the house was a suspect in the armed robbery. We agree.

In support of their claims for assault and battery, false arrest and imprisonment, and intentional infliction of emotional distress, plaintiffs generally alleged that the police officers tortiously "manhandled" and detained them, causing physical and emotional injury. Plaintiffs further alleged that they were needlessly placed in fear for their lives when the police officers aimed assault rifles at them, and that individual plaintiffs suffered emotional distress from either witnessing family members being placed in handcuffs and police cars, or themselves being subjected to such treatment.

On appeal, defendants acknowledge that it was defendant Blair who handcuffed Cordell and Michael while on the rear deck, and that it was Chicko who handcuffed then lead Bianca from the home. There is also evidence indicating that Blair "may" also have been the officer who handcuffed Chentelle, and that Robinson was outside the house with his gun drawn at the time plaintiffs were ordered from the home.[1] There is, therefore, at least some evidence to support plaintiffs' claims against defendants Blair, Chicko, and Robinson. We note, however, that plaintiffs presented no evidence showing that defendant Gersky was involved in any of the activities that form the basis for their claims. Accordingly, we find that summary disposition of plaintiffs' claims against Gersky was proper under MCR 2.116(C)(10), regardless whether he would be entitled to immunity. See MCR 2.116(G)(4). Regarding the remaining defendants, we further find that because no reasonable observer could conclude that the officers' conduct that evening was unjustified, summary disposition in favor of those defendants was also proper.

As recognized by our Supreme Court in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 659; 363 NW2d 641 (1984), police officers "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." See also, e.g., *Graham v Connor*, 490 US 386, 396-397; 109 S Ct 1865; 104 L Ed 2d 443 (1989) (recognizing that "police officers are often forced to make split-second judgments . . . in circumstances that are tense, uncertain, and rapidly evolving"). The question is whether the officer's exercise of such discretion was objectively reasonable under the circumstances. *VanVorous*, *supra*.

Applying the foregoing principles to the evidence submitted by the parties, we cannot conclude that a reasonable observer would find defendants' conduct on the evening in question to have been unjustified. Regarding the use of assault rifles to order the occupants from the home, the evidence wholly supports that the officers were justified in believing that one of the suspects had entered plaintiffs' house, as they had been informed of a suspicious individual in a neighboring yard and a canine unit had tracked the scent to plaintiffs' rear deck. Given the

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[1] Although defendants contend in their brief on appeal that no Taylor police officer had physical contact with Chentelle, we note that the record indicates that Blair admitted to his supervisor that he "may" have been the individual who handcuffed Chentelle.

nature of the crime under investigation, i.e., armed robbery, and considering that officers had earlier been fired upon while pursuing the suspected perpetrators of that crime, the officers were similarly justified in perceiving a need to protect both themselves and plaintiffs in the event an armed suspect had in fact entered plaintiffs' house.

Defendants conduct toward Bianca Wyatt was also not objectively unreasonable. Indeed, given that officers had been fired upon earlier, defendants were on a heightened state of alert and needed to react quickly with little time for reflection. The evidence indicates that Bianca admittedly came out of the house screaming "at the top of [her] lungs," and did not immediately follow orders to move off the deck and away from the house. Rather, testimony from witnesses indicates that Bianca, both physically and vociferously, fought the officers' attempts to move her away from the house. As argued by defendants, it would have been foolish not to handcuff an individual in such an emotional state. See, e.g., *People v Zuccarini*, 172 Mich App 11, 14; 431 NW2d 446 (1988) (handcuffing and detention of defendant was a reasonable, limited intrusion on the defendant's liberty under circumstances where violence could arise and the risk of harm to the police and others needed to be minimized). Moreover, while there is evidence that, when viewed in a light most favorable to plaintiffs, indicates that restraining Bianca in this manner required that she be forcefully subdued, there is no evidence to indicate that the officers used any more force than necessary under the circumstances. *Id*.; see also, e.g., *Brewer v Perrin*, 132 Mich App 520, 528; 349 NW2d 198 (1984). Accordingly, we do not conclude that reasonable minds could differ regarding whether defendants were justified in restraining Bianca in the manner alleged.

Given Bianca's admitted emotional state, it was similarly not objectively unreasonable to have placed Bianca into a patrol car until the situation at hand had been resolved by the officers. Furthermore, while there is evidence to indicate that Bianca suffered bruising and swelling as a result of being handcuffed that night, there is no evidence to suggest that she was handcuffed too tightly or was otherwise injured during handcuffing by defendants. When viewed in a light most favorable to plaintiffs, the evidence of record fails to establish a genuine issue of material fact regarding whether defendants' actions in temporarily subduing, handcuffing, and placing Bianca into a police car were objectively reasonable and necessary to remove Bianca from the situation for both her safety and the safety of others.

