# STATE OF MICHIGAN

# COURT OF APPEALS

DEBBIE JEAN LATITS, Personal Representative of the Estate of LASZLO JOHN LATITS,

Plaintiff-Appellee,

v

POLICE OFFICER LOWELL PHILLIPS,

Defendant-Appellant,

and

CITY OF FERNDALE,

Defendant.

UNPUBLISHED
August 21, 2012

No. 304236
Wayne Circuit Court
LC No. 10-007384-NO

Before: SAAD, P.J., and SAWYER and CAVANAGH, JJ.

PER CURIAM.

Defendant Phillips (defendant) appeals from an order of the circuit court denying his motion for summary disposition based upon governmental immunity. MCR 2.116(C)(7). We reverse and remand.

While the parties disagree over many of the factual details, and the interpretation of various facts, the basic facts needed to resolve this matter are undisputed. The events that gave rise to this action began with a routine traffic stop by Ferndale Police Officer Ken Jaklic. The decedent, Laszlo Latits, initially stopped as directed. When Latits opened his glove compartment, presumably to retrieve his registration and proof of insurance, Officer Jaklic observed a bag of marijuana. Officer Jaklic ordered Latits out of the vehicle. Instead of complying, Latits took off in his vehicle, with Officer Jaklic giving chase.

The dashcam videos supplied by the parties show Latits fleeing and eluding from the police, even after the officers attempted a PIT maneuver.[1] Eventually, the Latits vehicle entered

[1] A PIT (Precision Intercept Technique) is a maneuver in which an officer giving chase pushed the rear fender of the suspect vehicle with the patrol car's opposite front fender, causing the

a parking area in Detroit near the State Fairgrounds. Officer Jaklic and three other officers, including defendant, attempted to box in the Latits vehicle. Latits was still attempting to evade capture and drive off, including ramming one of the patrol cars.[2]

Defendant left his vehicle and approached the Latits vehicle from the passenger side with his weapon drawn. As Latits continued to attempt to evade capture by driving backwards, defendant fired four times.[3] Shortly thereafter, the Latits vehicle came to a stop. Latits was arrested and transported to the hospital, where he later died from three gunshot wounds to the arm, chest and abdomen. The autopsy also disclosed the presence of alcohol and hydrocodone in Latits' system.

Defendant in his deposition described his decision to shoot as follows:

> I was involved in a pursuit. I was informed by two officers of attempted ramming and ramming. When I got out of my vehicle, I observed him ram the officer, Officer Jaklic. As I approached his vehicle, I could hear the engine revving, he looked back over his should directly at me. As he started moving I felt fear for my life, I wasn't – I wasn't sure as to how – how much room I had between his vehicle and my vehicle. I fired to ensure my own safety and the safety of my fellow officers.

(It should be noted that the reference to ramming Officer Jaklic is actually to ramming Jaklic's patrol car while Jaklic was still in the vehicle.)

Plaintiff filed a complaint, alleging a claim under gross negligence and a claim under assault and battery. Defendant thereafter moved for summary disposition based upon governmental immunity. The trial court denied defendant's motion for summary disposition with only brief explanation. The trial court stated that there were "issues of fact here" and that the dashcam videos were "very interesting and very troubling."

The relevant standard of review was summarized by the Supreme Court in *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008), quoting *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999):

> 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

suspect vehicle to spin out of control and come to a stop. In this case, the video shows Latits' vehicle fishtailing on the wet pavement, but it did not immediately end the chase.

[2] The police reports also detail other attempts by Latits to ram the police cars involved.

[3] The exact details of the firing of the shots is somewhat unclear. In his deposition, Officer Phillips describes firing a four-round burst and stated that he did not fire any more shots. However, seven shell casings, matching the casings from Phillips' firearm, were recovered at the scene. None of the other officers discharged their weapons.

> 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.

We begin by noting that this also addresses a point raised by plaintiff in her brief on appeal objecting to defendant supporting a number of statements of fact by reference to police reports. Plaintiff argues that defendant's motion for summary disposition cannot be supported by police reports because they are inadmissible as evidence at trial. Plaintiff's argument is flawed for two reasons. First, as the above quotation from *Odom* alludes to, and as is more fully discussed in *Maiden*, 461 Mich at 124 n 6, while a motion for summary disposition must be supported by admissible evidence, that evidence does not have to be in admissible form. Because defendant's reliance on those reports is in references to the officer's personal observations, those officers would be able to testify at trial to the substance of the material in the reports. That evidence would be admissible. See also *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009). Second, it is not necessarily the case that those reports would, in fact, be inadmissible at trial. As noted in *Maiden*, 461 Mich at 124-125, police reports are "plausibly admissible" under MRE 803(6), though any secondary hearsay within the document would not be. They may also be admissible under MRE 803(8). See *In re DMK*, 289 Mich App 246, 258 n 6; 796 NW2d 129 (2010). But, because the officers could testify as to their own observations, we need not resolve this matter.

