

STATE OF MICHIGAN
COURT OF APPEALS

ROYAL ALEXANDER,

Plaintiff-Appellant,

v

BRETT CASSIDY, ROBERT FROST and
BLAKE HIBEN,

Defendants-Appellees,

and

NATE GUIGER,

Defendant.

UNPUBLISHED
November 29, 2012

No. 301860
Genesee Circuit Court
LC No. 09-092311-CZ

Before: MURPHY, C.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Defendants Brett Cassidy, Robert Frost, and Blake Hiben (collectively “the officers”) appeal as on leave granted by order of the Michigan Supreme Court, remanding this case to this Court for plenary consideration. The Michigan Supreme Court asks this Court to address the officers’ claims of immunity against plaintiff Royal Alexander’s claims of excessive force and assault and battery under federal and state law.¹ Because we conclude that there are genuine issues of material fact on the officers’ qualified immunity claims under state and federal law, we reverse and remand.

I. FACTS

A. BACKGROUND FACTS

On April 23, 2008, Officer Hiben initiated a traffic stop on a yellow Hummer vehicle owned by CaSandra Alexander. Bienville Alexander was driving the vehicle. Officer Hiben stopped the vehicle because it had an air freshener hanging from the rearview mirror, obstructing

¹ *Royal Alexander v Cassidy*, 491 Mich 869; 809 NW2d 562 (2012).

the driver's view, or because Bienville Alexander had accelerated quickly from a stop. Bienville Alexander was not able to provide the vehicle's registration or proof of insurance. Bienville Alexander called CaSandra Alexander and asked if she could bring a copy of the vehicle's registration to him.

Before CaSandra Alexander arrived, a canine unit arrived. The canine unit indicated that there might be illegal substances inside the vehicle. The officers removed Bienville Alexander from the Hummer and placed him in the police car. After searching the Hummer, the officers did not find any illegal substances.

CaSandra Alexander testified that she drove to the location, parked, and approached the Hummer. When she arrived, Bienville Alexander was located in the back seat of Officer Hiben's car. He was handcuffed. CaSandra Alexander testified that as she approached the Hummer, one of the officers stopped her and used profanity at her. She testified that she was upset, and tried to inform the officer that she had the registration for the Hummer. CaSandra Alexander testified that the officer grabbed her arm and told her to get back, and that he was yelling and spitting in her face. Officer Hiben testified that CaSandra Alexander was loud and appeared upset when she was speaking with Officer Guiger.

CaSandra Alexander testified that she returned to the parking lot and called Royal Alexander to inform him that police had pulled over Bienville Alexander, that she had tried to give them the registration to the Hummer but they refused to take it, and that they would not explain why they were arresting Bienville Alexander.

Royal Alexander arrived after the officers had finished searching the vehicle. Royal Alexander testified that he parked at a store on the corner, and approached CaSandra Alexander, who was in the store's parking lot. He testified that CaSandra Alexander asked him to find out why the officers were arresting Bienville Alexander.

B. ROYAL ALEXANDER'S VERSION OF THE ARREST

Royal Alexander testified that he approached the police officers and indicated that his brother Bienville Alexander was in the police car. He testified that he was inquisitive, not angry, and that he could not remember whether he talked with his hands, gestured, or used any profanity. Royal Alexander testified that when he asked the police why they were arresting his brother, and that the officer told him to get on the sidewalk. He testified that the officer did not indicate a specific sidewalk, but that traffic was approaching, and he walked to closer of the two the sidewalks. Royal Alexander testified that there were witnesses on both sidewalks.

Royal Alexander described the altercation as follows:

[A]n officer actually ran over there and said, hey, you, I told you to get on the other sidewalk, you're under arrest. So, I looked around. I put my hands down like this to my side and I said I'm under arrest for what? Once I said that [Officer Hiben] swung at my head and tried to hit me in the face. So, I moved out of the way. Once I moved to the side another officer jumped on my back and started choking me. Once that happened two more officers slammed me to the concrete . . .

Royal Alexander testified that when the officer approached him, he was standing quietly by himself. He testified that he did not throw his hands up, and that the officers did not ask him to put his hands behind his back.

