STATE OF MICHIGAN

COURT OF APPEALS

BENTON CHARTER TOWNSHIP,

Plaintiff-Counter-Defendant-Appellant,

v

RICHARD BROOKS,

Defendant-Counter-Plaintiff-Appellee,

and

RICHARD BROOKS,

Third-Party-Plaintiff-Appellee,

v

LISA SMITH BRADSHAW, THOMAS SIEBENMARK, and ROBERT O'BRIEN,

Third-Party-Defendants-Appellants,

and

JIMMY COBURN, DELMAR LANGE, KIM FOWLER, and RAHMAN OMAR ABDULLA,

Third-Party-Defendants.

UNPUBLISHED
March 1, 2005

Nos. 252142; 254420
Berrien Circuit Court
LC No. 99-004226-CZ-T

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

In Docket No. 252142, Benton Charter Township, Lisa Smith Bradshaw, Thomas Siebenmark, and Robert O'Brien, the latter three being police officers employed by the Township, appeal as of right from orders entered in the trial court, which denied their motions

for summary disposition based on governmental immunity. In Docket No. 254420, the Township appeals by delayed application for leave to appeal granted from an order, which denied its motion for summary disposition with regard to plaintiff Richard Brooks' allegations of equal protection violations "as it relates to his operating a used car dealership in Benton Charter Township based on race . . . ." Siebenmark and O'Brien appeal by delayed application for leave granted from orders, which denied summary disposition with regard to "those claims brought pursuant to Section 1983 claiming a violation of Plaintiff's Fourth Amendment rights as asserted in paragraphs 31, 33 and 34 of Plaintiff's Seconded [sic] Amended Complaint . . . ." These appeals have been consolidated by this Court's order of July 1, 2004. We affirm.

I. FACTS

The instant appeals arise from two intertwined and related matters: Brooks' failed attempt to secure a special use permit to operate a used car lot on property he owned within the Township and a controversy over the purchase of a used car.

Brooks owned property in Benton Township ("Township"), which has been zoned for commercial use since he purchased it in 1969. In 1995, Brooks approached the Township about selling used cars on his property. To this end, he applied for and received from the Township a vehicle dealer license.

However, the Township informed plaintiff that a special use permit was required in order to operate a used vehicle lot on his property. To obtain this use permit, a representative of the Township told Brooks that he must make certain changes on his property. Brooks attested that these changes involved significant alterations to the property, such as removing a hill and tree, removing an old foundation, and rebuilding the garage. Although Brooks believed he had made the necessary alterations, in April of 1997, the Township denied Brooks' request for a special use permit A market analysis, requested by the Township and completed in March of 1997, predicted a possible negative value impact to the surrounding properties if Brooks was allowed to operate a used car lot on his property.

One of the bases of Brooks' lawsuit arises from an incident that occurred in October of 1999. Rahman Omar Abdullah came to Brooks' used car lot expressing interest in buying a car. Abdullah wanted to test drive a Lincoln overnight. Abdullah left his own car at the lot, but did not return the next day with the Lincoln. After two or three days, Brooks went to the police station and reported Abdullah's failure to return the vehicle. Abdullah eventually returned to the car lot on his own volition, but without the Lincoln. Abdullah had been arrested while driving the Lincoln, but Brooks was never notified.

Brooks contends that at some point after speaking with Abdullah, he went to the Benton Township Police Department to find out why he had not been notified of Abdullah's arrest. Officer Fowler, in his police report, recorded that the Michigan State Police had stopped Abdullah with the Lincoln, but they did not have the evidence to charge Abdullah with theft. According to Brooks, a police officer [later determined to be defendant Bradshaw] came to his lot 30 minutes after Brooks spoke with the Benton Township Police, accompanied by Abdullah. Brooks testified that the officer asked him if he was Mr. Brooks, then kicked him with her knee. Brooks went into his house, with the officer following. After Brooks sat in his reclining chair,

Bradshaw turned it over, causing Brooks to fall to the floor. Brooks testified that Bradshaw jumped on his chest and called him racial epithets.

