

STATE OF MICHIGAN
COURT OF APPEALS

VERA GARLICK,

Plaintiff-Appellee,

v

BENJAMIN HARLESS,

Defendant-Appellant.

UNPUBLISHED
November 20, 2014

No. 317650
Wayne Circuit Court
LC No. 11-012756-CZ

Before: BORRELLO, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order denying his motion for summary disposition on the basis of governmental immunity, MCR 2.116(C)(7), and the absence of a genuine issue of material fact, MCR 2.116(C)(10). We affirm in part and reverse in part.

I

Defendant joined a fellow officer in a traffic stop that led to the arrest of plaintiff's son, who was driving plaintiff's vehicle. Following the arrest, the son and the other officer departed the scene. Defendant remained to ensure that the tow truck driver arrived and transported the vehicle to impound. When plaintiff arrived on the scene, visibly upset, she and defendant stepped into the grass to the right of the roadway to talk. The parties dispute whether defendant told plaintiff what happened to her son, whether plaintiff gave defendant her identification to verify her ownership of the vehicle, whether plaintiff told defendant of her medical issues, and whether plaintiff received permission from defendant to enter her vehicle and rest. Undisputed video evidence from defendant's dashboard camera shows that, following the off-camera talk on the side of the road,¹ plaintiff entered the driver side of her vehicle and closed the door. Defendant followed shortly afterward, opened the door, and asked plaintiff to leave the vehicle at least twice. According to plaintiff, she was putting her license back in her purse when defendant came over to her side of the vehicle and "started screaming" at her to leave the vehicle. Whereas according to defendant, after he opened the driver door, plaintiff reached over to her purse near

¹ Audio is not available on the tape until the plaintiff entered her vehicle and sat in the driver's seat.

the center console and he grabbed her left arm to prevent her from doing so. When plaintiff did not exit her vehicle, defendant pulled plaintiff's arm twice. Plaintiff maintained that defendant pulled her from the vehicle—twisting and squeezing her arm—but defendant stated that she stepped out of the vehicle independently after he held her left arm to prevent her from reaching into her purse. The parties also dispute the extent and character of the physical contact. Plaintiff alleges that the physical contact resulted in continuing physical pain in her left shoulder and wrist and that the altercation resulted in her diagnoses of depressive disorder and post traumatic stress disorder. She also alleges that her injuries were caused by defendant using violent and excessive force to pull her from the vehicle despite knowing that she had osteoarthritis and carpal tunnel syndrome.

Plaintiff brought suit against defendant alleging one count of intentional assault and battery and one count of gross negligence in the performance of duties as a police officer. Defendant moved for summary disposition based on MCR 2.116(C)(7) (governmental immunity) and (C)(10) (no genuine issue of material fact). The trial court denied defendant's motion. It evaluated defendant's claim of governmental immunity for both the intentional tort and the gross negligence claims under the framework of *Odom v Wayne County*, 482 Mich 459, 466; 760 NW2d 217 (2008), which applied the test for immunity set forth in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 647-648; 363 NW2d 641 (1984): 1) the acts were undertaken during the course of employment and the employee believed he was acting within the scope of his employment, 2) the undertaking was in good faith, and 3) the acts were discretionary rather than ministerial. The trial court stated that the first element was undisputed, and that defendant's decision, because it concerned the level of force necessary to secure his safety, was a discretionary action satisfying the third element. However, the trial court found that questions of fact existed as to whether defendant was acting in good faith. It held that these questions of fact, such as whether plaintiff made a sudden reach for her purse or whether defendant used excessive force in his restraint of plaintiff, were questions appropriate for the fact finder to determine. Because all elements needed for governmental immunity were not established as a matter of law, the trial court denied defendant's motion for summary disposition.

II

Defendant argues that the trial court should have dismissed plaintiff's claims based on governmental immunity. We agree and reverse as to the gross negligence claim; we disagree and affirm as to the intentional tort claim. A decision on a motion for summary disposition is reviewed de novo on appeal. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). When deciding a motion for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(10), a court must consider the affidavits, pleadings, depositions, admissions, and all other documentary evidence submitted in the light most favorable to the nonmoving party. MCR 2.116(G)(5).

