No. 334619
STATE OF MICHIGAN COURT OF APPEALS

Estate of Stanley-Jones v. Weekley

Decided Jan 18, 2018

No. 334619

01-18-2018

ESTATE OF AIYANA STANLEY-JONES, by CHARLES JONES, Personal Representative, and DOMINIKA STANLEY, Plaintiffs-Appellees, v. OFFICER JOSEPH WEEKLEY, Defendant-Appellant.

PER CURIAM.

UNPUBLISHED Wayne Circuit Court
LC No. 10-005660-NO Before: JANSEN, P.J., and FORT HOOD and RIORDAN, JJ. PER CURIAM.

In this tort action, defendant appeals as of right the trial court's order granting in part and denying in part his motion for partial summary disposition based on governmental immunity. We affirm.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Defendant was a police officer with the Detroit Police Department's Special Response Team (SRT), a SWAT-like unit which handled, among other things, high risk search warrants. During the execution of one such warrant in the early morning hours of May 16, 2010, defendant shot and killed seven-year-old ASJ.

Plaintiffs sued defendant shortly thereafter, alleging one count each of gross negligence, assault and battery, intentional infliction of emotional distress (IIED), and negligent infliction of emotional distress (NIED). After several lengthy delays due to criminal trials, Detroit's bankruptcy, and a Federal 42 USC 1983 action, the case reopened on October 20, 2015. Shortly before trial, defendant moved for summary disposition on plaintiffs' gross negligence and NIED claims, arguing that plaintiffs were not permitted to maintain those claims based on allegations that defendant intentionally shot ASJ. Alternatively, defendant argued that the NIED claim was not permitted under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*., because it alleged only ordinary negligence. The trial court denied the motion with respect to the gross negligence claim and granted the motion with respect to the NIED claim. This appeal followed. The trial court proceedings have been stayed pending the outcome of this appeal.

II. GROSS NEGLIGENCE

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Defendant argues that the trial court erred when it denied his motion for summary disposition of plaintiffs' claim of gross negligence. We disagree.

A. STANDARD OF REVIEW & GENERAL LAW

"This Court [] reviews de novo decisions on motions for summary disposition brought under MCR 2.116(C)(10)." *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016). A motion for summary disposition pursuant to MCR 2.116(C)(10) "tests the factual sufficiency of the complaint." *Joseph v Auto Club Ins Assoc*, 491 Mich 200, 206; 815 NW2d 412 (2012). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most

favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is proper where there is no "genuine issue regarding any material fact." *Id*.

"When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). "If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact." *Id*. at 429. "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law." *State Farm Fire & Cas Co v Corby Energy Services, Inc*, 271 Mich App 480, 482; 722 NW2d 906 (2006). The applicability of governmental immunity and its statutory exceptions are also reviewed de novo. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). Summary disposition is proper where no relevant factual dispute exists regarding whether a claim is barred by law. *Id*.

"The GTLA, MCL 691.1401 *et seq*., affords broad immunity from tort liability to governmental agencies and their employees whenever they are engaged in the exercise or discharge of a governmental function." *Beals v Michigan*, 497 Mich 363, 370; 871 NW2d 5 (2015). "The GTLA provides several exceptions to this general rule, all of which must be narrowly construed." *Id*. One such exception, codified at MCL 691.1407(2), considers immunity for governmental employees:

> (2) 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 . . . is immune from tort liability for an injury to a person or damage to property caused by the . . . employee . . . while acting on behalf of a governmental agency if all of the following are met:
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> (a) The . . . employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
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> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The . . . employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

*3 Thus, "[a]n employee of a governmental agency acting within the scope of his or her authority is immune from tort liability unless the employee's conduct amounts to gross negligence that is the proximate cause of the injury." *Kendricks v Rehfield*, 270 Mich App 649, 682; 716 NW2d 623 (2006). There is no dispute that defendant was an employee of a governmental agency and acting within the scope of his employment when the injury occurred. Therefore, defendant is entitled to governmental immunity unless he was grossly negligent and his gross negligence was the proximate cause of ASJ's death. MCL 691.1407(2). Defendant does not make any argument regarding proximate cause.

B. GROSS NEGLIGENCE VS. INTENTIONAL TORTS

Defendant argues that plaintiffs' gross negligence claim should have been summarily disposed because plaintiffs' claims are limited to intentional torts. We disagree.

1. APPLICABLE LAW

"A party's choice of label for a cause of action is not dispositive," and this Court is "not bound by the choice of label because to do so would exalt form over substance." *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011) (quotation marks omitted). Instead, this Court looks to the "gravamen of plaintiff's action, [which] is determined by considering the entire claim." *Latits v Phillips*, 298 Mich App 109, 120; 826 NW2d 190 (2012) (quotation marks omitted). Indeed, "[t]he courts must look beyond the procedural labels in the complaint and determine the exact nature of the claim." *Norris*, 292 Mich App at 582. This is because plaintiffs "cannot avoid the protections of immunity by artful pleading." *Latits*, 298 Mich App at 120 (quotation marks omitted). In that vein, "[e]lements of intentional torts may not be transformed into gross negligence claims." *Norris*, 292 Mich App at 582.

2. ANALYSIS

Mertilla Jones, ASJ's grandmother, was in the living room with ASJ when the SRT executed the search warrant at Mertilla's home, searching for Chauncey Owens, a suspect in the murder of a high school senior. The SRT had information that Owens was potentially armed with an AK-47. All the SRT officers involved in surveillance and reconnaissance on the subject residence testified that they did not see any toys or other signs that a child was present. Mertilla testified that, "[a]s soon as [defendant] came in, he just put the gun to [ASJ's] head and shot." In essence, Mertilla testified that defendant intentionally shot ASJ. As a result of this testimony, defendant specifically asserts, when viewing the light most favorable to plaintiff, a jury would be required to accept *all* of Mertilla's testimony as true. Defendant contends that if a jury were to disbelieve his version of events that the shooting was not intentional, then the jury would be required to fully accept all of Mertilla's claims, including that he intentionally and purposefully shot and killed ASJ.

Defendant's assertion that plaintiffs are limited to Mertilla's version of events, and therefore only intentional torts, is incorrect. "In general, parties are permitted to plead inconsistent claims and facts in the alternative." *AFSCME Council 25 v Faust Pub Library*, 311 Mich App 449, 459; 875 NW2d 254 (2015). "Even . . . where proof of one claim must defeat the existence of another, the plaintiff is allowed to present both claims." *Abel v Eli Lilly & Co*, 418 *4 Mich 311, 335; 343 NW2d 164 (1984). Further, in Michigan, a jury is permitted to believe some portions of a witness's testimony and disbelieve other portions of testimony from that same witness. See *Taylor v Mobley*, 279 Mich App 309, 311-312; 760 NW2d 234 (2008). "It is fundamental that the fact finder may accept in part and reject in part the testimony of any witness." *Adkins v Home Glass Co*, 60 Mich App 106, 111; 230 NW2d 330 (1975); see also *Brown v Pointer*, 41 Mich App 539, 552; 200 NW2d 756 (1972), rev'd on other grounds by 390 Mich 346 (1973) ("A jury is entitled to believe all, part, or none of a witness's testimony."); *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999) ("[A] jury is free to believe or disbelieve, in whole or in part, any of the evidence presented."). Thus, a plaintiff is barred from bringing a gross negligence claim only when that "claim of gross negligence is *fully premised* on" the intentional tort claim. *VanVorous v Burmeister*, 262 Mich App 467, 483; 687 NW2d 132 (2004) (emphasis added), overruling in part on other grounds recognized by *Brown v Lewis*, 779 F 3d 401, 420 (CA 6, 2015).

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Indeed, a jury can believe parts of some testimony and disbelieve other parts of that same testimony, *Adkins*, 60 Mich App at 111. For example, a reasonable juror could choose to believe Mertilla's version of the events to the extent that there were children's toys readily observable on the front lawn and porch, thus alerting defendant of the presence of children, that the raid happened quickly and with military precision, that defendant entered the house first and had his finger on the

trigger, and that she did not reach for, grab, or hit his gun before he fired. Meanwhile, a juror could disbelieve Mertilla's testimony that defendant purposefully shot ASJ, and instead choose to believe defendant that he did not kill ASJ intentionally. Thus, viewing the evidence in that manner is in the light most favorable to plaintiffs' claim of gross negligence. Of course, on the other hand, a jury also would be permitted to believe Mertilla's version of events entirely and find defendant liable for the intentional torts, or believe defendant's testimony entirely and find him not liable for any damages.

While this Court has repeatedly held that a claim of an intentional tort cannot be pleaded into a claim for gross negligence, see *Latits*, 298 Mich App at 120; *Norris*, 292 Mich App at 582; *VanVorous*, 262 Mich App at 483, those cases all involved issues where a police officer admittedly, purposely used a certain level of force, and the factual issue only was whether the decision by the police officer was based on "a good-faith belief that he was acting properly[.]" *Latits*, 298 Mich App at 115. See also *Norris*, 292 Mich App at 578. In *Norris*, 292 Mich App at 580-581, it was undisputed that the officer in question intentionally ordered a police dog to attack the plaintiff while the plaintiff was resisting arrest and assaulting another officer. Likewise, in *Latits*, 298 Mich App at 111-112, the police officer did not dispute that he intentionally shot the deceased three times to stop the deceased's vehicle from striking the shooting officer and other officers on the scene. Lastly, in *VanVorous*, 262 Mich App at 471-472, the defendant police officers admittedly shot and killed the deceased after he caused a car accident with another officer and subsequently attempted to run over that officer. In all of those cases, the plaintiffs asserted assault and battery claims, as well as gross negligence claims. *Id*. at 482-483; *Latits*, 298 Mich App at 112-113; *Norris*, 292 Mich App at 577. Because all the gross negligence claims were "fully premised" on the intentional tort claims of assault and battery, i.e. the officers' admittedly conscious decisions to initiate an unwanted contact, this Court held that all the gross negligence claims were required to be summarily disposed. *Latits*, 298 Mich App at 120; *Norris*, 292 Mich App at 582; *VanVorous*, 262 Mich App at 483. *5

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Unlike those cases, the evidence here does not provide undisputed evidence that defendant intentionally shot ASJ. Indeed, defendant himself contradicts that notion. This matter is factually distinguishable from *Latits*, *Norris*, and *VanVorous*, because plaintiffs' allegation of gross negligence is not "fully premised" on their claims of assault, battery, or IIED. Thus, the trial court did not err in denying defendant's motion for summary disposition on that ground. See, e.g., *Bell v Porter*, 739 F Supp 2d 1005, 1015 (WD Mich, 2010).

C. DEFENDANT'S GROSS NEGLIGENCE

Defendant asserts that the trial court should have granted his motion for summary disposition as there is no evidence that he was grossly negligent. We disagree.

1. APPLICABLE LAW

Pursuant to the GTLA, " '[g]ross negligence' means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). In other words, gross negligence "suggests . . . almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). More specifically, "[i]t is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge." *Id*. Generally, a determination of whether an individual was grossly negligent is a decision for the finder of fact. *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998). "However, if, on the basis of the evidence presented, reasonable minds could not differ, then

the motion for summary disposition should be granted." *Id*. (internal citations and quotations omitted.) "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden*, 461 Mich at 122-123.

2. ANALYSIS

Plaintiffs presented evidence that defendant drove by the residence one time during reconnaissance and walked through the lawn up to the front porch as the police raid progressed. At both times, there were children's toys in the front lawn in front of the porch. There also was a child's chair on the porch. Defendant acknowledged the toys were present, but stated that he did not see them because it was dark. Mertilla testified, and photographic evidence shows that the toys were plainly visible in daylight. Video evidence confirms that there was a visible toy scooter in front of the porch at the time of the raid. Although defendant and the other SRT officers deny it, a juror could infer from that evidence that defendant could have been aware that because of the presence of those toys, children who used those toys were in the house.