CaSandra Alexander testified that Royal Alexander “trotted” toward the officers, but was not running or making any gestures. She testified that he stopped in the middle of the street to ask the officers what was going on in an “escalated” voice. She testified that the officer responded, “Who the f*** are you?” and that Royal Alexander told the officer that he was “his f***ing brother,” and only wanted to know what was going on. She testified that the officer ordered Royal Alexander to get on the sidewalk. She testified that when Royal Alexander got on the sidewalk, he turned with his palms up. She testified further that

after he asked him about moving . . . to the sidewalk, and [Royal Alexander] moved to the sidewalk, he—one of the officers said you’re interfering with something. You’re interfering with something, and he was like I’m just asking a question. . . . I just want to know what’s going on. That was the last thing said before an officer . . . swung at him.

CaSandra Alexander testified that after the officer swung at Royal Alexander, other officers “dove” on him.

Betty Homsher testified that she was watching the situation from her office in a nearby building. She saw Royal Alexander walk swiftly toward the sidewalk. Homsher testified that his walk appeared agitated, but that he did not appear to be threatening the officers. When asked whether anyone behaved inappropriately, Homsher answered, “The guy who swung the punch . . . nothing I observed warranted that punch.”

Eva White testified that she was also watching the situation from Homsher’s office, and that she had a “very clear view.” When asked whether Royal Alexander looked angry, White testified that she could not tell, but that “his stance was sort of—[I]like, what happened, or what are you doing?” She testified that she saw an officer approach Royal Alexander on the sidewalk. White testified that officers approached Royal Alexander and “all of a sudden all of them threw him down.” She testified that Royal Alexander did not throw his arms up or attempt to strike any officers.

C. THE OFFICERS’ VERSION OF THE ARREST

Officer Cassidy testified that Royal Alexander approached the traffic stop with his fists clenched, as though he was angry. Officer Guiger testified that Royal Alexander ran at the traffic stop, yelling, swearing, screaming, and flailing his arms wildly.

Officer Frost testified that he first saw Royal Alexander when Royal Alexander was running across the street toward the sidewalk where he stood. Officer Frost testified that Officer Hiben was following behind Royal Alexander. He testified that he yelled and pointed toward the other side of the street, but that Royal Alexander refused to comply. Officer Frost testified that Royal Alexander did not have his fists balled, but that Royal Alexander was throwing his hands in the air dramatically and acting belligerent. Officer Frost testified that he told Royal Alexander

to go back across the street several times, but that Royal Alexander told him he was going to stand on the sidewalk.

Officer Cassidy testified that Officer Frost grabbed Royal Alexander by the wrists and told him that he was under arrest. Officer Hiben testified that Royal Alexander pulled away, and Officer Hiben attempted to grab Royal Alexander's other wrist; at that point, Royal Alexander and Officers Frost and Hiben fell to the ground.

D. PROCEDURAL HISTORY

Royal Alexander filed a civil complaint, alleging that the officers used excessive force to effectuate an arrest, and assaulted and battered him. The officers filed a motion for summary disposition under MCR 2.116(C)(7), (8), and (10), arguing that they were entitled to qualified immunity against Royal Alexander's excessive force and assault and battery claims, because the officers acted objectively reasonably in tackling Royal Alexander under the circumstances. Royal Alexander responded that because of the conflicting testimonies, there were genuine issues of material fact concerning whether the officers were entitled to qualified immunity.

The trial court ruled that there was an issue of fact concerning whether the officers used excessive force while Royal Alexander was on the ground. However, it dismissed Royal Alexander's excessive force and assault and battery claims concerning how the officers took Royal Alexander to the ground.

Royal Alexander applied for leave to appeal the trial court's grant of partial summary disposition concerning how the officers took him to the ground. A prior panel of this Court peremptorily reversed the trial court's grant of summary disposition to the officers.² The officers appealed to the Michigan Supreme Court, which remanded this case, asking this Court to address the officers' claims of qualified immunity under state and federal law.³

II. STANDARD OF REVIEW

This Court reviews de novo the trial court's determination on a motion for summary disposition.⁴ A defendant is entitled to summary disposition under MCR 2.116(C)(7) if the plaintiff's claims are barred because of immunity granted by law.⁵ The moving party may support its motion with affidavits, depositions, admissions, or other documentary evidence that

² *Royal Alexander v Cassidy*, Order of the Court of Appeals, dated September 22, 2011 (Docket No. 301860).

³ *Royal Alexander v Cassidy*, 491 Mich 869; 809 NW2d 562 (2012).

⁴ *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008).

