STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2377

Quincy Smith,
Appellant,

vs.

Michael Morales, et al.,
Respondents.

Filed November 18, 2008
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Hennepin County District Court
File No. 27-CV-07-326

David L. Shulman, 1005 West Franklin Avenue, #3, Minneapolis, MN 55405 (for appellant)

Jay M. Heffern, City Attorney, Sara J. Lathrop, Assistant City Attorney, 333 South Seventh Street, Suite 300, Minneapolis, MN 55402 (for respondents)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant challenges the district court's grant of summary judgment in favor of respondent officers and the district court's denial of appellant's motion to amend the complaint to add a claim for punitive damages. Because a genuine issue of material fact

exists with regard to the reasonableness of the officers' initial use of force, we reverse the district court's grant of summary judgment and remand for trial. But because the district court did not abuse its discretion when it determined that the evidence submitted in support of appellant's motion to amend the complaint to add a claim for punitive damages did not meet appellant's statutory burden, we affirm the district court's denial of appellant's motion to amend.

FACTS

Some facts were undisputed for the purpose of the district court's summary judgment determination. On July 13, 2005, at approximately 2:00 a.m., appellant Quincy Smith was leaving a club in downtown Minneapolis. Appellant observed Officer Marc Gingerich of the Minneapolis Police Department detain one of appellant's friends. Appellant approached the officer to ask why his friend was being arrested. Officer Gingerich instructed appellant to step back onto a sidewalk, which he did. Appellant approached the officer a second time and was again instructed to step back onto the sidewalk. Appellant approached the officer a third time, at which time Officer Gingerich decided to cite appellant for failure to obey a lawful order.[1] The parties agree that appellant walked with Officer Gingerich to the front of the officer's squad car and that no force was used at that point. The parties' accounts of the remaining facts diverge.

Appellant maintains that after he arrived at the squad car, he complied with orders to keep his hands on the squad car and to spread his legs so Officer Gingerich and a

[1] Appellant and Officer Gingerich's accounts of the facts vary as to the circumstances of this third approach, but they agree that appellant did approach the officer a third time.

second officer could search him. Appellant alleges that despite his compliance, the officers forcibly attempted to handcuff him and took him to the ground. The officers allege that appellant resisted by removing his hands from the squad car, by failing to spread his legs, and by fighting their attempts to handcuff him. The parties agree that the officers physically struggled with appellant. During the struggle, appellant was taken to the ground, kicked in the shoulder, kneed in the side, maced, punched, and subjected to multiple cycles of electrical shock from a Taser. Multiple police officers had arrived at the scene and were involved in the struggle. The police arrested appellant and charged him with obstruction of legal process with force. Following a jury trial, appellant was acquitted of the criminal charges.

Appellant commenced this action, asserting claims of assault, battery, false arrest, and false imprisonment against six of the officers involved in the struggle.[2] Appellant filed a notice of motion and motion to amend the complaint to add a claim for punitive damages. The district court issued an order denying the motion. The officers then filed a joint motion for summary judgment, claiming official immunity. The district court issued an order granting summary judgment in favor of all of the officers based on the defense of official immunity. This appeal followed.

[2] Appellant did not name Officer Gingerich in the lawsuit.

D E C I S I O N

I. The district court erred when it granted summary judgment in favor of the officers.

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district court] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

> A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.

Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993) (citations omitted). No genuine issue for trial exists "'[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.'" *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)). "[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party's case, the nonmoving party must make a showing sufficient to establish that essential element." *Id.* at 71 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986)); *see also Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006) (describing *substantial evidence* as "incorrect legal standard" and clarifying that "summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions").

The district court granted summary judgment based on the officers' claims of official immunity. The common-law doctrine of official immunity is intended to enable "public employees to perform their duties effectively, without fear of personal liability that might inhibit the exercise of their independent judgment." *Mumm v. Mornson*, 708 N.W.2d 475, 490 (Minn. 2006). Under the doctrine, a police officer has a defense to state-law claims and may not be held personally liable for damages if the claims arise from the performance of job duties that "call for the exercise of his judgment or discretion," and if the officer's actions were neither willful nor malicious. *Id.*

"Police officers are generally classified as discretionary officers entitled to official immunity."[3] *Maras v. City of Brainerd*, 502 N.W.2d 69, 77 (Minn. App. 1993) (citing *Johnson v. Morris*, 453 N.W.2d 31, 42 (Minn. 1990)), *review denied* (Minn. Aug. 16, 1993). However, "[t]o have official immunity (1) the challenged acts must have occurred in the exercise of the officer's discretion, and (2) the officer must not have committed a willful or malicious wrong." *Id.* Malice is the "'intentional doing of a wrongful act without legal justification.'" *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991) (quoting *Carnes v. St. Paul Union Stockyards Co.*, 164 Minn. 457, 462, 205 N.W. 630, 631 (1925)). "In the official immunity context, willful and malicious are synonymous." *Id.* "Whether or not an officer acted willfully or maliciously is usually a question of fact to be resolved by the jury." *Maras*, 502 N.W.2d at 77 (citing *Johnson*, 453 N.W.2d at 42). The issue of malice has been characterized as an "objective inquiry into the legal

[3] Appellant concedes that the acts at issue here occurred in the exercise of the officers' discretion.

reasonableness of an official's actions." *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994). "Mere allegations of malice are not sufficient to support a finding of malice, as such a finding must be based on specific facts evidencing bad faith." *Semler v. Klang*, 743 N.W.2d 273, 279 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Feb. 19, 2008).

"[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 1872 (1989).

> The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

Id. at 396-97, 109 S. Ct. at 1872 (quotation marks and citations omitted).

"In reviewing an appeal from the grant or denial of official immunity on summary judgment, we must determine whether there are genuine issues of material fact and whether the [district] court erred in applying the law." *Thompson v. City of Minneapolis*, 707 N.W.2d 669, 673 (Minn. 2006). When there is a genuine dispute regarding predicate facts material to a determination of whether immunity applies, those fact issues are submitted for trial. *Id.* at 675. We conclude that there is a genuine dispute regarding a

predicate fact material to a determination of whether the defense of immunity applies in this case to wit, whether the officers' initial use of force was objectively reasonable.

In his deposition testimony, appellant maintained that he was compliant throughout his initial contact with police and that he never removed his hands from the hood of the squad car or attempted to resist officers before the officers used force. The officers give a starkly different version of the facts. Officer Gingerich testified that appellant was uncooperative, forcibly resisted officers, and attempted to pull away from them. Officer Gingerich testified that it was this increased level of resistance that predicated the officers' increased use of force.

The accounts of the police officers and appellant differ greatly in key details regarding whether or not appellant resisted the search and thereby necessitated the officers' use of force. The district court nevertheless adopted several contested facts as undisputed. Specifically, the district court stated as fact that appellant "was 'very agitated' and did not want Gingerich to get control of his arm"; "officers were unable to frisk [appellant] for weapons"; and "[appellant] became aggressive and a struggle ensued." These facts are clearly disputed given appellant's deposition testimony.

"[S]ummary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions." *Schroeder*, 708 N.W.2d at 507. Appellant has the burden of presenting sufficient evidence to permit reasonable persons to conclude that the defense of immunity does not apply because the officers' actions were willful or malicious. Appellant has met his burden. If appellant's version of the facts is determined by a

factfinder to be more credible than the officers' version, a reasonable person could find that the officers' initial use of force was not objectively reasonable and therefore malicious. Thus, a rational factfinder could find for appellant. Because there is a genuine dispute regarding predicate facts material to a determination of whether the officers' actions are shielded by official immunity, those fact issues must be submitted for trial. *See Thompson*, 707 N.W.2d at 675.

II. The district court did not abuse its discretion by denying appellant's motion to amend the complaint to add a claim for punitive damages.

Minnesota Statutes section 549.20, subdivision 1 (2006), provides the standard by which plaintiffs in a civil action are allowed to bring a claim for punitive damages. The statute reads:

> (a) Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.
>
> (b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:
>
> (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
>
> (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Minn. Stat. § 549.20, subd. 1.

A plaintiff in a civil suit may not raise a claim for punitive damages in the initial complaint, but must move the district court to amend the pleadings to add a claim for

punitive damages, providing the court with the proper legal basis for awarding punitive damages and one or more affidavits demonstrating the factual basis for the claim. Minn. Stat. § 549.191 (2006). "[I]f the court finds prima facie evidence in support of the motion [to add a claim for punitive damages], the court shall grant the moving party permission to amend the pleadings to claim punitive damages." *Id.* "The term 'prima facie' does not refer to a quantum of evidence, but to a procedure for screening out unmeritorious claims for punitive damages." *Swanlund v. Shimano Indus. Corp.*, 459 N.W.2d 151, 154 (Minn. App. 1990), *review denied* (Minn. Oct. 5, 1990).

> To prevail at trial, the plaintiff must show "clear and convincing" evidence of willful indifference to the rights or safety of others. We have previously held this quantum of proof is implicitly incorporated into the requirement that the movant present a prima facie case of willful indifference. The trial court may not allow an amendment where the motion and supporting affidavits do not reasonably allow a conclusion that clear and convincing evidence will establish the defendant acted with willful indifference.

Id. (quotation and citations omitted). "The clear and convincing standard is met when the truth of the facts sought to be admitted is 'highly probable.'" *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998) (quoting *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978)). "We will not reverse the trial court's decision to grant or deny a motion to add a claim for punitive damages absent an abuse of discretion." *LeDoux v. Nw. Publ'g, Inc.*, 521 N.W.2d 59, 69 (Minn. App. 1994), *review denied* (Minn. Nov. 16, 1994).

Appellant argues that the evidence submitted in support of his motion to amend demonstrates that all of the officers understood that the law prohibited them from using

excessive force, and that they therefore acted with deliberate disregard for appellant's rights. But appellant's argument is based on appellant's version of the facts without regard to contrary facts. In support of his motion, appellant submitted both his version of the facts and the versions of the officers involved, which the district court properly considered. As previously discussed, the officers' accounts differ greatly from the appellant's account. On review of the district court's denial of appellant's motion to add a claim for punitive damages, appellant does not enjoy the benefit of having the evidence viewed in the light most favorable to appellant, as he does on review of the district court's summary judgment decision. And while appellant was entitled to have his evidence treated as unrebutted by the district court, meaning not subject to cross-examination or other challenge, the district court was permitted to weigh the evidence. *Compare Swanlund,* 459 N.W.2d at 154 (explaining that the district court must view the evidence presented through the prism of the substantive evidentiary burden), *with Murphy v. Country House, Inc.*, 307 Minn. 344, 351, 240 N.W.2d 507, 512 (1976) (explaining that it is not the function of the district court to weigh evidence on a motion for summary judgment).

The district court considered all of the evidence submitted by appellant, including Officer Gingerich's deposition testimony, and found that appellant's evidence failed to meet the clear and convincing standard. The district court noted that the appellant's own evidence contained alleged facts that bear on the reasonableness of the officers' use of force. The district court stated:

> [T]he facts known to [the officers] did not create a high probability of injury to the rights or safety of [appellant], but rather indicated that a party, who may have been armed from the perspective of [the officers], was engaged in resistant-type activity and needed to be brought under control and into custody. Therefore, [appellant] has failed to establish by clear and convincing evidence the first prong of the *prima facie* evidence test, and this court need not consider the second prong.
>
> Since [appellant] has failed to establish by clear and convincing evidence that [the officers] deliberately disregarded [appellant's] rights or safety, [appellant's] claim for mandatory punitive damages must fail under Minn. Stat. § 549.191.

The district court's discussion of the evidence is supported by the record. The district court did not abuse its discretion when it determined that appellant's evidence did not meet the clear and convincing standard.[4] The district court, therefore, properly denied appellant's motion to amend the complaint to add a claim for punitive damages.

[4] The district court did not base its decision regarding punitive damages on the erroneous conclusion that appellant admitted resisting the search, which is the error that underlies the court's grant of summary judgment. However, in one potentially troubling sentence, the district court stated, "[appellant] himself admits that he twice disregarded an order of a police officer and even as [appellant] was initially brought to the police car by Officer Gingerich, he was 'very agitated' and displayed signs of resistance, such as 'not wanting to let [Officer Gingerich] have control of his arm.'" This sentence implies that appellant admitted that he was agitated and displayed signs of resistance before or during the search. The record does not support this conclusion. But the district court's statement does not misrepresent the record. In making this statement, the district court cited both to appellant's memorandum of law in support of his motion to add a claim for punitive damages and to the deposition testimony of Officer Gingerich. In his memorandum, appellant admits he "twice disregarded an order of a police officer," referencing Officer Gingerich's orders that appellant step back to the sidewalk. Officer Gingerich's deposition testimony supports the second portion of the challenged sentence, that appellant was very agitated and did not want the officer to have control of his arm. When read in conjunction with the citations provided, the district court's statement is supported by the record, though the wording of the sentence is confusing.

See Swanlund, 459 N.W.2d at 154 ("The trial court may not allow an amendment where the motion and supporting affidavits do not reasonably allow a conclusion that clear and convincing evidence will establish the defendant acted with willful indifference.").

Affirmed in part, reversed in part, and remanded.

Dated: _____

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The Honorable Michelle A. Larkin
Minnesota Court of Appeals