STATE OF MICHIGAN

COURT OF APPEALS

THELONIOUS JACKSON,

Plaintiff-Appellee,

v

DANIEL LUBELAN and PLATT R. WEINRICK,

Defendants-Appellants.

UNPUBLISHED
September 10, 2020

No. 350239
Genesee Circuit Court
LC No. 16-108364-CZ

Before: CAVANAGH, P.J., and BORRELLO and TUKEL, JJ.

PER CURIAM.

In this case involving plaintiff's claim that defendants were grossly negligent when they arrested plaintiff following a traffic stop, defendants appeal as of right the trial court's partial denial of their motion for summary disposition under MCR 2.116(C)(7). Defendants essentially maintain that governmental immunity shields them from liability because their conduct was not grossly negligent as a matter of law. For the reasons set forth in this opinion, we affirm the trial court's ruling.

I. BACKGROUND

This case has previously been before this Court, see *Jackson v Lubelan*, unpublished per curiam opinion of the Court of Appeals, issued July 5, 2018 (Docket No. 338275), and the underlying incident in this case was also the subject of previous litigation in the federal courts, see *Jackson v Lubelan*, 657 F Appx 497 (CA 6, 2016).

In defendants' prior appeal in the instant case, this Court summarized the underlying facts of plaintiff's arrest as follows:

> Defendants are Michigan State Police troopers. On December 22, 2011, defendants were on duty and conducted a traffic stop of plaintiff's vehicle in Flint. After discovering that plaintiff had three outstanding arrest warrants, plaintiff was placed under arrest. In the process of arresting plaintiff, he was handcuffed. This gross negligence lawsuit arises from the handcuffing. Plaintiff contended that he was handcuffed in an "extremely tight manner" by defendant Lubelan, that Lubelan

> lifted plaintiff's "handcuffed wrists upwards" when assisting plaintiff into the police squad car, and that he was then forced to sit "at a very awkward angle, with his arms twisted behind him." Plaintiff alleged that he repeatedly complained about the pain that he was in from the tight handcuffs, but neither defendant checked the handcuffs or loosened them. As a consequence of defendants' failure to loosen the handcuffs, plaintiff claimed that he suffered injuries to his hands and wrists. [*Jackson*, unpub op at 1.]

Following his arrest, plaintiff initiated the above referenced federal court action alleging that defendants employed excessive force in violation of the Fourth and Fourteenth Amendments to the United States Constitution and additionally raising state law tort claims of assault and battery and gross negligence. *Jackson*, 657 Fed Appx at 499-500. The district court granted summary judgment in favor of defendants on the excessive force and gross negligence claims but dismissed the assault claim without prejudice to allow plaintiff to refile the claim in state court. *Id*. at 500. With respect to the excessive force claim, the district court concluded that there was no genuine issue of fact that plaintiff had not incurred a physical injury as a result of the handcuffs being placed on him too tightly. *Jackson v Lubelan*, unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued December 8, 2015 (Case No. 13-cv-15178), pp 7-8, aff'd in part and remanded in part 657 Fed Appx 497 (CA 6, 2016). As particularly relevant to the issues in the instant appeal, the district court dismissed plaintiff's gross negligence claim based on the district court's determination that plaintiff had not raised any tort claims predicated on the negligence of defendants but had instead only asserted claims based on defendants' intentional conduct that could not be transformed into gross negligence claims. *Id*. at 14.

On appeal from that ruling, the United States Court of Appeals for the Sixth Circuit affirmed the district court's dismissal of plaintiff's excessive force claim. *Jackson*, 657 Fed Appx at 502. Regarding this claim, the Sixth Circuit first specifically concluded that plaintiff had not sufficiently alleged that a physical injury resulted from the handcuffing or pointed to any evidence in the record that would demonstrate a causal connection between any physical injury and the handcuffing. *Id*. at 500-501. The Sixth Circuit next concluded with respect to the excessive force claim that plaintiff had not provided any caselaw showing (1) that it was a clear violation of the Fourth Amendment for a police officer to "lift[] an arrestee's handcuffed wrists to facilitate him moving into a police car," (2) that there was a clearly established right under the Fourth Amendment "to be free from awkward or uncomfortable placement in a police cruiser," or (3) that "handcuffing someone just tightly enough that an awkward arm placement or a minor lift causes an injury" is a clearly established violation of the Fourth Amendment. *Id*. at 501-502.

However, in reaching these conclusions, the Sixth Circuit Court of Appeals also stated, "In truth, the record and [plaintiff's] testimony suggest that the injuries stem from the nerve damage in his neck, which [plaintiff] admits was not caused by the tightness of his handcuffs. In [plaintiff's] words, 'if they would have seated [him] . . . differently . . . it might have alleviated the pain.' " *Id*. at 500-501 (ellipses and last alteration in original; citation omitted).

With respect to plaintiff's gross negligence claim, the Sixth Circuit remanded the matter to the district court for further consideration of this claim. *Id*. at 499, 503. The Sixth Circuit determined that plaintiff was "not transforming intentional excessive force or battery claims into

negligence claims" because breaching a duty to perform employment duties without endangering or causing harm to others is "not inevitably intentional" and "Michigan does allow gross negligence claims based on allegations that also form the basis of a claim for intentional use of excessive force." *Id*. at 502. The court noted that plaintiff was "alleging that, even if intentional conduct did not cause his injuries, conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results did." *Id*. at 503 (quotation marks and citation omitted). The Sixth Circuit concluded as follows:

> All in all, [plaintiff's] claims may well fail under Michigan's immunity statute for reasons similar to those that doom his § 1983 claim. However, because the district court did not analyze these issues in the first instance, we remand for further consideration consistent with the above conclusions. In light of this ruling and the district court's previous decision to decline jurisdiction over [plaintiff's] other state law claim, the district court may reconsider the issue of supplemental jurisdiction in its discretion on remand. [*Id*.]

On remand, the district court declined to exercise supplemental jurisdiction over plaintiff's state law gross negligence claim since there were no remaining federal claims, and the court dismissed plaintiff's gross negligence claim without prejudice. *Jackson v Lubelan*, unpublished order of the United States District Court for the Eastern District of Michigan, entered December 1, 2016 (Case No. 13-cv-15178).

Plaintiff subsequently initiated the instant lawsuit in the Genesee Circuit Court by way of a single-count complaint alleging gross negligence. In the complaint, plaintiff alleged that defendant Lubelan applied the handcuffs in "an extremely tight manner," that plaintiff complained that the handcuffs were too tight, and that neither defendant took any steps to check the handcuffs or loosen them. Plaintiff further alleged that when Lubelan put him into the police vehicle, Lubelan "lifted Plaintiff's handcuffed wrists upwards and lifted Plaintiff up, and ultimately put Plaintiff in the squad car at a very awkward angle, with his arms twisted behind him." Plaintiff alleged that "[w]hen Defendant Lubelan lifted upwards on Plaintiff's handcuffs, it felt as if the nerves in Plaintiff's neck were pinched," and that defendants did nothing to address plaintiff's pain when he again informed them of his pain while he was seated in the back of the police vehicle. Plaintiff claimed to have suffered injuries and damages "including but not limited to numbness and pain in his hands and wrists" as a result. He alleged that his injuries were proximately caused by defendants' gross negligence and that "[d]efendants' actions and/or inactions were such that they completely ignored the potential risk of injury to Plaintiff."

Defendants responded to the complaint by moving for summary disposition under MCR 2.116(C)(7) and (C)(8). The trial court denied defendants' motion. Defendants appealed this decision to this Court, which resulted in the decision previously referenced. In that appeal, this Court affirmed the trial court's ruling denying defendants' motion for summary disposition. *Jackson*, unpub op at 4.

Subsequently, defendants again moved the trial court for summary disposition under MCR 2.116(C)(7). Defendants argued that plaintiff's gross negligence claim was barred by collateral estoppel because the federal district and appellate courts had determined that there was no physical injury resulting from the handcuffing and that determination on this issue was dispositive of any

claim of gross negligence predicated on the handcuffing. Defendants additionally argued that any claim based on defendants' actions related to putting plaintiff in the police vehicle could not establish gross negligence because there was no evidence that defendants acted so recklessly as to show a substantial lack of concern for whether an injury would result. Thus, defendants maintained that governmental immunity insulated them from tort liability pursuant to MCL 691.1407(2)(c) because their conduct did not amount to gross negligence.

In opposing the motion, plaintiff argued that there had never been a valid and final judgment regarding the gross negligence claim. Plaintiff maintained that "the precise issue which the Sixth Circuit Court of Appeals remanded to the Federal District Court was whether Defendants acted grossly negligent in handcuffing Plaintiff too tightly and placing him in an awkward position with his arms twisted behind him, and continuing to ignore his complaints that his positioning and the overly tight handcuffs were causing him pain for approximately 45 minutes to an hour[] . . . [w]hereby these actions caused bruising, scarring, and swelling to Plaintiff's wrists, as well as a slipped disc in Plaintiff's neck." (Emphasis omitted.) Plaintiff further argued that the federal courts had never adjudicated the issue whether defendants breached a duty to avoid foreseeable injury to plaintiff while pursuing legitimate police activity or to avoid conduct or failure to act that was so reckless as to demonstrate a substantial lack of concern for whether injury would result.

Plaintiff argued, "the gross negligence claim in this case involves the totality of the circumstances surrounding Plaintiff being handcuffed, his arms being twisted and lifted when he was placed in the back of the police vehicle, and his complaints of pain and numbness being ignored for approximately 45 minutes to an hour while waiting to be transported to jail, and during transport to the jail" and that the federal courts had only held that there was no physical injury from the overly tight handcuffs and not that plaintiff had not suffered any injuries from defendants' actions. The totality of the circumstances surrounding the incident, according to plaintiff, demonstrated that a jury could find that defendants acted with reckless disregard and a substantial lack of concern for whether plaintiff would be injured and that defendants' grossly negligent conduct caused plaintiff's injuries that included a slipped disc in his neck and bruising, scarring, and swelling on his wrists.

In his deposition for this case, plaintiff described the underlying incident as follows:

> I was leaving a friend's house. I can't really remember the time or date necessarily, but I was pulled over by your officers. They never did really give me the reason why, but I had—come to find out I had a warrant and they said I was driving around while my license were suspended, which they were due [sic] to the driver's responsibility fee . . . .
>
> And once I got stopped we were talking. They was checking whatever they need to check, and at some point they came around and said I had a warrant, kind of to my surprise, but they—so they had to take me down, and at that point, like I said, put the cuffs on me. As soon as they put them on they were extremely tight, and I told them once they cuffed me could they possibly loosen the cuffs up, and it went from there to there to there.

> And as we waited, it takes a while for them to call the tow truck and for the tow truck to actually get there, and all that time that the tow truck was on its way obviously I'm still in pain and suffering with the cuffs being too tight, and I asked them again several other times could they just please loosen the cuffs and I'd be okay.
>
> After a moment, that's when we were standing outside the police vehicle waiting, they put me in the police—in the car. At that point still uncomfortable, handcuffs still too tight, and when they lifted me up they had to—I'm not the shortest fellow in the world but not the tallest as well, so when they put me in the car I was at an angle that wasn't comfortable. And I stayed in that angle for about maybe 45 minutes to an hour still cuffed tight and no assistance as far as trying to—not that they lived for my comfort but for just getting pulled over for driving while my license was suspended I thought that was a little bit much.

According to plaintiff, both defendants helped put him in the back seat of the police vehicle. Plaintiff explained that once he was in the vehicle, because the front seats were pushed back as well, he had "no wiggle room at all" and could not adjust his position to a normal sitting position. Instead, his body was "twisted a tad" and he was "sitting at an angle with [his] arms up in the back of the car . . . so [he] couldn't never straighten up." Plaintiff testified that defendants "lifted my arms up into a situation where they tried to help me sit, and in doing so I was placed at an angle with my arms up above my back a little high and basically stuck in that position for about an hour or so." He indicated that his hands were up at approximately his "mid back" for this period of time. Plaintiff also testified about what he believed defendants did wrong, indicating that they ignored his complaints about the tightness of the handcuffs, did nothing to alleviate the pain he was experiencing when they could have done so, and positioned him improperly in the police vehicle for an extended period of time, although plaintiff did not believe that defendants intended to harm him in how they placed him in the vehicle. Regarding his placement in the vehicle, defense counsel questioned plaintiff as follows:

> *Q.* So what exactly did they do wrong when they put you in the car? That's what I'm trying to understand.
>
> *A.* Well, from a layman's point of view, like I said, when they put me in they put me in at an angle that they couldn't get me out of or didn't want to get me out of. They could have let the seat up a little bit. They could have had it where I can be sit, like I said, straight in the seat where I'd be a bit comfortable. I know they wasn't looking for my comfort at all, but by them placing my arms behind me and placing them up above at an odd angle, so to speak, for 45 minutes was a bit much.

When he was questioned by his own counsel at his deposition, plaintiff testified about the requests he made to defendants while he was seated in the back seat of the police vehicle:

> *Q.* Did you say anything to the officers about the way your body was put in the back of the police car and the discomfort related to the positioning of your body in the car?

A. Yes, I did. I asked them if there's any way they can straighten me out or I might have asked them could they let the seat up. Like I said, it's been a while and I'm not for certain.

Q. But you know you mentioned something about straightening up your body?

A. Yes, I tried to straighten it up myself but I couldn't.

Q. Okay.

A. There was no room to turn.

Q. And did they do anything to help you with that about straightening up your body or even make a comment?

A. Nothing at all.

Plaintiff also testified in his deposition about the injuries he claimed to have received as a result of the incident that gave rise to the instant litigation. Plaintiff testified that he suffered scaring, redness, and swelling on his wrists from the handcuffs digging into his skin. Plaintiff further testified that a chiropractor told him that he "had a pinched nerve by them putting [him] in the car a certain way." Additionally, plaintiff stated that "[w]hen they pushed my arms up behind my back it pinched a nerve which, therefore, led to the—to the numbness and the tingling that I feel in my hands and fingers." According to plaintiff, he had a slipped disc in his upper spine and neck area as a result of this incident. He further explained that his chiropractor informed him that his slipped disc in his neck was caused by the manner in which his arms were raised up behind him and that the slipped disc in turn caused the pain and numbness to "shoot[] down into [his] arm." Plaintiff stated that the swelling and broken skin on his wrists were the only injuries that arose from the handcuffing and that all of his other injuries arose from how defendants placed him in the back seat of the police vehicle, raising his handcuffed arms behind him and "pinn[ing]" them in an "awkward position."

Plaintiff also attached his deposition from the federal lawsuit to his response to defendant's summary disposition motion. In that earlier deposition, plaintiff described the underlying events similarly but included more detail about defendants' response to his complaints about the tightness of the handcuffs:

> And then he placed me in handcuffs, and as soon as he placed me in handcuffs they were extremely tight and I asked him could he loosen them up because it was just a traffic violation and I hadn't done anything, and he said not to worry about it.
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> * * *
>
> Once he placed me in the handcuffs I think he went and talked to his other officer for a moment or so, and then I was on the left side of my vehicle and we walked around to the right side of the officers' vehicle.

* * *

> And when we got around to the passenger's side I was still telling that the cuffs were—because they was hurting very bad so I kept telling him, hey, could you just loosen these up? He said don't worry about it again and, like, I guess he would take care of it. So I'm—then he lift me up from the—from my wrist to put me in the car and it got even worse because I was in the car. I had a different, funny angle.

* * *

> I was sitting—I was placed in—like I said, when he lifted up on it it kind of pinched my nerves in my neck. And when he set me in I was sitting straight up in the vehicle where my arms were up behind me so to speak, very uncomfortable. And I told him that there was—it was painful and, first of all, could he kind of move me around because once I got in the car there was no room for me to really move where I could get myself situated in a comfortable position.
>
> So I just sat like that until—for another 30 minutes or so until the tow truck came, which I continually asked the guy could he just loosen the cuffs and that way I would feel a little more—I mean, I didn't mind being stopped because I was—might have been wrong or what have you, but he never did loosen up on the cuffs or change my position where I was seated.

Plaintiff further explained that during the incident,

> I was just in a lot of pain by the cuffs, and, like I said, if they would have seated me any other differently I think it might have alleviated the pain or maybe not even caused the pinching of the nerves up in my neck. It's the way that they place you in those cars initially that makes a big difference . . . .

Plaintiff indicated that he complained about the handcuffs being too tight approximately six to eight times over the course of the incident.

Lubelan testified in his deposition that he did not recall the process of handcuffing plaintiff and did not have any independent memory of how plaintiff got into the police vehicle that night. However, Lubelan testified that he always checks the tension of handcuffs by placing his index finger between the handcuffs and an arrestee's wrists, always "double locks" the handcuffs so that they do not continue to tighten further, and follows these procedures "every single time I handcuff." Lubelan did not know if anyone pulled up on plaintiff's arms to get him into the vehicle, but he indicated that there was no reason to do so. Lubelan also did not know if plaintiff ever complained about the handcuffs being too tight or requested that the handcuffs be loosened. Plaintiff's counsel questioned Lubelan as follows regarding whether plaintiff complained about any pain while he was in the back seat of the vehicle:

> *Q.* Do you know—once [plaintiff] was in the back seat, do you know if he ever complained of being uncomfortable, or being in a bad or awkward position, or anything like that?

A. Not to my knowledge, sir.

Q. If he had, would there be anything that you would typically do?

A. Would have tried to have made him a little more comfortable.

Q. And there would be no reason not to do that, right?

A. Correct, sir.

A hearing on defendants' summary disposition motion was held at which the trial court announced its ruling from the bench. The trial court granted defendants' motion in part, ruling that the doctrine of collateral estoppel applied to preclude plaintiff from further litigating the issue whether there was injury resulting from the handcuffing. However, the trial court also denied defendants' motion in part and ruled that whether defendants were grossly negligent with respect to the circumstances surrounding plaintiff's placement in the police vehicle was an issue for a jury to decide. The trial court specifically explained that "a claim for gross negligence can be brought based upon allegedly putting him in the police car at an awkward angle with his arms twisted, raised behind him, pulling plaintiff's wrists up hard, and ignoring his complaints of pain and discomfort for approximately 45 minutes to an hour." The trial court stated that this was a jury question, that "[a]ny or all of those could go to the slipped disc in his neck," and that it would "leave in the bruising, scarring, and swelling to his wrist" because the record supported the conclusion that "maybe those were caused by the twisting of his arms behind him, pulling up his wrists hard."An order was entered to this effect, and the instant appeal followed. The trial court stayed the proceedings pending the resolution of this appeal.

II. STANDARD OF REVIEW

The standard of review applicable to a motion for summary disposition under MCR 2.116(C)(7) based on the assertion of governmental immunity, such as the motion at issue in this case, has been summarized by our Supreme Court as follows:

> We review de novo a trial court's determination regarding a motion for summary disposition. Under MCR 2.116(C)(7), the moving party is entitled to summary disposition if the plaintiff's claims are " 'barred because of immunity granted by law . . . .' " 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. [*Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008) (citations omitted; ellipsis in original).]

This Court reviews the applicability of governmental immunity de novo as a question of law. *Beals v Michigan*, 497 Mich 363, 369; 871 NW2d 5 (2015). "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether the claim is barred by immunity is a question for the court to decide as a matter of law." *Id*. at 370 (quotation marks and citation omitted). However, "[t]he determination whether a governmental employee's conduct constituted gross negligence under MCL 691.1407 is generally a question of fact," and a

court should only grant summary disposition if reasonable minds could not differ. *Oliver v Smith*, 269 Mich App 560, 563; 715 NW2d 314 (2006).

MCR 2.116(C)(7) is also applicable to motions for summary disposition on the basis of collateral estoppel. *Alcona Co v Wolverine Environmental Prod, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). This Court reviews de novo, as a question of law, whether a preclusion doctrine such as collateral estoppel applies to preclude relitigation of an issue. *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 33-34, 42; 620 NW2d 657 (2000).

III. ANALYSIS

The unifying theme of defendant's appellate arguments is that defendants are immune from tort liability as governmental employees because their conduct did not constitute gross negligence as a matter of law.

The governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, provides "broad immunity from tort liability to governmental agencies and their employees whenever they are engaged in the exercise or discharge of a governmental function." *Beals*, 497 Mich at 370. The exceptions to this general rule, provided in the GTLA, must be construed narrowly. *Id*. At issue in this case is the exception contained in MCL 691.1407(2), which provides 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. [Emphasis added.]

Of these requirements, the only one implicated by the nature of defendants' appellate arguments is whether defendants' conduct did not amount to gross negligence. MCL 691.1407(2)(c). Because the remaining requirements for establishing the applicability of governmental immunity are not in dispute as the issues have been framed by the parties, we need not address the other requirements at this juncture and expressly decline to do so. For purposes of resolving this appeal, we thus focus only on the question of gross negligence.

Defendants argue that their conduct did not amount to gross negligence as a matter of law for two independent reasons and that the trial court therefore erred by concluding that there exists a factual dispute relative to this issue and partially denying defendants' motion for summary disposition on this basis. Each of defendants' arguments will be addressed in turn.

A. COLLATERAL ESTOPPEL

First, defendants argue that plaintiff is collaterally estopped by the decisions in his federal court action from relitigating the issue whether he suffered any physical injury from the handcuffing and that he therefore cannot establish his claim of gross negligence as a matter of law.

"The preclusive effect of a federal-court judgment is determined by federal common law." *Taylor v Sturgell*, 553 US 880, 891; 128 S Ct 2161; 171 L Ed 2d 155 (2008); see also *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380-381; 596 NW2d 153 (1999) ("The state courts must apply federal claim-preclusion law in determining the preclusive effect of a prior federal judgment.") (quotation marks and citation omitted). Collateral estoppel is also referred to as issue preclusion. *Taylor*, 553 US at 892 n 5. "Issue preclusion . . . bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim. By preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate, these two doctrines [of claim preclusion and issue preclusion] protect against the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id*. at 892 (quotation marks and citations omitted; first, third, and fourth alterations in original).[1]

In this case, defendants argue that plaintiff is precluded from relitigating the issue whether he suffered a physical injury from the handcuffing because the Sixth Circuit concluded that plaintiff had not been physically injured as a result of the handcuffing, which was an affirmance of the same conclusion reached by the district court. Notably, the trial court in this case agreed with defendants on this specific point and ruled that the issue whether there was an injury resulting from the handcuffing itself was precluded from further litigation due to the Sixth Circuit's

[1] Our Supreme Court has stated the necessary requirements for collateral estoppel to apply in a similar manner:

> Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full [and fair] opportunity to litigate the issue; and (3) there must be mutuality of estoppel. [M]utuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action. In other words, [t]he estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him. [*Monat v State Farm Ins Co*, 469 Mich 679, 682-685; 677 NW2d 843 (2004) (quotation marks and citations omitted; alterations in original).]

decision in plaintiff's prior federal action. Therefore, we glean from the nature and context of defendants' appellate challenge that the issue presented to us on appeal is not actually whether plaintiff is collaterally estopped from relitigating whether he suffered a physical injury from the handcuffing—an issue which the trial court resolved in defendants' favor by affirmatively ruling that plaintiff was collaterally estopped from relitigating this issue. Instead, we discern that the issue is the effect of this application of collateral estoppel on plaintiff's gross negligence claim.

Defendants contend that the effect of this issue being precluded is to render it impossible as a matter of law for plaintiff to advance his gross negligence claim at all such that the trial court erred by partially denying defendants' motion for summary disposition and permitting the claim to proceed.[2] Defendants rely on *Oliver*, 269 Mich App at 566, for this Court's holding in that case that "a police officer's conduct of handcuffing an individual too tightly does not constitute gross negligence *unless physical injury results*." (Emphasis added.) The trial court in this case also agreed with defendants *to the extent that plaintiff could not make out a gross negligence claim based on the overly tight handcuffing itself because of the preclusive effect of the Sixth Circuit's conclusion that there had been no physical injury resulting from the handcuffing*.

However, contrary to defendants' argument, such a conclusion is not dispositive in these circumstances and does not mean that plaintiff cannot bring *any* form of gross negligence claim based on the circumstances of his arrest. As the trial court in this case recognized, plaintiff's theory is not that defendants were grossly negligent merely by how they allegedly placed the handcuffs too tightly on him initially, but is instead that defendants' gross negligence is evidenced by the combined actions and inactions that involved leaving plaintiff in handcuffs that were too tight for an extended period of time, pulling up on plaintiff's handcuffed wrists and positioning him in the vehicle in an awkward position with his arms twisted behind him, and ignoring his complaints that he was in pain from the awkward position and overly tight handcuffs for 45 minutes to an hour because such conduct demonstrates a reckless disregard for plaintiff's safety and well-being. Further, plaintiff claims that as a result of this combination of circumstances constituting gross negligence, he incurred injuries consisting of a slipped disc in his neck and bruising, scarring, and swelling to his wrists.

The Sixth Circuit, despite ruling that plaintiff suffered "no injury resulting from the handcuffing," *Jackson*, 657 Fed Appx at 500 (quotation marks and citation omitted), and that there was no caselaw supporting the existence of a *Fourth Amendment excessive force* claim based on defendants' actions related to plaintiff's placement in the police vehicle, *id*. at 501-502, had

[2] In making this argument, defendants expressly state that they are relying on the doctrine of issue preclusion and their contention that plaintiff's inability to show physical injury from the handcuffing is conclusive as to plaintiff's inability to successfully assert a gross negligence claim. Defendants continue by expressly disavowing any reliance on the related doctrine of *claim* preclusion (i.e., res judicata), stating affirmatively that their argument is not that res judicata completely bars plaintiff's gross negligence claim in its entirety. Therefore, any issue related to res judicata has been abandoned and this Court need not consider it. *Wilson v Taylor*, 457 Mich 232, 242-243; 577 NW2d 100 (1998) (stating that an appellate court need not address issues not argued or properly presented on appeal).

nonetheless expressed its recognition of plaintiff's gross negligence theory in a manner entirely consistent with the above observation that was subsequently made by the trial court in the instant action. Specifically, the Sixth Circuit stated that plaintiff had "also raised a state-law gross negligence claim predicated on the breach of the 'duty to perform . . . employment activities so as not to endanger or cause harm' to others" and that a breach of such a duty "is not inevitably intentional." *Id*. at 502 (citation omitted). The court further explained that "Michigan does allow gross negligence claims based on allegations that also form the basis of a claim for intentional use of excessive force," *id*., citing *Oliver*, 269 Mich App at 562-563, 565-567, and that plaintiff's alleged theory was that even if his injuries were not caused by defendants' intentional conduct, defendants were grossly negligent by ignoring the risk of injury and their reckless conduct demonstrating a lack of concern for whether injury would result was the cause of plaintiff's injuries, *id*. at 502-503. Additionally, the Sixth Circuit noted that plaintiff had alleged that his injuries were caused by the combination of defendants' various actions and inactions rather than a single, particular act. *Id*. at 502.

Accordingly, the fact that plaintiff did not suffer a physical injury solely as a result of the initial handcuffing itself does not undermine plaintiff's actual gross negligence theory. Defendants have not provided any caselaw to suggest that simply because a plaintiff cannot show gross negligence on the basis of overly tight handcuffs, the plaintiff is therefore unable as a matter of law to demonstrate gross negligence on the basis of other actions and inactions involved in the arrest.[3] Plaintiff submitted evidence that he suffered a physical injury from the totality of the

[3] Defendants' reliance on *VanVorous v Burmeister*, 262 Mich App 467; 687 NW2d 132 (2004), abrogated by *Odom*, 482 Mich 459, is misplaced. In that case, the federal court had granted summary judgment in favor of the defendant police officers on the plaintiff's Fourth Amendment excessive force claim that was based on the defendant officers' shooting of the plaintiff's decedent because the federal court determined that the officers were entitled to qualified immunity. *Id*. at 469, 472-476. The federal court also dismissed the plaintiff's state law claims without prejudice. *Id*. at 476. The plaintiff then pursued these claims in state court. *Id*. As relevant to defendants' argument in the instant case, one of the state law claims was a claim against the officers for intentional infliction of emotional distress (IIED) based on the shooting of the decedent. *Id*. at 469, 480-481. Noting that the federal court's conclusion that the defendants were entitled to qualified immunity was based on the federal court's determination that the defendants' conduct in shooting the decedent was objectively reasonable under the circumstances, or at least the result of an objectively reasonable mistake, this Court concluded in *VanVorous* that the plaintiff could not show that the defendants' conduct was also simultaneously extreme and outrageous as required to successfully advance an IIED claim. *Id*. at 473-476, 481-482. The *VanVorous* Court concluded:

> For plaintiff to pursue her claim would require relitigating where on the spectrum of reasonableness defendants' actions fell. Under Michigan law, the officers pursuing VanVorous were entitled to use the amount of force that was objectively reasonable under the circumstances. Similarly, the "objective reasonableness" standard applied by the federal court also concerned the reasonableness of the conduct from the perspective of an objective police officer under the totality of the circumstances at the time. Thus, when the federal court reached and decided the

circumstances that included having his handcuffed wrists pulled up behind him; being placed in the back of the police vehicle in an awkward, twisted position with his hands raised up to the middle of his back; and having his complaints of pain and discomfort ignored for 45 minutes to an hour. Although the Sixth Circuit determined that he suffered no physical injury from the handcuffing *alone*, plaintiff is not claiming gross negligence on the basis of the handcuffing alone. Instead, plaintiff is claiming gross negligence on the basis of the totality of defendants' conduct and, specifically, from how he was placed into the police vehicle. There was no determination in the federal court that plaintiff did not suffer any physical injury at all from the entire incident. Defendants thus have not demonstrated that the trial court's ruling related to the issue of collateral estoppel was erroneous. *Minicuci*, 243 Mich App at 33-34, 42.

