

STATE OF MICHIGAN
COURT OF APPEALS

CARDELLE KENDRICKS,
Plaintiff-Appellee,

FOR PUBLICATION
April 20, 2006
9:00 a.m.

v

LIVONIA POLICE OFFICER JOHN REHFIELD,
LIVONIA POLICE OFFICER CHRISTOPHER
KOTT, and LIVONIA POLICE SERGEANT
MCKEE,

No. 256693
Wayne Circuit Court
LC No. 03-340901-NO

Defendants-Appellants,

and

DETROIT POLICE OFFICER KEVIN COUNTS,
DETROIT POLICE OFFICER KEVIN REED,
DETROIT POLICE SERGEANT JOSEPH
O'LEARY, DETROIT POLICE INVESTIGATOR
DIETRICH LEVER, and DETROIT POLICE
OFFICER HOYT,

Defendants.

Before: Cooper, P.J., and Jansen and Markey, JJ.

COOPER, P.J.

The Livonia defendants appeal as of right from a circuit court order denying their motion for summary disposition on the ground of governmental immunity. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's twin brother, Carnelle Kendricks, apparently committed a felony offense in Livonia. He evaded Livonia officers and entered Detroit, where he was arrested. The Detroit officers informed the Livonia officers "of the arrest of Carnelle Kendricks a/k/a Cardelle Kendricks with reference to a fleeing and eluding and UDAA offense in Livonia." The Livonia

officers subsequently arrested plaintiff,¹ and allegedly ignored his protestations that it was his brother they wanted. Plaintiff was held in jail pending trial for seven months until his claim of mistaken identity was confirmed. Defendants sought summary disposition on the ground that they were immune from liability. Defendants' motion was brought under MCR 2.116(C)(7), but the trial court treated it as having been brought under MCR 2.116(C)(8) and denied it, finding that plaintiff had alleged facts sufficient to demonstrate recklessness.

An order denying governmental immunity is appealable as of right. MCR 7.202(6)(a)(v); MCR 7.203(A)(1). Governmental immunity is not an affirmative defense proffered by government defendants, but rather is a characteristic of government; therefore "a party suing a unit of government must plead in avoidance of governmental immunity." *Mack v Detroit*, 467 Mich 186, 203; 649 NW2d 47 (2002). To be effective, such pleading must state a claim that fits within a statutory exception to immunity or include facts that indicate the action at issue was outside the exercise of a governmental function. *Id.* at 204. Plaintiff here alleged facts indicative of gross negligence by defendants, and the trial court found sufficient indicia of gross negligence to determine that plaintiff had pleaded in avoidance of immunity. MCL 699.1407(2)(c). The effect of the ruling was that defendants were not entitled to immunity, and that ruling is reviewable as of right. *McDowell v Detroit*, 264 Mich App 337, 342-344; 690 NW2d 513 (2004). Further, the trial court entered an order for a stay pursuant to MCR 7.209(E)(4) stating that it "denied summary disposition based upon governmental immunity" as to the Livonia defendants. That order provides further evidence that the order denying summary disposition was, essentially, an order denying governmental immunity, thus providing defendants with an appeal as of right.

We review the trial court's ruling on a motion for summary disposition de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). Governmental immunity is a question of law that is also reviewed de novo on appeal. *Pierce v Lansing*, 265 Mich App 174, 176; 694 NW2d 65 (2005).

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). Gross negligence is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). Relevant to the disposition of this action, "[s]ummary disposition is precluded where reasonable jurors honestly could have reached different conclusions with respect to whether a defendant's conduct amounted to gross negligence." *Stanton v Battle Creek*, 237 Mich App 366, 375; 603 NW2d 285 (1999), *aff'd* 466 Mich 611 (2002).