A

MCL 691.1407(2) provides:

Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and

employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Although MCL 691.1407(2) refers generally to "tort liability," our Supreme Court has determined that it only applies to negligent tort liability because MCL 691.1407(2) must be read in conjunction with MCL 691.1407(3), which specifically states that the enactment of MCL 691.1407 did not alter the common law of intentional tort liability. *Odom*, 482 Mich at 470. Therefore, the proper test for whether a government employee has immunity from an intentional tort claim is the test established in *Ross*, 420 Mich at 647-648.² The *Ross* test requires the following: 1) that the 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 were not undertaken in malice, and 3) the acts were discretionary and not ministerial. *Odom*, 482 Mich at 480.

B

The trial court erred by using the *Ross* test to determine whether defendant should have governmental immunity for the gross negligence claim. Moreover, under the test set forth in MCL 691.1407(2), defendant is entitled to governmental immunity for that claim. Defendant is a police officer who was operating in the time and spatial boundaries of his job when the incident in question occurred. MCL 691.1407(2)(a) and (b) are satisfied because there is no question of fact that defendant believed removing plaintiff from the vehicle was within the scope of his authority as a police officer ensuring that the seized vehicle was properly transported to impound. Concerning MCL 691.1407(2)(c), whether the conduct constituted gross negligence, plaintiff alleged that defendant's actions caused her serious bodily injury and that these actions were made with substantial disregard of whether they would cause injury. But the gross negligence alleged must also be *the* proximate cause of plaintiff's injuries. *Oliver v Smith*, 290

² Prior to the amendment to MCL 691.1407 providing that the statute did not alter the common law of intentional tort liability, 1986 PA 175, § 3(1), the *Ross* test was utilized for all tort liability claims against government agencies.

Mich App 678, 686; 810 NW2d 57 (2010), quoting *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000) (holding that proximate cause in MCL 691.1407(2) is “ ‘the one most immediate, efficient, and direct cause preceding an injury.’ ”). Taking the evidence in the light most favorable to plaintiff, there was no evidence establishing that defendant’s acts alone were the one most immediate, efficient, and direct cause of plaintiff’s alleged injury. *Id.* Plaintiff’s refusal to comply with defendant’s direct orders to leave the vehicle resulted in the physical contact aimed at getting her to exit the vehicle. Therefore, plaintiff’s conduct was a contributing cause and defendant’s conduct could not be *the* proximate cause of injury. Thus, given that defendant was acting within the scope of his authority and the governmental agency was engaged in the discharge of a governmental function, defendant is entitled to governmental immunity as to the gross negligence claim.

C

The trial court correctly used the *Ross* test and concluded questions of fact existed regarding whether defendant should have governmental immunity for the intentional tort claim. As previously discussed, defendant’s actions were undertaken during the course of employment and he was acting within the scope of his authority, thereby satisfying the first prong of the test. Defendant’s actions were also discretionary under the third prong, as defendant personally deliberated and decided how to react to plaintiff’s behavior. However, it has not been established as a matter of law that defendant’s actions were undertaken in good faith—the second prong. Good faith cannot be found where an “employee acts maliciously or with a wanton or reckless disregard of the rights of another.” *Odom*, 482 Mich at 474. It is subjective in nature, focusing on the defendant’s honest beliefs. *Id.* at 481. Resolving conflicts in the pleadings and depositions in a light most favorable to plaintiff, we conclude that a rational trier of fact could find that when plaintiff and defendant first stepped to the side of the road, plaintiff provided defendant with her identification and received permission to sit in the vehicle, and that defendant used excessive force in restraining plaintiff after being told of her health problems. On the basis of those facts, a rational trier of fact could also find that defendant subsequently pulled plaintiff from the vehicle and that his act was malicious and made with reckless disregard of plaintiff’s rights. This analysis requires a credibility decision for the trier of fact and therefore, as the trial court concluded, questions of fact exist and summary disposition was inappropriate for the intentional tort claims.

III

We affirm the trial court’s denial of summary disposition for the intentional tort claim, but reverse its denial of summary disposition for the gross negligence tort claim, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens