

STATE OF MICHIGAN
COURT OF APPEALS

DANYELLE BURRELL,

Plaintiff-Appellee,

v

COUNTY OF MACOMB and CITY OF
WARREN,

Defendants,

and

OFFICER BOOMS, OFFICER MICHAEL
ANDERSON, and OFFICER JOHN DOE,

Defendants-Appellants.

UNPUBLISHED

May 17, 2011

No. 295637

Macomb Circuit Court

LC No. 2008-003621-NI

Before: K.F. KELLY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendants,¹ Officers Jason Booms, Michael Anderson, and John Doe, appeal as of right the trial court's denial of their motion for summary disposition. This case arises out of plaintiff's alleged mistreatment at defendants' hands following plaintiff's arrest for operating while under the influence. For the reasons set forth in this opinion, we reverse.

Defendants contend that plaintiff failed field sobriety tests after her vehicle was stopped and that she refused to take a breathalyzer test; plaintiff contends that she did not refuse and had not been drinking and that the breathalyzer repeatedly showed a "zero, zero, zero" result. Plaintiff maintains that she was cooperative at all times, but she was assaulted, threatened, forcibly restrained, subjected to racial slurs, injured, and denied subsequent medical attention. Defendants contend that plaintiff was uncooperative and unruly and needed to be physically

¹ Because the County of Macomb and the City of Warren are not participating in this appeal, we refer to the individual defendants as "defendants."

restrained. A video recording was made of the booking process, and it shows that plaintiff and officers engaged in a struggle; but the recording has no audio, has a low frame rate, and is otherwise of poor quality. We agree entirely with the trial judge's evaluation of the video recording as "inconclusive." Plaintiff's wrist was injured at some point. The trial court concluded that the evidence conflicted and so whether defendants used excessive force was a question of fact. It therefore denied defendants' motion for summary disposition. We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Defendants argue that they are entitled to summary disposition on the basis of governmental immunity for plaintiff's gross negligence claim arising out of the injury she sustained to her wrist. We agree.

Governmental officers or agents are immune from tort liability for injuries they cause while in the course of their employment if, in relevant part, their "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(c). Gross negligence requires "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). This can also be "characterized as a willful disregard of safety measures and a similar disregard for substantial risks." *Oliver v Smith (After Remand)*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 292585, issued November 23, 2010), slip op at 4. "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden*, 461 Mich 122-123. The injury plaintiff sustained while officers placed a wrist lock on her raises some question of fact regarding whether the officers were as considerate of plaintiff's safety as they could have been. But otherwise, the evidence only indicates that the officers used the precise kind of restraint on plaintiff that is intended to control a resistive detainee. The only contrary evidence is plaintiff's conclusory, and therefore inadequate, statement that "[she] was assaulted." We find that there is insufficient evidence of negligence to support a question of fact regarding whether defendants committed gross negligence. Therefore, summary disposition should have been granted on this claim.

Defendants next argue that the trial court erred in denying their motion for summary disposition of plaintiff's intentional tort claim for assault and battery. We agree.²

The elements of assault and battery are:

An assault is "any intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact." *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991). This Court defined

² Defendants did not properly preserve this argument in the trial court, but because it is a question of law and all of the necessary facts are presented, we nevertheless choose to address it. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

battery as “the wilful and harmful or offensive touching of another person which results from an act intended to cause such contact.” *Id.* [*Smith v Stolberg*, 231 Mich App 256, 260; 586 NW2d 103 (1998).]

Plaintiff asserted in her deposition that defendants made hostile, malicious and threatening comments to her, as well as racial slurs and crude sexual comments. She also asserted that defendant Boom push-punched her and forcibly removed her hair extensions and that defendant Anderson pepper sprayed her. Plaintiff’s claims in this regard are conclusory. A party may not create a genuine issue of material fact by merely asserting conclusory statements. *Rose v Nat’l Auction Group*, 466 Mich 453, 470; 646 NW2d 455 (2002). Therefore, the trial court should have granted summary disposition of plaintiff’s assault and battery claim because plaintiff failed to establish an issue of material fact regarding whether defendants committed the intentional tort of assault and battery.

Finally, defendants assert that they were entitled to summary disposition on plaintiff’s claim of gross negligence for failing to provide medical care. We agree.³

We initially find meritless defendants’ claim that they were unaware of plaintiff’s need for medical care. The Macomb County Sheriff’s report, states:

At approx. 2120 hrs Inmate [Burrell] was transported to the MJC by the Warren PD. While being pat searched by Officer Balsama Birrelly stated she was unable to place her hand on the glass. When asked why[,] [Burrell] stated “Warren broke my hand when they arrested me”. When asked if she brought this injury to the Officers[’] attention she responded “Yes, they told me to tell you when I got to the County.”

This is evidence that plaintiff brought her injury to the attention of defendants. Plaintiff also testified that she repeatedly asked for medical care, and to be taken to the hospital. At a minimum, there is a genuine question of fact regarding whether plaintiff asked for medical care.

However, there is no evidence of *when* plaintiff brought her injury to defendants’ attention, which, in context, is significant. The evidence in the record is consistent with plaintiff reporting her injury late, around the time when she was about to be transported to the county jail, which explains defendants’ alleged instruction to plaintiff to inform the county of her injury. There is no evidence from which reasonable minds could infer that plaintiff gave defendants a realistic opportunity to provide her with medical care. Arguably, defendants should have noticed plaintiff’s injury, but failing to be as watchful as they should have been is not, by itself, more than ordinary negligence. *Walden v Green*, 346 Mich 21, 24; 77 NW2d 266 (1956). We are unable to perceive a genuine question of fact whether defendants acted with reckless disregard. Defendants were therefore entitled to summary disposition on this issue.

³ However, defendants’ reliance on decisions dealing with federal claims, rather than state law claims, is inapposite and we do not consider those decisions.

Reversed.

/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello

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RONAYNE KRAUSE, J. (*concurring in part and dissenting in part*)

I agree with the majority in all respects other than their resolution of plaintiff's assault and battery claim. My review of the record reveals that the trial court properly denied summary disposition at this stage of the proceedings. I would affirm the denial of summary disposition as to plaintiff's intentional tort claim.¹

I agree with the majority's recitation of the elements of assault and battery. See *Smith v Stolberg*, 231 Mich App 256, 260; 586 NW2d 103 (1998). Governmental immunity from

¹ As the majority states, defendants failed to preserve this argument, but because it is a question of law and all of the necessary facts are presented, this Court may nevertheless choose to address it. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). I further note defendants' contention that plaintiff did not address intentional tort immunity in her response to defendants' motion for summary disposition, but find it meritless because neither did defendants, so there was nothing to which plaintiff would have been obligated to respond.

intentional torts is governed by the common law. MCL 691.1407(3). Defendants are entitled to governmental immunity from intentional torts if “(1) the employee’s challenged acts were undertaken during the course of employment and the employee was acting, or reasonably believed he was acting, within the scope of his authority, (2) the acts were undertaken in good faith, or not with malice, and (3) the acts were discretionary, rather than ministerial, in nature.” *Oliver v Smith (After Remand)*, ___ Mich App ___, ___; ___ NW2d ___ (2010), citing *Odom v Wayne Co*, 482 Mich 459, 480-481; 760 NW2d 217 (2008) (slip op at 5). Generally, a lack of good faith requires conduct showing an intent to cause harm or such indifference to harm that it is effectively an intent to cause harm. *Odom*, 482 Mich at 474-475. There is no dispute that the alleged acts here were undertaken in the course of defendants’ employment and were discretionary in nature. It is also not disputed that defendants used physical force against plaintiff and injured her in the process. The question is whether the use of that force was lawful and done without malice.

The majority rejects plaintiff’s assault and battery claim by concluding that she merely made conclusory statements in her deposition. I have read plaintiff’s deposition, and I cannot comprehend how the majority arrives at such a conclusion. Plaintiff testified with some specificity about particularized hostile, malicious, and threatening comments defendants made to her, in addition to racial slurs, during her stay at the police station. These were not mere conclusory assertions, but rather unambiguous and detailed descriptions of threats and targeted racial epithets contemporaneous with otherwise unmotivated acts like push-punching plaintiff, forcibly tearing out her hair extensions, threatening to “give her a charge of Vicodin” simply because “this bitch is pissing me the fuck off,” and, in response to her complaints after her wrist was broken, telling her, “nigger, you got what you deserved” and calling her “a black cunt.” Upon arrival at the police department one of the officers said to her, “you black bitch, you piss me the fuck off,” and at some point an officer told her, “you people make me sick.”

Admittedly, plaintiff did not provide the most eloquent timeline, and portions of her deposition are confusing because portions of it were inexplicably not provided. Nevertheless, plaintiff did provide an actual and detailed narrative, rather than simply making conclusory assertions to the effect that she had been subjected to hostile commentary. If plaintiff is to be believed, racially motivated threats and hostility suggest that defendants did intend to cause harm or were recklessly indifferent to whether harm occurred, and that defendants had no lawful reason for using force against plaintiff. Whether plaintiff should be believed turns on her credibility, which is an issue for the jury. See *Oliver*, ___ Mich App at ___ (slip op at 4). At this stage of proceedings, this Court cannot and should not attempt to evaluate whether a jury is likely to believe plaintiff’s version of events. This evidence of intent or reckless indifference is sufficient to raise a genuine question of fact whether defendants acted in good faith or without malice. Summary disposition was properly denied on this claim.

I agree with the majority’s decision to reverse in all respects other than as to plaintiff’s intentional tort claim. The trial court’s denial of summary disposition as to the claim of assault and battery should be affirmed.

/s/Amy Ronayne Krause