Officer Bradshaw's version of the incident is that Abdullah produced proof of ownership of his vehicle. Officer Bradshaw attempted to explain to Brooks that Abdullah could take his vehicle, but Brooks resisted, saying that Abdullah was not permitted to take his car. Bradshaw was standing next to the driver's window of the car, but Brooks pushed her away. Ignoring her warnings, Brooks reached into the car for the keys. After Bradshaw informed him that he was under arrest, Brooks went into the building. Bradshaw followed him inside, but Brooks resisted the arrest. After other officers arrived to assist, Brooks was arrested and taken to jail. Brooks was later tried on a criminal charge (resisting and obstructing) arising from this incident, which resulted in a hung jury; a retrial resulted in an acquittal.

The Township filed a complaint for injunctive relief to prevent Brooks from operating a used car lot. On January 17, 2001, the trial court granted the Township's amended motion for partial summary disposition seeking a permanent injunction against Brooks until he complied with Township requirements. Brooks filed a lawsuit under 42 USC § 1983 against the Township and certain individuals, including amongst others, police officers Lisa Bradshaw, Thomas Siebenmark, and Robert O'Brien. His second amended complaint contains six counts, the first four of which are directed against the individual third-party defendants and are based on his arrest at the car lot. Count I alleges a general § 1983 claim for a violation of Brooks' constitutional rights under the Fourth and Fourteenth Amendments; Count II alleges assault and battery; Count III alleges false arrest and illegal imprisonment; and Count IV alleges conspiracy under 42 USC § 1985(3). The remaining two counts (V and VI) are directed against the Township and are based on the Township's denial of Brooks' request for a permit to operate a used car dealership. Count V alleges a § 1983 action. More specifically, Brooks alleged in that count that the police officers who arrested him were inadequately trained by the Township in investigating police misconduct. Count V also alleged that the Township denied Brooks a special use permit in violation of his constitutional right to equal protection under the law. Count VI alleged damages.

The parties filed cross motions for summary disposition, and the trial court, ruling from the bench denied the Township's motion for summary disposition with respect to Count V. The trial court also denied the governmental parties' motion with respect to Officer Bradshaw under Counts I, II, and III. However, the trial court granted summary disposition on the Fourteenth Amendment allegation against O'Brien and Siebenmark. Regarding Count II (assault and battery) as it applies to Bradshaw, the trial court opined that there was sufficient evidence to submit the claim to a jury. But the trial court dismissed the claim of assault and battery against O'Brien and Siebenmark. Similarly, regarding Count III (false arrest and imprisonment), the trial court found that there was evidence of an arrest at the behest of Bradshaw, warranting submission of the issue to the jury. But the trial court dismissed the false arrest and imprisonment claim against O'Brien and Siebenmark. However, the trial court granted the governmental parties' motion on the conspiracy claim in Count IV as to all the individual governmental parties. In sum, the court denied the governmental parties' motion for summary disposition as to Counts I, II, III, and V.

II. STANDARD OF REVIEW

At trial court's grant or denial of summary disposition is reviewed de novo. *Shepherd Montessori Center Milan v Ann Arbor Charter Township*, 259 Mich App 315, 324; 675 NW2d 271 (2004). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.* When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party. *Id.* A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b); *Shepherd Montessori*, *supra* at 324. 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. *Id*. All reasonable inferences are to be drawn in favor of the nonmovant. *Id.*

III. ANALYSIS

A. Prima Facie Case

The governmental parties argue that Brooks failed to provide an adequate evidentiary basis to establish a prima facie case of racial discrimination under 42 USC § 1983 to avoid summary disposition. We disagree.

Brooks' averments contained in his second affidavit, complied with the deposition testimony of Jerry Crockett, is sufficient to establish a prima facie case that the Township denied Brooks a special use permit to operate a used car dealership because he is black, and hence, to raise a genuine issue of material fact for resolution at trial.

Brooks' claim regarding the denial of the special land use permit is essentially an equal protection argument for the selective enforcement of a valid regulation. See *Hillside Productions, Inc v Duchane*, 249 F Supp 2d 880, 897 (ED Mich, 2003). Among the three types of selective enforcement claims, this action concerns "those brought by members of a protected class alleging that the government arbitrarily discriminated against them based on class membership." *Id.* To state an equal protection claim under § 1983, "a plaintiff must allege that: (1) the person, compared with others similarly situated, was selectively treated; and (2) such selective treatment was based on impermissible consideration such as race, religion, intent to punish the exercise of constitutional rights, or malicious bad faith intent to injure a person." *T. S. Haulers, Inc v Town of Riverhead*, 190 F Supp 2d 455, 462 (ED NY, 2002).

B. Training

The governmental parties next argue that Brooks has not shown a violation of his rights caused by a lack of training afforded the Township police officers. The United States Supreme Court made it clear that the focus (at least initially) "must be on the adequacy of the training program in relation to the tasks the particular officers must perform." *City of Canton v Harris*, 489 US 378, 390; 109 S Ct 1197; 103 L Ed 2d 412 (1989). There, the Supreme Court carefully explained the conditions under which the inadequacy of police training may serve as the basis of § 1983 liability. The general and most fundamental condition is that the failure with training

may constitute liability only where it constitutes "deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388. The failure to train must be in a relevant respect for the municipality to evince deliberate indifference. *Id.* at 389. Second, the deficiency in the training program must be closely related to the injury or must have actually caused the officers indifference. *Id.* at 391.

There is no factual dispute that the Township has a civil dispute policy. However, Brooks has raised a genuine issue of material fact about the adequacy of the Township's training program. See *Russo v City of Cincinnati*, 953 F 3d 1036, 1047-1048 (CA 6, 1992) (City cannot avoid genuine issue of material fact about adequate training "by offering a course nominally covering the subject" of disturbed persons in case where officers shot disturbed person).

C. Qualified Immunity

The governmental parties also argue that Officers O'Brien and Siebenmark are entitled to qualified immunity and that the trial court therefore should have granted summary disposition as to these officers. We disagree. Under the doctrine of qualified immunity, government officials, when performing discretionary functions, are shielded from civil damages "'as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.'" *Solomon v Auburn Hills Police Department*, 389 F3d 167, 172 (CA 6, 2004), quoting *Anderson v Creighton,* 483 US 635, 638; 107 S Ct 3034; 97 L Ed 2d 523 (1987). The United States Supreme Court set forth a two-part test to determine whether an officer should be granted qualified immunity in *Saucier v Katz*, 533 US 194, 200; 121 S Ct 2151; 150 L Ed 2d 272 (2001). Under this test, "a court must consider whether the facts, viewed in the light most favorable to the plaintiff, 'show the officer's conduct violated a constitutional right.'" *Solomon, supra* at 172, quoting *Saucier, supra* at 201. "If the answer is yes, the court must then decide 'whether the right was clearly established.'" *Solomon, supra,* quoting *Saucier, supra* at 201. The "'inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation that the confronted.'" *Solomon, supra,* quoting *Saucier, supra* at 202.

Brooks' claim is that the officers used excessive force during the course of his arrest in violation of his constitutional right against unreasonable seizures under the Fourth Amendment. The Sixth Circuit Court of Appeals has recognized a person's constitutional "'right to be from excessive force during an arrest.'" *Solomon, supra* at 173, quoting *Minchella v Bauman,* 72 Fed Appx 405 (CA 6, 2003). In particular, the Sixth Circuit has recognized claims "based on excessive force used in handcuffing." *Solomon, supra*; see also *Burchett v Kiefer*, 310 F3d 937, 944 (CA 6, 2002) (recognizing that "right to be free from 'excessively forceful handcuffing' is a clearly established right for qualified immunity purposes"); *Martin v Heideman*, 106 F3d 1308 (CA 6, 1997) (district court erred by granting officer qualified immunity when a genuine issue of material fact existed as to whether the handcuffing was excessively forceful).