⁵ *Id.*

would be admissible at trial.⁶ We consider the contents of the plaintiff's complaint to be true, unless contradicted by the documentary evidence.⁷

A party is entitled to summary disposition under MCR 2.116(C)(10) if there is no genuine issue of material fact and the party is entitled to judgment as a matter of law.⁸ We will review "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party."⁹

III. QUALIFIED IMMUNITY UNDER FEDERAL LAW

A. LEGAL STANDARDS

This Court may review an issue of federal law.¹⁰ When reviewing federal law, we are bound by the holdings of federal courts on federal questions unless the federal courts of appeal are divided on the issue.¹¹

A governmental officer may have qualified immunity from suit under federal law.¹² To determine whether an officer has qualified immunity, we must determine whether (1) the action violates a constitutional right, and (2) the right was clearly established.¹³ A plaintiff may have a claim for excessive force if officers unreasonably seize the person in violation of the Fourth Amendment.¹⁴

B. APPLYING THE STANDARDS

We conclude that the trial court improperly dismissed Royal Alexander's claim for excessive force under federal law. In our view, a reasonable juror could conclude that the officers' actions were objectively unreasonable.

Whether a plaintiff's Fourth-Amendment right was clearly established depends on the objective legal reasonableness of the officer's action.¹⁵ A right is clearly established if a

⁶ *Id.*; MCR 2.116(G)(5).

⁷ *Odom*, 482 Mich at 466.

⁸ *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Odom*, 482 Mich 467.

⁹ *Odom*, 482 Mich at 466-467.

¹⁰ *Woodman v Miesel Sysco Food Services Co*, 254 Mich App 159, 165; 657 NW2d 122 (2002).

¹¹ *Id.*; *Schueler v Weintrob*, 360 Mich 621, 633-634; 105 NW2d 42 (1960).

¹² *Saucier v Katz*, 533 US 194, 200-201; 121 S Ct 2151; 150 L Ed 2d 272 (2001).

¹³ *Id.* at 200; *Pearson v Callahan*, 555 US 223, 231-232; 129 S Ct 808; 172 L Ed 2d 565 (2009).

¹⁴ *Graham v Common*, 490 US 386, 394; 109 S Ct 1865; 104 L Ed 2d 443 (1989).

¹⁵ *Pearson*, 555 US at 244.

reasonable officer would understand that his action violates that right.¹⁶ Generally, because the purpose of this requirement is to give officers fair notice that the law proscribes certain conduct, courts must have held the specific action to be unlawful.¹⁷

Under federal law, an officer may not tackle a suspect who is not fleeing or resisting.¹⁸ They instead argue that Royal Alexander was resisting arrest.

The officers claim that Royal Alexander disobeyed police orders and then resisted arrest by pulling away when they grabbed his wrists, at which point they were entitled to take him to the ground. An officer may place a plaintiff in a submissive posture in order to handcuff him if the plaintiff is uncooperative and refuses to follow orders to place his hands behind his back.¹⁹ However, the facts surrounding Royal Alexander's arrest are in controversy and, again, a reasonable juror could find that Royal Alexander was not actively resisting arrest. Royal Alexander testified that when he approached the officers, they instructed him to get on the sidewalk, and he complied. Royal Alexander testified that they did not tell him the sidewalk to which he should go. None of the witnesses testified that they saw the officers make any gestures. Royal Alexander testified that the officers did not tell him to put his hands behind his back. Viewing the testimony in the light most favorable to Royal Alexander, he was neither fleeing nor actively resisting arrest when the officers tackled him. Royal Alexander's right not to be physically assaulted when he was not fleeing or actively resisting the officers is clearly established.

We also conclude that viewing the testimony in the light most favorable to Royal Alexander, there is a question of fact whether the officers unreasonably used excessive force when in tackling and subduing him. Whether an officer's actions were unreasonable depends on the facts and circumstances of a particular case, including (1) the severity of the crime at issue, (2) whether the suspect poses a safety threat to the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest.²⁰ We must judge the facts and circumstances objectively, from the perspective of a reasonable officer on the scene.²¹

¹⁶ *Anderson v Creighton*, 483 US 635, 640; 107 S Ct 3034; 97 L Ed 2d 523 (1987); *Brosseau v Haugen*, 543 US 194, 198; 125 S Ct 596; 160 L Ed 2d 583 (2004).

¹⁷ *Saucier v Katz*, 533 US at 206; *Hope v Pelzer*, 536 US 730, 739-740; 122 S Ct 2508; 153 L Ed 2d 666 (2002).

¹⁸ *Goodson v City of Corpus Christi*, 202 F3d 730, 740 (CA 5, 2000); *Smoak v Hall*, 460 F2d 768, 784 (CA 6, 2006); *Blackenhorn v City of Orange*, 485 F3d 463, 478-479 (CA 9, 2007); *Morris v Noe*, 672 F3d 1185, 1198 (CA 10, 2012).

¹⁹ *Marvin v City of Taylor*, 509 F 3d 234, 247-248 (CA 6, 2007).

²⁰ *Graham*, 490 US at 396.

²¹ *Id.* at 396-397.

Here, the crime at issue was Royal Alexander's failure to obey the police officer's orders, or interfering with a police investigation. The officers argue that the crime was a more serious drug-related traffic stop. But Royal Alexander was not under investigation in the initial traffic stop. Bienville Alexander was handcuffed and inside a police vehicle, and the investigation was completed before Royal Alexander arrived.

There is conflicting testimony whether Royal Alexander followed police orders, or was actively resisting or attempting to evade arrest. Royal Alexander testified that the officers did not instruct him where to stand, and that he complied with their orders. Officer Hibben testified that he pointed Royal Alexander at a specific sidewalk, and Officer Frost testified that Royal Alexander refused to stand on the other sidewalk. The officers testified that Royal Alexander pulled away when Officer Frost attempted to grab Royal Alexander's wrist, while Royal Alexander, CaSandra Alexander, and Homsher testified that Royal Alexander only stepped back after an officer attempted to punch him.

There is also conflicting testimony whether a reasonable officer would believe that Royal Alexander posed a safety risk. Royal Alexander was not armed and his hands were visible. Officer Guiger testified that Royal Alexander approached the traffic stop at a run, was yelling, swearing, and flailing his arms. Officer Frost testified that Royal Alexander was throwing his hands dramatically, and acting belligerently. However, Royal Alexander and CaSandra Alexander testified that Royal Alexander was merely inquisitive, and did not appear angry. Royal Alexander testified that he had his palms up, but was not gesturing while on the sidewalk. White testified that Royal Alexander's stance was inquisitive, and that he did not throw his arms up. White and Homsher testified that no one, including Royal Alexander, appeared to be threatening the officers. Neither witness saw Royal Alexander gesture with his hands.

When reviewing whether a question of material fact exists under MCR 2.116(C)(10), we must view the evidence in favor of the nonmoving party.²² Viewing the conflicting testimony in the light most favorable to Royal Alexander, he attempted to comply with police orders, he was not fleeing or resisting arrest, and he did not appear to pose a safety risk. Further, Royal Alexander's crime was minor. We conclude that reasonable juror could find that the officers acted unreasonably when tackling Royal Alexander and forcing him to the ground under these circumstances.

IV. QUALIFIED IMMUNITY UNDER STATE LAW

A. LEGAL STANDARDS

Individual governmental employees are entitled to qualified immunity from their intentional torts.²³ To establish qualified immunity from an intentional tort, the employee must show that (1) the employee undertook the acts during the course of employment and within the

²² *Odom*, 482 Mich at 466.

²³ *Odom*, 482 Mich at 472.

scope of his or her authority, (2) the acts were discretionary, and (3) the employee acted in good faith or without malice.²⁴ The parties only dispute the good-faith element in this case.

The good-faith element “protects a governmental employee who reasonably believes that he was authorized to take certain actions, but later learns that he was mistaken.”²⁵ Once an officer has decided to make an arrest, the officer must perform the arrest in a proper manner.²⁶ An officer may not act recklessly, wantonly, maliciously, or capriciously when effecting an arrest.²⁷ An officer acts with malice when he or she engages in conduct that is intended to harm the plaintiff.²⁸ A defendant will be entitled to summary disposition on an assault and battery claim “if he can show that it is uncontroverted that he acted in good faith.”²⁹

B. APPLYING THE STANDARDS

Royal Alexander’s claim under Michigan law is that the officers assaulted and battered him. The officers argue that Royal Alexander did not establish that the officers acted with malice. We note that this is not the proper burden of proof. When the plaintiff pleads an intentional tort, “the proponent of individual immunity must establish that he acted without malice.”³⁰ We conclude that the officers have not established that they acted without malice when tackling Royal Alexander.

If the defendant’s action can be interpreted in numerous ways, some of which are not malicious, this may indicate that the defendants did not act with malice.³¹ But when an officer’s conduct shows an intent to harm, that is indicative of willful and wanton misconduct, and thus a lack of good-faith.³²

A reasonable juror could find that the officers’ conduct showed an intent to harm Royal Alexander, even before they beat him while he was on the ground. This is not a case in which an officer’s laugh at a plaintiff’s complaint could have “signified a vast array of emotions,” and no other facts indicated malice.³³ Nor is this a case in which a defendant’s release of a police dog

²⁴ *Odom*, 482 Mich at 472-476, 480.

²⁵ *Odom*, 482 Mich at 482.

²⁶ *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 660; 363 NW2d 641 (1984); *Norris v City of Lincoln Park Police Officers*, 292 Mich App 574, 579; 808 NW2d 578 (2011).

²⁷ *Odom*, 482 Mich at 474; *Ross*, 420 Mich at 660.

²⁸ *Odom*, 482 Mich at 473.

²⁹ *Latits v Phillips*, ___ Mich App ___, slip op p 5; ___ NW2d ___ (2012).

³⁰ *Odom*, 482 Mich at 475, 480.

³¹ See *Oliver v Smith*, 290 Mich App 678, 689; 810 NW2d 57 (2010).

³² *Odom*, 482 Mich at 475.

³³ *Id.*

was against department policy, but occurred only after plaintiff did not comply with the officer's sirens, lights, and verbal commands, engaged in a high speed chase, and then attempted to strike and kick the officers when stopped.³⁴

Here, the officers claim that they acted in good faith and attempted to effect the arrest by attempting to grab Royal Alexander's wrists, at which point he pulled away and they were forced to take him to the ground. Again, these facts are in controversy. Viewing the evidence in the light most favorable to Royal Alexander, he complied with verbal commands, did not attempt to flee, and did not attempt to strike the officers. Royal Alexander contend that, when the officers informed him that he was under arrest, he put his arms to his sides and asked why he was under arrest. Royal Alexander contends that, at that point, Officer Hiben attempted to punch him. Homsher testified that nothing she saw warranted a punch.

The officers' versions of the event does not include this punch. But if the jury believes Royal Alexander's version of events, the officers have provided no evidence that Officer Hiben intended something other than to harm Royal Alexander. After the attempted punch, multiple officers tackled Royal Alexander to the ground, where, according to Royal Alexander, they continued to punch him. Thus, Royal Alexander has presented evidence that would allow a reasonable juror to find that the officers' conduct showed an intent to harm him even before he was taken to the ground. And qualified immunity, therefore, does not bar his assault and battery claims.

V. CONCLUSION

We conclude that the trial court improperly granted the officers' motion for summary disposition on Royal Alexander's excessive force and assault and battery claims based on the officers' tackle. A reasonable juror could find that the officers' actions were objectively unreasonable under federal law concerning the excessive force claim, and could find that the officers acted with malice under Michigan law concerning the assault and battery claim.

Reversed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ William C. Whitbeck

³⁴ See *Norris v Police Officers for the City of Lincoln Park*, 292 Mich App 574, 580; 808 NW2d 578 (2011).

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O'CONNELL, J. (*dissenting*).

I respectfully dissent. The Michigan Supreme Court remand order in this case requires this Court to address the officers' claims of immunity against plaintiff Royal Alexander's claims of excessive force and assault and battery. The majority concludes that there are genuine issues of material fact on the immunity claims under state and federal law. I agree, but only with regard to the police officers' acts that allegedly occurred while plaintiff was on the ground. Accordingly, I would affirm the trial court's summary disposition order.

The trial court determined that the incident at issue had two phases: first, the arrest; and second, the police officers' actions after the arrest while plaintiff was on the ground. In essence, the trial court determined that the police officers have qualified immunity from plaintiff's claims arising from the first phase of the incident, but that there is a question of fact on whether the police officers have qualified immunity for plaintiff's claims arising from the second phase.

I agree with the trial court that the police officers have qualified immunity for claims arising from plaintiff's arrest, because the officers did not use excessive force to secure plaintiff for arrest. Police officers must be given some latitude in effectuating an arrest; otherwise, anyone arrested could claim excessive force in a myriad of ways. But, I also agree with the majority opinion, and the trial court, that questions of fact exist on whether the officers used

excessive force in the second phase of the incident, i.e., the phase while plaintiff was on the ground.

I would affirm the well-reasoned decision of the trial court.

/s/ Peter D. O'Connell