It is undisputed that defendant also was aware that the raid was going to occur during early morning hours, that Officer Thompson was going to ram the door, and that Officer Davis was going to break the front window and throw a flashbang into the front room. Defendant and the other SRT officers acknowledged that the flashbang, as it exploded, disoriented the sight and hearing of those in the room, generally causing confusion and giving the SRT a chance to get a foothold in the room. The SRT, including defendant, also testified that flashbangs were not often used in homes where children are present, because it is hard to
6 predict how a child will react to *6 such stimuli. From that evidence, a jury could infer that defendant was aware that if a child was in the front room, that child, and any other persons present, would be confused and disoriented by the flashbang.[1]

1 Defendant argues that he cannot be found grossly negligent for the planning of the raid, which is correct, because there is no evidence on the record that defendant was at all involved in the planning and tactics. However, plaintiffs do not allege that defendant was grossly negligent for planning the raid, but merely assert that his awareness of the circumstances of the raid were relevant to whether his actions handling his gun while entering the residence was grossly negligent. Thus, defendant's assertion that he be granted summary disposition on claims of gross negligence arising out of the planning of the raid need not be considered, because no such claims exist.

In part, because of this, defendant and the other SRT officers testified that they were trained to keep their finger off the trigger until they were ready to shoot. Defendant stated that the trigger finger is supposed to rest an inch or so away from the trigger, on the trigger guard or receiver. The purpose of that is to avoid firing the gun unintentionally. However, during the events at issue, defendant testified that he did, in fact, pull the trigger to make the gun fire. He stated that he pulled the trigger because otherwise, his gun would not have fired. But, defendant blamed that firing of his gun on Mertilla hitting his gun with her arm. However, Mertilla testified that she did not hit the gun, and an expert witness testified that hitting the gun could not make it fire. Further, Officer Stallard, who entered the residence immediately behind defendant, testified that he did not see anyone standing up or grappling with defendant in the living room when the gun fired. Thus, a jury could infer that defendant did not fire the gun due to Mertilla, and therefore, at some point, he had his finger on the trigger of his gun even though he did not intend to shoot. If, in fact, he did have his finger on the trigger it would have been in violation of department protocol.

There also was evidence that defendant's gun fired very quickly after entering the residence, Mertilla testifying that it happened all at once and only approximately two seconds after police broke the glass. The SRT officers generally agreed that the shot happened quickly, within five seconds of the window shattering. The video evidence reveals that there were about four seconds between the glass breaking and the gunshot. While that evidence does not establish that defendant's finger was on the rigger while entering the home, it could allow a juror to infer that defendant quickly placed his finger on the gun's trigger despite acknowledging having no reason to shoot. Lastly, during Mertilla's testimony, she stated that defendant walked in the door and immediately fired the gun at ASJ's head. The jury, as discussed, can disbelieve portions of a witness's testimony while believing other portions. As such, the jury could infer that defendant had his finger on the trigger while entering the residence in light of Mertilla's testimony that he came into the room and shot immediately, which necessarily required his finger on the trigger. Conversely, the jury could discredit Mertilla's testimony regarding defendant's trigger finger and that he shot the gun on purpose at ASJ. *7

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There is sufficient evidence on the record, viewed in a light most favorable to plaintiffs' gross negligence claim, to establish that defendant entered the residence with his finger on the trigger while aware that it was night time, there were potentially kids inside, and that any people inside would be distracted and confused by the glass breaking, door being rammed open, and the flashbang. Further, defendant did so after receiving training to keep his finger off of the trigger unless he intended to shoot the gun. He also was aware that flashbangs were not often used in raids involving children because it was not clear how a child would react.

Assuming those facts as true, as this Court must when deciding motions for summary disposition, reasonable minds could differ regarding whether defendant's actions "suggest[] . . . almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Tarlea*, 263 Mich App at 90. In normal situations, defendant was trained to keep his finger off of the trigger to avoid unintentionally firing his gun, so a decision to enter the residence contrary to that training, in light of the circumstances suggesting a high probability of chaos, confusion and children present, could allow a reasonable juror to determine "that [defendant] simply did not care about the safety or welfare of those in his charge." *Id*. Consequently, there is evidence from which a jury could conclude that defendant was grossly negligent by engaging in "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a).

Thus, defendant was not entitled to the benefit of governmental immunity under the GTLA. MCL 691.1407(2).

III. CONCLUSION

The trial court properly denied defendant's motion for summary disposition as there are questions of fact for the jury regarding whether defendant's actions amounted to gross negligence. MCL 691.1407(2); *Tarlea*, 263 Mich App at 90.

Affirmed.

/s/ Kathleen Jansen

/s/ Karen M. Fort Hood

/s/ Michael J. Riordan