We turn to the question whether defendant was entitled to the protection of governmental immunity for the claim based upon the intentional tort of assault and battery. Because this involves a claim against an individual governmental employee rather than the governmental entity, the burden is on defendant to raise and prove immunity as an affirmative defense. *Odom*, 482 Mich at 479. To establish his entitlement to immunity, defendant must show:

> (a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,
>
> (b) the acts were undertaken in good faith, or were not undertaken with malice, and
>
> (c) the acts were discretionary, as opposed to ministerial.

Plaintiff concedes the first and third prongs of the test, but argues that defendant was not acting in good faith. We disagree.

The substance of plaintiff's argument is that defendant exercised poor judgment or was mistaken as to his justification in using deadly force. But even if we were to agree with plaintiff, that does not affect the immunity analysis. As the Court explains in *Odom*, showing that an officer made a mistake does not defeat immunity. In *Odom*, the claim was for false imprisonment and malicious prosecution. The trial court denied summary disposition for a lack of probable cause. The trial court denied summary disposition because "there remained a question of fact whether defendant lacked probable cause to detain or arrest plaintiff." *Odom*,

482 Mich at 481. But, as the Court explains, that does not resolve the governmental immunity question:

> The mere existence of probable cause, however, is not the proper inquiry. A police officer would be entitled to immunity under *Ross* [*v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984)] if he acted in good faith and honestly believed that he had probable cause to arrest, even if he later learned that he was mistaken. Yet the claim of false arrest or false imprisonment cannot be sustained if the arrest was legal.
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> The Court of Appeals held that there remained a question of fact whether defendant's conduct was justified and "objectively reasonable." This objective analysis is also not the proper *Ross* inquiry. The good-faith element of the *Ross* test is subjective in nature. It protects a defendant's honest belief and good-faith conduct with the cloak of immunity while exposing to liability a defendant who acts with malicious intent.

Thus, while plaintiff would ultimately have to prove that defendant was not justified in using deadly force in order to prevail at trial on her assault and battery claim, such a showing is inadequate to defeat the defense of governmental immunity. So long as defendant can show that he was acting in a good-faith belief that he was acting properly in using deadly force, he is entitled to the protections of governmental immunity regardless whether he was correct in that belief. And there is no evidence in this case to show that defendant did not have such a belief.

Defendant's stated reason for firing his weapon was to ensure his safety and the safety of others. The facts support the conclusion that defendant would have such a reason and there is no evidence presented by plaintiff to establish any other motivation. Defendant testified in his deposition that he was informed that Latits had rammed and attempted to ram police cars, that there had been a chase, and Latits had engaged in erratic driving. That defendant actually would have had this belief is supported not only by his own testimony, but by the statements of the other officers involved as recorded in the police reports and to which they would presumably testify at trial.

Plaintiff, on the other hand, points to no evidence supporting a finding of malice. Plaintiff spends a good portion of her argument on this point discussing whether the use of deadly force was justified. But the standard in evaluating the governmental immunity question is not whether, when viewing the facts objectively with the benefit of hindsight, the use of deadly force was justified. Rather, as discussed in *Odom*, 482 Mich at 481, the standard is a subjective one from the perspective of defendant with respect to whether he was acting in good faith. Whether the legal standards for acting in self-defense or defense of others was met is not controlling. Whether the information relayed to defendant by the other officers was accurate is

not relevant.[4] What is relevant was whether defendant, in good faith, believed that he needed to fire his sidearm to protect himself and others.

In this regard, we find the United States Supreme Court's opinion in *Brosseau v Haugen*, 543 US 194; 125 S Ct 596; 160 L Ed 2d 583 (2004), somewhat instructive. In that case, Officer Rochelle Brosseau shot the plaintiff in the back as he was attempting to flee in a vehicle. The officer's stated reason for doing so was her concern for the safety of the other officers on foot in the area, as well as any civilians that might be in the plaintiff's path. 543 US at 196-197. The plaintiff sued Officer Brosseau under 43 USC 1983. Ultimately, however, the Court declined to determine whether Officer Brosseau employed excessive force under the standards of *Tennessee v Garner*, 471 US 1; 105 S Ct 1694; 85 L Ed 2d 1 (1985), and *Graham v Connor*, 490 US 386; 109 S Ct 1865; 104 L Ed 2d 443 (1989).[5] Rather, it concluded that the established case law did not "squarely govern" the *Brosseau* case and that "Brosseau's actions fell in the 'hazy border between excessive and acceptable force.'" *Brosseau*, 543 US 194, quoting *Saucier v Katz*, 533 US 194, 206; 121 S Ct 2151; 150 L Ed 2d 272 (2001). And, therefore, the Court concluded that Officer Brosseau was entitled to qualified immunity under 43 USC 1983 because it was not clearly established that her actions violated that the constitution. 543 US at 201.