While the need to restrain Chentelle was less apparent, the evidence indicates that defendants' conduct in this regard was, nonetheless, also objectively reasonable under the circumstances. The evidence clearly shows that this was a tense and volatile situation, and that Chentelle had disregarded the officers' earlier order to exit the home with the other female occupants, at least one of which had already demonstrated a disruptive and arguably dangerous lack of emotional control. Moreover, there is no evidence to show that Chentelle was subjected to unnecessary force, or that her being restrained by the officers, as opposed to the distress of the entire episode, i.e., being surrounded by officers with guns drawn and seeing her father and siblings led away by the police, caused the mental distress generally asserted by plaintiffs. See *Brewer*, *supra* at 529 ("[b]y itself the use of handcuffs is not unreasonable force"). As already discussed, the officers responding to the plaintiffs' home were justified in perceiving a general need to secure the home and its occupants. Furthermore, the evidence indicates that Chentelle was placed in handcuffs only for a very brief period of time, was never placed in a police vehicle, and was released almost immediately after being safely moved to the front of the home.

Accordingly, we find no genuine issue of material fact regarding whether the defendants' conduct toward Chentelle was objectively reasonable.

The evidence similarly fails to raise a genuine question of fact regarding whether defendants' conduct toward Michael and Cordell was objectively reasonable. We note that Cordell indicated during deposition that he did not believe that the officers did anything inappropriate in securing Michael, and that he understood why he and Michael were initially restrained by defendants. Indeed, the officers were looking for an African-American male and had been shot at earlier. Further, plaintiffs admitted that Michael was visibly upset before exiting the house, and acknowledge that at the time officers believed a hostage situation to be underway. Given that the officers had been informed of a suspicious person in a neighboring yard, and that a canine unit had tracked a scent to the rear of plaintiffs' home, reasonable minds could not differ regarding whether the precautionary tactics employed by defendants until such time as the situation was resolved were objectively reasonable, and thus justified.

Consequently, we conclude that even when viewed in the light most favorable to plaintiffs, the evidence does not support a conclusion that the officers acted in other than an objectively reasonable manner under the circumstances. The alleged actions taken here do not rise to the level of objectively unreasonable conduct sufficient to destroy the protection of governmental immunity. As noted, the alleged encounters occurred during a highly charged incident, and without the benefit of hindsight, the facts and circumstances confronting the officers rendered their actions objectively reasonable. See *Graham*, *supra* at 396 (indicating that the judgment of reasonable officers on the scene should not be subjected to the "20/20 vision of hindsight" but, rather, afforded deference). Therefore, because the officers' conduct does not give rise to an actionable claim, whether arising from direct contact with the officers, or derivatively as a result of viewing the officers action that night, the trial court erred in failing to grant summary disposition of plaintiffs' claims of intentional tort in favor of defendants.

C. Negligent Tort Claims

In the remainder of their complaint, plaintiffs allege that defendants did not use due care to prevent their false arrest and imprisonment and assault and battery and that, in doing so, defendants violated their ministerial duties as police officers and negligently inflicted emotional distress onto plaintiffs. We note, however, that "this Court has rejected attempts to transform claims involving elements of intentional torts into claims of gross negligence." *VanVorous*, *supra* at 483-484, citing *Smith v Stolberg*, 231 Mich App 256, 258-259; 586 NW2d 103 (1998) and *Sudul v Hamtramck*, 221 Mich App 455, 458, 477; 562 NW2d 478 (1997). Plaintiffs' general claims of negligence and claims of negligence in relation to their claims of violation of ministerial duties and infliction of emotional distress merely reassert their claims of intentional tort. Plaintiffs may not, however, transform these claims into additional claims for gross negligence.[2] *VanVorous, supra*. Therefore, the trial court should also have dismissed plaintiffs'

[2] Moreover, even were such "transformation" permissible, for the same reasons it cannot be said that defendants' conduct on the night of September 18, 2001 was not justified, we cannot conclude that a reasonable observer would find defendants' conduct to be "so reckless as to
(continued…)

claims of negligence, violation of ministerial duties, and negligent infliction of emotional distress. *Id*.

Reversed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

(…continued)

demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a); *West, supra*.