The dissent asserts that "[d]efendants were not grossly negligent in arresting plaintiff" because their mistake was reasonable. We agree that the mistake was reasonable at the point of arrest, and might be inclined to agree that a delay of a day or even several days before

¹ It is unclear from the record whether both brothers were in custody, in Detroit and Livonia respectively, at the same time, or how or why the Livonia police failed to take custody of plaintiff's brother, Carnelle Kendricks, from the Detroit police after he was arrested in Detroit.

investigating plaintiff's claim of mistaken identity could have been reasonable under these circumstances. But we cannot agree that holding plaintiff without investigating the claim for *seven months* was even remotely reasonable. This man remained incarcerated for over 1/2 year because of this grievous error. We therefore agree with the trial court because we find sufficient indicia of gross negligence to create a genuine issue of material fact, and therefore find summary disposition on the ground of governmental immunity inappropriate. We believe reasonable jurors could reach the conclusion that defendants were grossly negligent.

Plaintiff alleged that when he was arrested by Livonia officers he informed them that his twin brother was in fact the person they sought. The officers ignored plaintiff's claim of mistaken identity, and plaintiff was held in jail pending trial for seven months until his claim of mistaken identity was confirmed. Defendants had access to fingerprints and photographs of both plaintiff and his brother throughout the seven months, and could have easily confirmed plaintiff's identity with this readily accessible information. Defendants' failure to investigate plaintiff's claim of mistaken identity certainly caused an egregious injury, here seven months of deprivation of freedom. The question of whether the officers' conduct demonstrated a sufficient lack of concern to constitute gross negligence is a question for a trier of fact. We therefore cannot conclude that defendants were immune from liability and were entitled to summary disposition.

Affirmed.

/s/ Jessica R. Cooper

/s/ Jane E. Markey

STATE OF MICHIGAN
COURT OF APPEALS

CARDELLE KENDRICKS,

Plaintiff-Appellee,

v

LIVONIA POLICE OFFICER JOHN REHFIELD,
LIVONIA POLICE OFFICER CHRISTOPHER
KOTT, and LIVONIA POLICE SERGEANT
MCKEE,

Defendants-Appellants,

and

DETROIT POLICE OFFICER KEVIN COUNTS,
DETROIT POLICE OFFICER KEVIN REED,
DETROIT POLICE SERGEANT JOSEPH
O'LEARY, DETROIT POLICE INVESTIGATOR
DIETRICH LEVER, and DETROIT POLICE
OFFICER HOYT,

Defendants.

FOR PUBLICATION
April 20, 2006

No. 256693
Wayne Circuit Court
LC No. 03-340901-NO

Before: Cooper, P.J., and Jansen and Markey, JJ.

JANSEN, J. (*dissenting*).

I respectfully dissent. The sole issue presented in this case is whether defendants' conduct amounted to gross negligence. This Court has held that police officers acting with probable cause¹ are not grossly negligent for arresting the wrong person on the basis of mistaken identity. *Bell v Fox*, 206 Mich App 522, 525; 522 NW2d 869 (1994). Here, defendants mistook plaintiff for his brother. It is uncontested that plaintiff's brother had committed a crime. It is

¹ "Probable cause" is the quantum of evidence sufficient to cause a person of ordinary prudence and caution to reasonably entertain a belief of the accused person's guilt. *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003).

further undisputed that the brothers are twins. Moreover, plaintiff's first name, "Cardelle," is remarkably similar to his twin brother's first name, "Carnelle." Finally, evidence indicated that Carnelle may have used his brother's name as an alias on past occasions. Under the circumstances of this case, defendants' mistake with respect to plaintiff's identity was a reasonable misunderstanding. Defendants were not grossly negligent in arresting plaintiff. *Id.*

Nor were defendants grossly negligent in failing to investigate plaintiff's claims of mistaken identity. Defendants' failure to conduct a more thorough investigation of plaintiff's true identity was not "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). While "[an] investigation's lack of thoroughness might support an inference of negligence," *Ahlers v Schebil*, 188 F3d 365, 373-374 (CA 6, 1999), mere evidence of ordinary negligence does not create a question of fact concerning gross negligence, *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999). The burden was on plaintiff to plead facts in avoidance of governmental immunity. *Michonski v Detroit*, 162 Mich App 485, 490; 413 NW2d 438 (1987). Nonetheless, plaintiff failed to identify how defendants' conduct rose to the level of recklessness required for gross negligence. I would reverse the trial court's denial of defendants' motion for summary disposition.

/s/ Kathleen Jansen