Defendants also argue that this Court determined in the prior appeal that plaintiff would need to demonstrate that he sustained a physical injury from the handcuffing to succeed on his gross negligence claim. See *Jackson*, unpub op at 4. Defendants appear to suggest, without explicitly referring to the law-of-the-case doctrine, that this Court previously determined that the failure to show physical injury resulting from the handcuffing itself would be fatal as a matter of law to plaintiff's gross negligence claim and that this determination controls the resolution of the instant appeal.

"Under the law of the case doctrine, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000) (quotation marks and citation omitted). "[A]s a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in

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> question in defendants' favor, and the conduct element of plaintiff's intentional infliction of emotional distress claim is based on the identical question of fact litigated in the district court, the trial court correctly concluded that collateral estoppel barred plaintiff's claim of intentional infliction of emotional distress. [*Id.* at 482 (citations omitted).]

Additionally, this Court concluded in *VanVorous* that the plaintiff had failed to state a claim for gross negligence because the gross negligence claim was "fully premised" on the excessive force claim and therefore constituted an improper attempt to transform an intentional tort into a gross negligence claim. *Id.* at 483. The Court further stated that this conclusion also made it evident that the plaintiff was collaterally estopped from pursuing the gross negligence claim. *Id.* at 484.

In this case, contrary to defendants' argument, the application of collateral estoppel in *VanVorous* is distinguishable from the application of the doctrine in the present case. As more fully explained in the body of this opinion, plaintiff's gross negligence claim is *not based solely on an injury resulting from the handcuffing*, which is the only issue to which collateral estoppel applies, and there exists other conduct that plaintiff maintains constitutes gross negligence and that was not addressed in the federal court action. Thus, *VanVorous* does not impact our analysis or conclusion with respect to defendants' collateral estoppel issue in this case.

subsequent appeals." *Id*. at 260. "The reason for the rule is the need for finality of judgment and the want of jurisdiction in an appellate court to modify its own judgments except on a rehearing." *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988).

In defendants' prior appeal, however, this Court expressly declined to consider the issue whether plaintiff was collaterally estopped from relitigating the issue of a physical injury resulting from the handcuffing because this Court determined that the issue was not preserved for appeal since it had not been raised and decided in the trial court. See *Jackson*, unpub op at 3. This Court in the prior appeal also recognized that plaintiff's theory was based on more than the mere application of the handcuffs, noting that plaintiff also relied on his allegations that defendants lifted up on plaintiff's handcuffed wrists and placed him in the police vehicle in an awkward position with his arms twisted behind him, that plaintiff experienced pinched nerves in his neck as he was placed in the vehicle, and that plaintiff was left in this position for a significant period of time during which defendants ignored his multiple complaints about the tightness of the handcuffs and the pain he experienced from his positioning in the back seat. See *id*. at 3-4. Moreover, in the prior appeal, this Court explicitly stated that defendants could still challenge the issue whether plaintiff sustained a physical injury from the handcuffing in a subsequent summary disposition motion.

This is exactly what defendants did. In the summary disposition motion from which the present appeal derives, defendants challenged whether plaintiff sustained a physical injury from the handcuffing and relied on the doctrine of collateral estoppel in doing so. Defendants now raise the same argument on appeal. However, as previously explained, defendants have already prevailed on this particular issue and the real issue becomes the effect of plaintiff being precluded from relitigating whether he incurred a physical injury from the handcuffing. This Court in the prior appeal expressly did not consider the precise issue that is now before this Court, namely the effect on plaintiff's gross negligence claim of the application of collateral estoppel to preclude plaintiff from demonstrating a physical injury resulting from the handcuffing and in light of plaintiff's actual theory of gross negligence that encompasses a wider range of actions and inactions by defendants. Therefore, this Court's prior opinion does not govern the resolution of this issue in the present appeal. *Lopatin*, 462 Mich at 260 ("Law of the case applies, however, only to issues actually decided, either implicitly or explicitly, in the prior appeal.").

B. GROSS NEGLIGENCE

At this point, the question becomes whether there were material questions of fact regarding whether defendants' actions and inactions constituted gross negligence despite that plaintiff did not incur a physical injury from the handcuffing itself. In this regard, defendants advance a second appellate argument that to the extent plaintiff's claim is based on the manner in which he was placed into the police vehicle, his claim also fails as a matter of law because plaintiff cannot demonstrate any conduct by defendants satisfying the statutory definition of gross negligence.

As previously stated, MCL 691.1407(2)(c) requires that, for governmental immunity to apply, the conduct at issue "not amount to gross negligence that is the proximate cause of the injury or damage". See also *Oliver*, 269 Mich App at 565. The term "gross negligence" is defined in MCL 691.1407(8)(a) to mean "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Gross negligence reflects "almost a 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). This Court has explained, "It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge." *Id*.

"[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999). Additionally,

> [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. However, saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness. Even the most exacting standard of conduct, the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent. [*Tarlea*, 263 Mich App at 90.]

In this case, according to plaintiff's deposition testimony, he complained about the handcuffs being too tight as soon as they were placed on his wrists and asked if the handcuffs could be loosened. Plaintiff testified that the handcuffs were extremely tight and that he was in pain. One of the defendants responded to plaintiff's complaints by telling him "not to worry about it." Plaintiff continued to complain, and he was again told, "don't worry about it." Plaintiff testified that both defendants were involved in putting plaintiff into the police vehicle. At this point, the handcuffs were still too tight and defendants lifted plaintiff's arms up by his wrists. Plaintiff testified that when his arms were lifted up, "it kind of pinched my nerves in my neck." Plaintiff maintained that defendants placed him into the police vehicle in a twisted, awkward position with his arms raised up to approximately the middle of his back, the front seats pushed back into the rear area of the vehicle, and no room for plaintiff to maneuver into a normal sitting position.

Defendants left plaintiff in this position for approximately 45 minutes to an hour. Plaintiff further testified that he complained about the way his body was positioned in the vehicle and the discomfort he was experiencing, and he also stated that he asked defendants if they could straighten his body or move the front seats up to allow for a better sitting position. Plaintiff testified that defendants ignored his complaints and requests and that defendants did "[n]othing at all." Plaintiff's testimony reflects that he made numerous complaints to defendants about the conditions that were causing him pain and that defendants never took any action to even investigate plaintiff's claims, instead choosing to automatically disbelieve him and ignore him.

Plaintiff testified that as a result of the manner in which his arms were raised up behind him and how he was positioned in the vehicle, he suffered a slipped disc and pinched nerve causing pain and numbness in his arm, hands, and fingers. He also testified that the handcuffs dug into his skin and caused scarring, redness, and swelling on his wrists. Plaintiff maintained that defendants wrongfully ignored complaints he made, did nothing to alleviate the pain he was experiencing when they could have done so, and positioned him improperly in the police vehicle for an extended period of time.

A jury could reasonably conclude from this evidence that defendants "simply did not care about the safety or welfare" of plaintiff when defendants arrested him and transported him in the police vehicle while completely ignoring his numerous complaints of pain and discomfort he was experiencing as a result of how defendants placed him into the vehicle, during which time plaintiff suffered injuries. *Tarlea*, 263 Mich App at 90. Such evidence reflects a "willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Id.*

Contrary to defendants' appellate argument, plaintiff has not merely claimed that defendants "could have done more" under these circumstances, *id.*, but plaintiff has instead provided evidence that defendants *did nothing* in response to his complaints for approximately 45 minutes to an hour. Although there was also evidence that Lubelan always checks handcuff tension and that there was no reason to pull up on plaintiff's arms to put him into the vehicle, Lubelan also testified that he did not recall the process of handcuffing plaintiff and did not have any independent memory of how plaintiff got into the police vehicle that night. Lubelan also testified that he did not remember plaintiff complaining at all that night about pain or discomfort but that defendants would have tried to make plaintiff more comfortable if he had complained. These conflicts in the parties' respective deposition testimony submitted as evidence simply illustrate that there exist material questions of fact about the events that plaintiff claims constituted gross negligence by defendants and that reasonable minds could differ about the conclusion to reach, which weighs against resolving the matter through summary disposition. *Beals*, 497 Mich at 370; *Oliver*, 269 Mich App at 563.

Defendants, in arguing to the contrary, have cherry-picked the evidence and turned a blind eye to any evidence in the record that is not favorable to them, choosing to pretend that such evidence does not exist rather than confront it.[4] Defendants also characterize their conduct during

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[4] For example, defendants argue that there is "no evidence to support the trial court's finding that the Troopers ignored [plaintiff's] complaints of pain regarding [his] positioning in the rear of the vehicle." In support of this argument, defendants claim that plaintiff only testified that he complained about the tightness of the handcuffs and not about his awkward positioning in the vehicle. Defendants additionally state, "Indeed, when specifically asked by his counsel whether he complained regarding his positioning in the vehicle, [plaintiff] stated, 'it's been awhile and I'm not for certain.' " However, defendants mischaracterize plaintiff's testimony by completely ignoring the immediately preceding portion of his answer to the question. As previously quoted in this opinion, plaintiff testified as follows:

> *Q.* Did you say anything to the officers about the way your body was put in the back of the police car and the discomfort related to the positioning of your body in the car?
>
> *A.* Yes, I did. I asked them if there's any way they can straighten me out or I might have asked them could they let the seat up. Like I said, it's been a while and I'm not for certain.

Thus, the record reflects that plaintiff affirmatively indicated that he complained about the way he was positioned in the police vehicle and the concomitant discomfort he experienced. The

the incident as constituting "[a]t worst" a "mistake in judgment in the way they helped [plaintiff] into the rear of the police vehicle, or in the way they positioned [plaintiff] in the rear of the police vehicle" that does not amount to gross negligence. While they may have a different perception of the facts than plaintiff, this only demonstrates that reasonable minds could differ about how to interpret the evidence and that summary disposition was unwarranted. *Beals*, 497 Mich at 370; *Oliver*, 269 Mich App at 563.

Neither party has cited any published Michigan caselaw that is directly on point factually to the circumstances present in the instant case,[5] and our research has also not located any such caselaw. However, two decisions by the Sixth Circuit Court of Appeals support our conclusion

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record also shows that plaintiff expressed uncertainty about exactly what he said. Plaintiff's testimony does not appear to actually be *inherently* inconsistent. Nonetheless, when reviewing a trial court's governmental immunity determination on a summary disposition motion pursuant to MCR 2.116(C)(7), this Court must "consider[] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Beals*, 497 Mich at 370 (quotation marks and citation omitted). Here, to the extent there are any arguable inconsistencies or discrepancies in the above testimony by plaintiff, the testimony does not "specifically contradict" the allegation in plaintiff's complaint that while he was in the back seat of the police vehicle and after he had been put in the vehicle "at a very awkward angle[] with his arms twisted behind him," plaintiff "told both of the Defendants that he was in pain, but again, nothing was done." Hence, for purposes of the (C)(7) motion currently at issue, defendants have not demonstrated that there is "no evidence" that they ignored plaintiff's complaints of pain related to his positioning in the back seat of the police vehicle. *Beals*, 497 Mich at 370. Reasonable minds could differ about the conclusion to be reached on the question of gross negligence from the record before us, leaving a factual question to be resolved by the jury and making summary disposition inappropriate at this juncture. *Id.*; *Oliver*, 269 Mich App at 563.

[5] The two Michigan appellate court opinions cited by plaintiff relative to the gross negligence issue and which plaintiff appears to believe are factually analogous are not actually on point factually. First, the issue in *Beals*, 497 Mich at 371, was whether the governmental employee's conduct was the proximate cause of the decedent's death, and the Court expressly noted that the governmental employee had not challenged "whether his conduct amounted to gross negligence." Second, in *Pardon v Finkel*, 213 Mich App 643, 648, 650; 540 NW2d 774 (1995), this Court reversed the trial court and concluded that governmental immunity was not applicable because the defendants were not engaged in a governmental function. The issue of gross negligence does not appear to have actually been before this Court in *Pardon*, *id.*; to the extent gross negligence was referenced in passing, it was not the basis for this Court's conclusion that governmental immunity did not apply, *id.* at 648, 650-651. Hence, these references appear to be dicta. *Auto Owners Ins Co v Seils*, 310 Mich App 132, 160 n 7; 871 NW2d 530 (2015) ("Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, lack the force of an adjudication.") (citation and quotation marks omitted). Plaintiff's reliance on these two cases is therefore unavailing.

that the trial court in this case did not err in its decision to partially deny defendants' summary disposition motion.[6]

First, plaintiff relies on *Kindl v City of Berkley*, 798 F3d 391 (CA 6, 2015), a case in which the gross negligence claim arose out of the decedent's death from a severe form of alcohol withdrawal that occurred while the decedent was confined in a jail cell overnight following her arrest for violating a probation condition requiring her to refrain from alcohol use, *id*. at 395-396. There was evidence that the decedent informed law enforcement officers during her booking that she might suffer from alcohol withdrawal, that she was placed in a cell that was monitored by video recording and direct visual observation by the front desk, that she called out to the officers on duty multiple times seeking to get their attention, that she experienced symptoms of alcohol withdrawal that included tremors and multiple seizures during the course of the night, that she spoke to the officers about her condition, that the officers never obtained medical treatment for her, and that she passed away in her cell that night. *Id*. at 395-397. In affirming the district court's ruling that the defendant officers were not entitled to governmental immunity on the gross negligence claim and that the claim thus survived summary judgment, the Sixth Circuit stated:

> A jury could find that Defendants displayed "a substantial lack of concern for whether an injury results" when they failed to seek or provide any medical assistance for [the decedent] despite having been alerted to her condition (both by [the decedent] and, allegedly, by [a different police officer]) and despite her visible symptoms including multiple seizures, urinary incontinence, and falling off the bench. Additionally, a jury could credit [the] testimony that [the decedent] was calling for help, and they could interpret the video evidence as corroborating his testimony. These permissible factual findings would support a conclusion that Defendants failed to adequately monitor [the decedent's] condition, or that they were aware of her condition but chose not to act, or even that they ignored her direct requests for help knowing that she was suffering from alcohol withdrawal—all of which could constitute gross negligence within the meaning of §§ 691.1407(2)(c) and (8)(a). [*Id*. at 404.]

In *Kostrzewa v City of Troy*, 247 F3d 633, 638 (CA 6, 2001), the plaintiff filed an action alleging, among other things, that two police officers were grossly negligent in effectuating the plaintiff's arrest. The plaintiff specifically alleged that the defendant officers forcefully applied handcuffs that were too small for the plaintiff's large wrists such that the handcuffs could only be latched to the first tooth. *Id*. at 637. The plaintiff further alleged that he complained about the handcuffs being too small and too tight, that he complained that the handcuffs were injuring his wrists, and that the defendants responded to the plaintiff's repeated complaints of pain by indicating that it was city policy to handcuff detainees under all circumstances. *Id*.

Additionally, the plaintiff's complaint alleged that his handcuffed wrists were further injured as he was jostled around the back seat of the police vehicle, hitting his head and shoulders on the plastic partition separating the front and back seats, as a result of the defendants' generally

[6] "Decisions from lower federal courts are not binding but may be considered persuasive." *Truel v City of Dearborn*, 291 Mich App 125, 136 n 3; 804 NW2d 744 (2010).

reckless driving that included tailgating, abrupt braking, and speeding. *Id*. After the plaintiff requested medical treatment, the defendants found larger handcuffs but kept the plaintiff in handcuffs for transportation to and from the hospital despite the swollen state of the plaintiff's wrists. *Id*. at 637-638. The Sixth Circuit noted that the plaintiff had not alleged only that he had been handcuffed too tightly but had also alleged in his complaint that he had repeatedly complained to the defendant officers while the plaintiff was in the police vehicle about the pain he was experiencing and that the defendants nonetheless drove in a reckless manner that placed additional pressure on the plaintiff's wrists. *Id*. at 640.

The Sixth Circuit in *Kostrzewa* reversed the district court's dismissal of the plaintiff's gross negligence claim, reasoning as follows:

> The officers in this case cuffed [the plaintiff], despite his large wrists, and then allegedly drove recklessly back to the station, further injuring the plaintiff. Although plaintiff requested medical attention, the officers recuffed him on his trip to the hospital and until he was treated by the doctor, despite the fact that, by this time, plaintiff's wrists were "extremely swollen, red and painful." . . . Given these facts, it is not beyond doubt that the plaintiff will be unable to show that the officers' conduct was "so reckless as to demonstrate a substantial lack of concern for whether an injury results." [MCL] 691.1407(2)(c). [*Id*. at 642-643.]

Kindl and *Kostrzewa* illustrate that gross negligence may be demonstrated based on a combination of actions and inactions by police officers with respect to an individual in custody, particularly where the individual's complaints about the surrounding circumstances leading to injury are ignored by the officers when brought to their attention because such conduct evidences a substantial lack of concern for whether an injury will result. See *Kindl*, 798 F3d at 404; *Kostrzewa*, 247 F3d at 637-638, 640, 642-643. Furthermore, the inquiry is not limited only to the application of the handcuffs during an arrest or whether the injury can be traced solely to that cause; injury may be demonstrated based on the effects of the handcuffs on the wrists *in combination* with the officers' subsequent acts surrounding how the arrestee is placed into the police vehicle and transported. See *Kostrzewa*, 247 F3d at 637-638, 640, 642-643.

In this case, because a factual dispute exists and reasonable minds could differ about whether defendants were grossly negligent when they placed plaintiff into the police vehicle and allegedly caused him to suffer injuries that included a slipped disc and pinched nerve in his neck or upper spine, the trial court's ruling partially denying defendants' motion for summary disposition was not erroneous. *Beals*, 497 Mich at 370; *Oliver*, 269 Mich App at 563.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello
/s/ Jonathan Tukel