This right having been determined, the next inquiry is whether there was a violation of Brooks' right to be free from excessive force. *Solomon, supra* at 173. Viewed in the light most favorable to the party asserting the injury, O'Brien's and Siebenmark's actions could be viewed to have violated plaintiff's Fourth Amendment right to be free from excessive force during an arrest. From an objective standpoint, and viewed in a light most favorable to Brooks, the documentation provided creates a genuine issue of material fact as to whether the officers'

conduct was unreasonable. See *Martin, supra* at 1313. Thus, the trial court correctly denied motion for summary disposition on the ground that the officers were entitled to the protection of qualified immunity.

D. Fourth Amendment Liability

The governmental parties next argue that Officer Bradshaw cannot be held liable for a Fourth Amendment violation because the actual arrest or seizure of Brooks did not occur until after the other officers arrived, and those other officers were the officers who effectuated the arrest. A genuine issue of material fact exists as to whether Bradshaw assisted in seizing Brooks, thus, precluding summary disposition.

The governmental parties argue that because Bradshaw's conduct in making the arrest was objectively reasonable, she cannot be found liable for assault and battery. The flaw in this argument is that Brooks has raised a genuine issue of material fact about whether that conduct was reasonable under the circumstances.

E. MCL 691.1407

The governmental parties further argue that Bradshaw is entitled to qualified immunity under MCL 691.1407 for the state law claim of assault and battery. Under subsection 1407(2), an officer is immune from tort liability if the officer she "is acting or reasonably believes he or she is acting within the scope of his or her authority," if the officer is engaged in the "discharge of a governmental function," and if the officer's conduct does not constitute gross negligence -- that is, "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." The question whether Bradshaw's conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury results is a question of fact for the jury.

The governmental parties likewise argue that § 1407(2) bars any claim of false imprisonment. Their argument fails. False arrest and false imprisonment are intentional torts, and intentional torts are generally not protected by governmental immunity because they are not regarded as the exercise of a governmental function. *Brewer v Perrin*, 132 Mich App 520, 528; 349 NW2d 198 (1984). However, government actions which would otherwise constitute intentional torts "are protected by governmental immunity if those actions are justified." *Id.* To prevail on the false arrest and false imprisonment count, "plaintiff must show that the arrest was not legal" -- that is, without probable cause. *Id.* at 527. Probable cause to arrest depends on whether the facts available to the police would have justified a fair person of average intelligence in believing that the subject had committed a felony. *Id.* The facts surrounding the arrest are disputed by the parties. It follows that the facts on which it could be determined whether Bradshaw acted in good faith are in dispute. Under these circumstances, summary disposition in favor of the governmental parties on this claim would not have been appropriate.

Defendants argue that the trial court incorrectly denied Bradshaw's motion on the ground that § 1407(3) did not apply to intentional torts. Subsection (3) states: "Subsection (2) [qualified immunity] does not alter the law of intentional torts as it existed before July 7, 1986." The trial court had relied on *Sudul v City of Hamtramck*, 221 Mich App 455; 562 NW2d 478 (1997). In *Sudul,* our Supreme Court expressly ruled that "an individual employee's intentional torts are not shielded by our governmental immunity statute." *Id.* at 458. Accordingly, the argument fails.

Finally, the governmental parties argue that § 1407(3) bars Brooks' claim of false arrest and imprisonment as pertains to Bradshaw. The argument suffers from the same flaw as before: the existence of a genuine issue of material fact about whether her conduct was justified. The trial court properly denied the governmental parties' motion for summary disposition in this regard.

Affirmed.

/s/ Bill Schuette
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra