COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP904 **Cir. Ct. No. 2014CV363**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

DANIEL G. WILSON,

PLAINTIFF-APPELLANT,

KATHLEEN SEBELIUS, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES AND STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES,

INVOLUNTARY PLAINTIFFS,

V.

CITY OF KENOSHA AND SARAH WEBB,

DEFENDANTS-RESPONDENTS,

UNITED HEALTH CARE OF WISCONSIN, INC.,

DEFENDANT.

APPEAL from an order of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Reversed and cause remanded with directions.*

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Daniel Wilson appeals an order granting summary judgment in favor of the City of Kenosha and Officer Sarah Webb in this case alleging excessive use of force under 42 U.S.C. § 1983.[1] Wilson argues that summary judgment was inappropriate because there are genuine issues of material fact as to whether, under the totality of the circumstances, Webb's use of force during Wilson's arrest was excessive and unreasonable. We readily acknowledge what is obvious from a review of all submissions, that Wilson does not appear to have a strong case. However, focusing on the parts of the submissions favorable to Wilson, and drawing all reasonable inferences in favor of Wilson, as required by summary judgment methodology, we conclude that there are genuine issues of material fact that prevent summary judgment in favor of the City and Webb. Therefore, we reverse the order granting summary judgment on this claim and remand for further proceedings.

BACKGROUND

¶2 On May 11, 2011, Wilson was arrested at his residence in Kenosha for disorderly conduct after the owner of the house called the police. Wilson had

[1] Wilson also alleged that Webb negligently used excessive force. Wilson does not address this common law negligence claim on appeal, and, therefore, we deem it abandoned. *See* ***Young v. Young***, 124 Wis. 2d 306, 317, 369 N.W.2d 178 (Ct. App. 1985) ("An issue which has not been briefed or argued on appeal is deemed abandoned.").

undergone back surgery on May 2, 2011, nine days before his arrest. According to Wilson, he and Officer Webb had a verbal exchange prior to his arrest, including his telling Webb that he recently had "major surgery."

¶3 Wilson alleges a variety of actions by Webb that he argues constitute excessive force causing him injuries. First, Webb used one set, as opposed to two sets, of handcuffs to cuff his hands behind his back, despite his complaint that it was hurting his back. Second, Webb "dragged" him to a police car by forcing him to walk faster than he could possibly walk, causing pain to his back. Third, after another officer "helped set [Wilson] into the [back] seat" of the police car, Webb "pushed" his chest with both hands, causing his body to "topple" back onto the seat of the car. Fourth, while Wilson's legs were still sticking outside of the car, Webb "attempted to get [him] completely in the car by twisting and contorting his legs to the point that the 'pop, pop, pop' was heard, and the hardware in his back came loose." Wilson underwent another back surgery several months after the arrest in order to "correct the damage that was done during his arrest."

¶4 Wilson brought suit under 42 U.S.C. § 1983 against the City and Webb, claiming that Webb used excessive force against him during his arrest. The City and Webb filed a motion for summary judgment. The circuit court granted summary judgment in favor of the City and Webb. Wilson appeals.

DISCUSSION

¶5 Officer Webb argues that she and the City are entitled to summary judgment because the facts as alleged by Wilson himself demonstrate that Webb's

conduct during Wilson's arrest was objectively reasonable.[2] Wilson argues that summary judgment is inappropriate because there are genuine issues of material fact as to whether, under the totality of the circumstances, Webb's use of force was excessive and unreasonable. As we explain below, we agree with Wilson that, drawing all reasonable inferences in his favor, there are genuine issues of material fact that prevent summary judgment.

A. Standard of Review

¶6 Our review of a circuit court's grant of summary judgment is de novo. ***Post v. Schwall***, 157 Wis. 2d 652, 656, 460 N.W.2d 794 (Ct. App. 1990). "We review a motion for summary judgment using the same methodology as the [circuit] court." ***M & I First Nat. Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). "Summary judgment is granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***Kruschke v. City of New Richmond***, 157 Wis. 2d 167, 169, 458 N.W.2d 832 (Ct. App. 1990). "Summary judgment should not be granted unless the moving party demonstrates a right to judgment with such clarity as to leave no room for controversy." ***Waters v. United States Fidelity & Guar. Co.***, 124 Wis. 2d 275, 279, 369 N.W.2d 755 (Ct. App. 1985). "Any reasonable doubt as to the existence of a genuine issue of material fact should be resolved against the moving party." ***Rach v. Kleiber***, 123 Wis. 2d 473, 478, 367 N.W.2d 824 (Ct. App. 1985).

[2] For ease of discussion, we refer to arguments by the City and Webb collectively as Webb's arguments.

¶7 "Summary judgment methodology prohibits the [circuit] court from deciding an issue of fact. The court determines only whether a factual issue exists, resolving doubts in that regard against the party moving for summary judgment." ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). "In deciding whether there are factual disputes, the circuit court and the reviewing court consider whether more than one reasonable inference may be drawn from undisputed facts; if so, the competing reasonable inferences may constitute genuine issues of material fact. We draw all reasonable inferences from the evidence in favor of the nonmoving party." ***H&R Block E. Enters., Inc. v. Swenson***, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421 (2007) (citations omitted).

¶8 "Credibility of witnesses is not a determination to be made at the summary judgment stage." ***Pum v. Wisconsin Physicians Serv. Ins. Corp.***, 2007 WI App 10, ¶16, 298 Wis. 2d 497, 727 N.W.2d 346 (2006). "While it may be that a particular witness turns out to be an unbelievable witness, it is not appropriate to weigh witness credibility on a motion for summary judgment." ***Id.***

¶9 Consistent with these well-established principles, we review the City and Webb's motion for summary judgment as the circuit court would. We review the summary judgment materials submitted by the parties, drawing all reasonable inferences from the evidence in favor of Wilson as the nonmoving party.

B. Excessive Use of Force Defined

¶10 "The principle is clear that one who has police authority to maintain the peace has a privilege to use force, and the question then becomes simply whether the force was excessive for the accomplishment of the purpose." ***Johnson v. Ray***, 99 Wis. 2d 777, 782, 299 N.W.2d 849 (1981). "A claim of

excessive use of force arising during arrest is grounded in the Fourth Amendment protection against unreasonable seizures as applied to the states by the Fourteenth Amendment." ***Robinson v. City of West Allis***, 2000 WI 126, ¶27, 239 Wis. 2d 595, 619 N.W.2d 692.

¶11 "The standard for determining whether a police officer's exercise of force is excessive is whether the officer's actions are objectively reasonable." ***Id.*** In other words, "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 (1989). "What amounts to reasonable force on the part of an officer making an arrest usually depends on the facts in the particular case, and hence the question is for the jury." ***Robinson***, 239 Wis. 2d 595, ¶31 (quoted source omitted).

¶12 "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." ***Graham***, 490 U.S. at 396. "'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 (citation omitted).

C. Excessive Use of Force Claim on Summary Judgment

¶13 Wilson argues that there are disputed facts such that summary judgment should not be granted. As stated above, Wilson alleges four acts of

excessive force by Webb, who according to Wilson knew that Wilson recently had major back surgery: (1) using one set of handcuffs, instead of two sets, to cuff his hands behind his back despite his complaint of pain, (2) "dragging" him to the police car, (3) violently pushing his chest and causing him to topple onto the backseat, and (4) twisting his legs so as to loosen the hardware in his back. Drawing all reasonable inferences from the evidence in favor of Wilson, we cannot say that Webb's actions, as described by Wilson, were reasonable as a matter of law.

¶14 Wilson testified to the following regarding Webb's actions during his arrest, before he was seated in the police car:

> [Webb] placed me in handcuffs and we started towards the vehicle…. *It was hurting my muscles in my back*…. [The officers] didn't care. As a matter of fact, [a neighbor] told them I just had major surgery again. And he told them that, and he said, ["]You can't handle him that way.["] … And they told him they would arrest him for obstruction of justice. Then [one witness] came up and they threatened him with obstruction of justice. Then [another witness] came up to them and they threatened her with obstruction of justice, continually dragging me toward the vehicle…. They were *pulling me*. Not dragging me, like feet dragging me, but they were *forcing me to walk faster than I could possibly walk.*

(Emphasis added.)

¶15 Wilson testified to the following regarding Webb's alleged violent "push" after he was seated in the police car:

> The male officer helped set me into the seat, and then he went to come around [to the other side car door]. And as he was rounding the vehicle, *[Webb] pushed me by my chest, both hands, and I fell on my back across the car seat.*
>
> ….

> [Webb] was like two feet away, a foot-and-a-half away, and she pushed me…. She did not put her hands gently on my upper torso and push me. *She brought her hands from a foot-and-a-half back and pushed them into my chest causing my body to topple back over the seat.*

(Emphasis added.)

¶16 Wilson testified that he "blacked out for a couple seconds due to the pain." Webb told him to "quit resisting," but he was not resisting and was instead unable to move. Wilson testified that, at this point, his feet were still sticking out of the door, so Webb "grabbed" his legs and "tried to twist" him on his side to fit him fully inside the car. He then heard the "pop, pop, pop."

¶17 A witness testified that Webb was "very rough" with Wilson:

> He [Wilson] was kind of trying to turn around and talk to her [Webb], and *she was being very rough with him* and bending – behind him over, trying to put him in the back of the police car…. [E]verybody was kind of like telling her "Be careful," you know, "his back. He just had surgery." … *You know, he wasn't trying to fight her or nothing. He was yelling, "My back! My back! My back!"* And … *she was just like pushing him over, trying to push him in the back of the car*. And he was just yelling, "You're hurting my back!"

(Emphasis added.)

¶18 Viewing the evidence in the light most favorable to Wilson, it can be reasonably inferred that the cumulative actions by Webb caused Wilson to be injured.[3]

¶19 Webb points to several parts of Wilson's testimony and other testimony that paint a more favorable picture from her perspective. Indeed, as suggested by our introductory remarks, when we look at all of the evidence that was before the circuit court, we can understand why the circuit court might have concluded that Wilson has a weak case. However, under the standards we must apply, these additional and different assertions merely create genuine issues of material fact as to whether Webb's actions were objectively unreasonable and excessive.

CONCLUSION

¶20 For the reasons set forth above, we conclude that the City and Webb are not entitled to summary judgment on the claim of excessive force under 42 U.S.C. § 1983. Therefore, we reverse the order granting summary judgment on this claim and remand for further proceedings.

[3] Webb seems to suggest that we should not consider the handcuffing, the "dragging" walk to the car, and the push because these events did not "cause any injury." However, Webb does not dispute Wilson's testimony that these events caused him pain to the point of him blacking out for a couple of seconds due to the pain. One reasonable inference from the pain described by Wilson is that he was injured. Moreover, under the standard discussed above, we must look at the totality of the circumstances surrounding the arrest, which includes the handcuffing, the dragging, and the push, to determine whether Webb's use of force was objectively reasonable.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.