

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GARY OLIVER,

Plaintiff-Appellee,

V

CORY SMITH,

Defendant-Appellant

and

PETE MUELLER, CITY OF DEARBORN  
HEIGHTS, and DEARBORN HEIGHTS POLICE  
DEPARTMENT,

Defendants.

**FOR PUBLICATION**

November 23, 2010

9:00 a.m.

No. 292585

Wayne Circuit Court

LC No. 03-313798-CZ

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Before: **MURRAY, P.J., and K.F. KELLY and DONOFRIO, JJ.**

PER CURIAM.

In this tort action alleging excessive use of force by a police officer, defendant Cory Smith appeals as of right from the trial court's order denying his motion for summary disposition based on governmental immunity. This is the second time that this case is before this Court. This Court previously affirmed the trial court's order denying a previous motion for summary disposition made by defendant.<sup>1</sup> *Oliver v Smith*, 269 Mich App 560; 715 NW2d 314 (2006). Because the trial court erred in denying defendant's motion for summary disposition, we reverse.

The facts underlying this appeal were summarized in our previous opinion:

The events giving rise to this appeal occurred on November 9, 2001. On that date, defendant, an officer with the Dearborn Heights Police Department, arrested plaintiff for interfering with a police officer after plaintiff was disruptive and uncooperative while defendant and another officer attempted to administer field sobriety tests to the driver of a vehicle in which plaintiff was a passenger. As a result of the arrest, plaintiff filed a complaint against the city, the police

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<sup>1</sup> References to "defendant" in the singular are to Smith alone.

department, and two police officers, including defendant. The complaint contained claims of assault and battery, negligence, and civil rights violations. In the complaint, plaintiff alleged that defendant used excessive force when he arrested him because he intentionally handcuffed plaintiff's wrists too tightly with the intent to inflict harm. The complaint further alleged that defendant's use of excessive force caused plaintiff to suffer physical and mental injuries. [*Oliver*, 269 Mich App at 561-562.]

Defendant Smith moved for summary disposition under MCR 2.116(C)(7) and (10), arguing that he was entitled to governmental immunity under the governmental immunity act, MCL 691.1401 *et seq.*, because his conduct did not amount to gross negligence under MCL 691.1407(2)(c) and (7)(a). The trial court denied the motion. In so ruling, the court noted that plaintiff failed to produce documentary evidence to establish a genuine issue of material fact regarding whether defendant's conduct caused plaintiff to suffer an injury. However, the court, in essence, concluded that summary disposition was premature because discovery was not complete and plaintiff still had time to produce documentary evidence of injury.<sup>2</sup>

Defendant appealed as of right in Docket No. 254654. On appeal, this Court affirmed the trial court's ruling. In reaching this result, this Court held that handcuffing an individual too tightly may constitute gross negligence for purposes of governmental immunity if physical injury results, and that defendant failed to meet his initial burden of providing evidence in support of his motion for summary disposition. *Oliver*, 269 Mich App at 566-568. However, this Court indicated that defendant might be entitled to summary disposition at the conclusion of discovery:

Because the trial court denied defendant's motion for summary disposition without prejudice, both parties will have sufficient opportunity to compile additional evidence, and, if he so desires, defendant can bring another motion for summary disposition at the end of the discovery period. [*Oliver*, 269 Mich App at 568.]

At the end of the discovery period, defendant filed another motion for summary disposition, which the trial court denied. Defendant has again appealed as of right to this Court.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "With regard to a motion for summary disposition pursuant to MCR 2.116(C)(7), this Court reviews the affidavits, pleadings, and other documentary evidence presented by the parties and 'accept(s) the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true.'" *Young v Sellers*, 254 Mich App 447, 449-450; 657 NW2d 555 (2002), quoting *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 681; 599 NW2d 546 (1999). In ruling on a motion for summary disposition under MCR 2.116(C)(10), "a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the non-moving party." *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d

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<sup>2</sup> The trial granted summary disposition in favor of all defendants except Smith on plaintiff's state law claims. The federal issues raised in the case were removed to the federal court. Thus, only the state law claims against defendant are in dispute here.

858 (2005). Summary disposition is appropriate under MCR 2.116(C)(10) when “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.”

The Supreme Court in *Odom v Wayne Co*, 482 Mich 459, 469-470; 760 NW2d 217 (2008) set forth the following steps that a court must follow when a defendant raises the affirmative defense of individual governmental immunity:

(1) Determine whether the individual is a judge, a legislator, or the highest-ranking appointed executive official at any level of government who is entitled to absolute immunity under MCL 691.1407(5).

(2) If the individual is a lower-ranking governmental employee or official, determine whether the plaintiff pleaded an intentional or a negligent tort.