Of course, unlike *Brosseau*, the case at bar does not involve a claim under § 1983 nor issues of qualified immunity. But it does provide guidance on two points. First, it draws into question plaintiff's claim that the force was excessive. If Officer Brosseau's actions were on the "hazy border" between acceptable and excessive force, defendant's actions in the case at bar would seem to more clearly fall into the area of acceptable force. Second, and more to the point, if Officer Brosseau's actions, and the circumstances surrounding her decision to shoot Haugen, did not clearly establish excessive force, then the circumstances surrounding defendant's decision to shoot Latits do not establish malice on behalf of defendant.

The closest that plaintiff comes to defeating defendant's claim of acting in good faith is that three rounds apparently fired by defendant are unaccounted for in the time frame. Defendant has maintained that he fired a single, four-round burst at Latits. Yet seven shell casings were recovered at the scene. But because there is no explanation of the extra three rounds being fired, plaintiff can merely speculate as to when those rounds were fired, whether they are the rounds that struck Latits, and what defendant's motivation was in firing those rounds.

In sum, defendant was entitled to summary disposition on the assault and battery claim if he can show that it is uncontroverted that he acted in good faith. Defendant is able to present

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[4] In her brief, plaintiff claims that the other officers, specifically officers Jaklic and Wurm, falsely radioed information regarding whether Latits had rammed their vehicles. But even assuming this to be true, that speaks to their good faith, not defendant's. That is, if defendant heard this radio information and believed it, the fact that it was false would not establish defendant's malice.

[5] The Ninth Circuit had concluded that Officer Brosseau did, in fact, employ excessive force. 543 US at 195.

evidence that he was acting in good faith at the time that he shot Latits. Plaintiff is unable to point to any evidence that would contradict such a finding. Therefore, summary disposition should have been granted to defendant on this claim.

We turn next to the issue of plaintiff's gross negligence claim. As discussed in *Odom*, 482 Mich at 479-480, the standard is different for establishing governmental immunity with respect to negligent torts and intentional torts. With negligent torts, the governmental employee is not entitled to the protection of governmental immunity if his "conduct amounted to gross negligence that was the proximate cause of the injury or damage." 482 Mich at 480. Paragraph 5 of plaintiff's complaint alleges that the following items plead gross negligence rather than the intentional tort of assault and battery:

> b. Failure to follow proper police procedures;
>
> c. Failure to appreciate that Laszlo J. Latits posed no threat of harm to Defendant Officer or anyone else;
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> d. Recklessly discharging multiple rounds from Defendant's handgun;
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> e. Recklessly pointing a gun at or in the direction of Laszlo J. Latits;
>
> f. Fraudulently conspiring to cover-up their gross negligence and/or willful and wanton misconduct by filing false police reports and providing false information to authorities regarding the facts and circumstances surrounding the shooting of Laszlo J. Latits;
>
> g. Any and all additional acts of gross negligence and/or willful and wanton misconduct as may come to be known through the course of this lawsuit.

These allegations do not defeat defendant's claim of governmental immunity. Defendant did not recklessly shoot Latits. There is no claim that Latits was shot as the result of an accidental discharge of defendant's firearm or that defendant otherwise had not intended to shoot Latits. Negligence would perhaps be the proper analysis if defendant unintentionally pulled the trigger while the gun was pointed at Latits and defendant should have been pointing the gun in a different direction or not had his finger on the trigger so as to avoid an accidental discharge. Or negligence would be the proper analysis if defendant were aiming at a different target but accidentally shot Latits instead. But there was nothing negligent or reckless about defendant's decision to point his firearm at Latits and shoot—he did so intentionally.

Furthermore, the claim under paragraph 5.c that defendant failed to appreciate that Latits did not pose a risk of harm may affect the analysis whether defendant made the proper decision to shoot, but it does not alter the fact that it was an intentional decision to shoot. Similarly, under paragraph 5.b, any failure to follow procedures would potentially go to the issue of the correctness of the decision to shoot, but not whether that decision was intentional. As for paragraph 5.f, because that involves claims regarding events that occurred after the shooting, it cannot establish anything with regard to the shooting itself. Finally, paragraph 5.g is simply meaningless.

As the Court noted in *Maiden*, 461 Mich at 135, "the gravamen of plaintiff's action is determined by considering the entire claim." That is, plaintiff cannot avoid the protections of immunity by artful pleading. *Id.* Moreover, "this Court has rejected attempts to transform claims involving elements of intentional torts into claims of gross negligence." *VanVorous v Burmeister*, 262 Mich App 467, 483-484; 687 NW2d 132 (2004).

The gravamen of plaintiff's claim against defendant is that he intentionally and improperly shot Latits. Plaintiff's claim is one of an intentional tort and no amount of artful pleading can change that fact. And, as discussed above, defendant is entitled to the protections of governmental immunity under an intentional tort claim arising from that shooting.

Reversed and remanded to the trial court with instructions to enter an order of summary disposition in favor of defendant on plaintiff's claims against him. We do not retain jurisdiction. Defendant may tax costs.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Mark J. Cavanagh