(3) If the plaintiff pleaded a negligent tort, proceed under MCL 691.1407(2) and determine if the individual caused an injury or damage while acting in the course of employment or service or on behalf of his governmental employer and whether:

(a) the individual was acting or reasonably believed that he was acting within the scope of his authority,

(b) the governmental agency was engaged in the exercise or discharge of a governmental function, and

(c) the individual's conduct amounted to gross negligence that was the proximate cause of the injury or damage.

(4) If the plaintiff pleaded an intentional tort, determine whether the defendant established that he is entitled to individual governmental immunity under the Ross [*v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984)] test by showing the following:

(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. [*Id.* at 479-480.]

Following the steps provided in *Odom*, we first observe that defendant is indisputably a lower-level government employee not entitled to the absolute immunity provided by MCL 691.1407(5). It is also plain that plaintiff pleaded both negligent and intentional torts. We will address both alleged torts in turn.

As was clarified in *Odom*, in order to determine whether defendant is entitled to summary disposition under MCR 2.116(C)(7), the proper inquiry is whether defendant has met his burden of proof in establishing that he is entitled to governmental immunity as a matter of law. *Odom*, 482 Mich at 479. Governmental immunity from negligence claims applies to officers of a governmental agency when they are acting, or reasonably believe they are acting, within the scope of their employment, they are exercising or discharging a governmental function, and their conduct does not amount to gross negligence that is the proximate cause of injury or damage. *Id.* at 479-480; MCL 691.1407(2). Here, there is no doubt that defendant was acting within the scope of his authority and was discharging a governmental function during the time he was arresting plaintiff and taking him into police custody. Thus, the only remaining question with regard to the gross negligence claim is whether defendant's conduct amounted to gross negligence that was the proximate cause of the injury or damage.

For the purpose of governmental immunity, gross negligence by an employee involves "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a); *Costa v Community Emergency Med Serv, Inc*, 475 Mich 403, 411; 716 NW2d 236 (2006). It has been characterized as a willful disregard of safety measures and a singular disregard for substantial risks. *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). If reasonable jurors could honestly reach different conclusions regarding whether conduct constitutes gross negligence, the issue is a factual question for the jury. However, if reasonable minds could not differ, the issue may be determined by summary disposition. *Jackson v Saginaw Co*, 458 Mich 141, 146-147; 580 NW2d 870 (1998). When this case was first before this Court, we held "that a police officer's conduct of handcuffing an individual too tightly does not constitute gross negligence unless physical injury results," and remanded the case for the completion of discovery. *Oliver*, 269 Mich App at 566.

On remand, plaintiff presented evidence that he suffered from continuing pain and decreased strength and range of motion, as well as wrist abrasions apparent immediately after his arrest. Our previous opinion in this case held:

Evidence that handcuffing caused some pain but not injury is insufficient to establish excessive force in applying the handcuffs; if injury is minimal or nonexistent, then the force creating it must also be minimal and, therefore, not excessive. [*Oliver*, 269 Mich App at 566.]

The evidence presented by plaintiff is generally subjective and difficult to verify. However, if plaintiff's complaints are believed, then he has suffered more than "some pain" and minimal injury and has suffered an injury that affects his ability to work and perform daily activities. Because the question turns on plaintiff's credibility, it would be proper to submit to a jury if the alleged gross negligence was the proximate cause of the injury or damage.

Proximate cause in the context of MCL 691.1407(2) refers to the cause that is "the one most immediate, efficient, and direct cause preceding an injury." *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). Even after remanding for further discovery and when taking the evidence in the light most favorable to plaintiff, there was simply no evidence establishing that it was defendant's acts alone that were "the one most immediate, efficient, and direct cause preceding [plaintiff's] injury." *Id.* The record evidence shows that plaintiff exited

the vehicle and began yelling at the officers to let the driver go after police stopped the vehicle. Plaintiff was belligerent and failed to comply with the officers' orders to remain in the vehicle, making it unsafe for them to continue the field sobriety tests of the driver. The police attempted to arrest plaintiff for hindering that process but plaintiff refused to place his hands behind his back so that he could be handcuffed. Defendant managed to place one cuff on plaintiff's right wrist, but plaintiff then began to pull away. Accordingly, a second officer had to help defendant pull plaintiff's left arm behind his back in order to handcuff plaintiff. As a result, plaintiff was also arrested for resisting arrest. Plaintiff does not seem to dispute the majority of the police evidentiary account of what occurred during the arrest but adds that defendant threw him to the ground in order to handcuff him.

Under these circumstances, it cannot be said that defendant's acts alone were "the one most immediate, efficient, and direct cause preceding [plaintiff's] injury." *Robinson*, 462 Mich at 459. The wrist and hand injury is not clearly attributable to defendant alone and instead may just as fairly be attributed to plaintiff. The facts as developed clearly indicate that plaintiff was actively resisting arrest and the record indicates that plaintiff's injuries were just as likely caused by his own efforts to thwart officers' attempts to restrain him. Plaintiff could have caused his own injuries when he: (1) refused to place his hands behind his back to allow officers to handcuff him and officers had no other option but to pull plaintiff's left arm, wrist, and hand behind his back, (2) continued to resist when he pulled away from officers after defendant was able to affix the first cuff, or (3) forced officers to restrain him on the ground after he continued to refuse to submit to officers' orders. Because, even when reviewing the facts in the light most favorable to plaintiff it cannot be said that defendant's acts constituted the proximate cause of plaintiff's injuries, defendant has met his burden of proof in establishing entitlement to governmental immunity under MCL 691.1407(2). The trial court therefore erred by not granting defendant's motion for summary disposition of plaintiff's "gross negligence" claim under MCR 2.116(C)(7).

In *Odom*, 482 Mich at 480, our Supreme Court stated that the proper method for determining whether governmental immunity applies to intentional torts (such as assault and battery) is to apply the test set forth in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984). The *Odom* Court stated that employees enjoy a qualified right to immunity 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. *Odom*, 482 Mich at 480 citing *Ross*, 420 Mich at 633.

With regard to the assault and battery claim, defendant was clearly acting during the course of his employment and within the scope of his authority. The parties' primary disagreement is whether defendant was acting in good faith when he handcuffed plaintiff. "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." *Odom*, 482 Mich at 481-482. Here, the trial court concluded that plaintiff's evidence that defendant laughed when he complained that the handcuffs were on too tightly suggested that defendant may not have been acting in good faith, and thus, there was a question of material fact for a jury.

Defendant's argument in response focuses on whether he honestly believed there was a need to handcuff plaintiff, but that is not the issue in question. Under *Ross*, what is in question is whether defendant acted in good faith when he selected how tightly to handcuff plaintiff, not whether defendant had a good faith basis for handcuffing plaintiff. Plaintiff relies solely on defendant's laughter when plaintiff informed him that the handcuffs were too tight to suggest that defendant's decision in that regard may not have been made in good faith. But defendant's laughter after plaintiff's complaint could just as fairly indicate his disbelief of plaintiff, thinking that if he loosened the handcuffs, plaintiff might again endeavor to resist, thereby creating another dangerous situation that defendant was not willing to risk. The laughter could also indicate that defendant was flabbergasted with plaintiff after plaintiff's obstreperous behavior, and had nothing to do with his previous act of cuffing plaintiff. When looking at the situation as a whole, the officers were faced with an unruly individual who was verbally belligerent, actively disturbing a police inquiry, and creating a dangerous situation for officers involved. Plaintiff was intent on physically resisting arrest and as a result, plaintiff's injuries were just as likely caused by his own repeated efforts to physically thwart officers' attempts to restrain him and regain control of the situation. Under these facts, considering the vast array of emotions defendant's laughter could signify, even when viewing the evidence in the light most favorable to plaintiff, plaintiff's reliance on the laughter alone, without more, has not created a justiciable question of fact with regard to whether defendant acted in good faith when he placed the cuffs on plaintiff.

Defendant also contends that the trial court erred when it concluded that handcuffing was a ministerial, as opposed to a discretionary, act. "Discretionary-decisional' acts are those which involve significant decision-making that entails personal deliberation, decision and judgment. 'Ministerial-operational' acts involve the execution or implementation of a decision and entail only minor decision-making." *Ross*, 420 Mich at 592. In reaching its conclusion, the trial court relied on *Watson v Quarles*, 146 Mich App 759; 381 NW2d 811 (1985). Citing *Ross*, *Watson* held that an officer's decision concerning what type of action to take, e.g., to make an arrest, issue a warning, or wait for assistance, is a discretionary act entitled to immunity. However, the execution of that decision is merely ministerial. *Id.* at 764-765. This Court has also observed that, "[i]t was generally conceded in *Ross* that a police officer's use of excessive force in effectuating an arrest is a ministerial act and not entitled to the cloak of immunity." *Butler v Detroit*, 149 Mich App 708, 718; 386 NW2d 645 (1986). Here, defendant was faced with an aggressive individual who was intent on physically and forcefully resisting the officers' efforts to restrain him. While handcuffing an individual under normal circumstances incident to arrest without resistance may be ministerial, plaintiff's conduct in this case, given his belligerent attitude, physical resistance to being arrested, and defiant refusal to put his arms behind his back to be handcuffed, together with the concern for officer safety transforms the act of handcuffing plaintiff into a discretionary act. Under these circumstances, defendant's actions, in deciding how to respond to plaintiff, safely diffuse the situation, and effectuate a lawful arrest of plaintiff as he resisted, were clearly discretionary. Accordingly, it is a decision to which governmental

immunity applies.

Reversed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Christopher M. Murray  
/s/ Kirsten Frank Kelly  
/s/ Pat M. Donofrio