S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

ROCHELLE GILL, Personal Representative of the Estate of JOHN GILL,

Plaintiff-Appellant,

v

CITY OF KALAMAZOO,

Defendant,

and

STACEY GEIK,

Defendant-Appellee.

UNPUBLISHED
June 15, 2006

No. 267078
Kalamazoo Circuit Court
LC No. 04-000597-NO

Before: O'Connell, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Plaintiff Rochelle Gill, personal representative of the estate of John Gill, appeals as of right from a final order granting summary disposition in favor of defendant Stacey Geik pursuant to MCR 2.116(C)(10). We affirm.

On September 30, 2004, decedent's apartment was extensively damaged in a fire. Decedent was not present when the fire was extinguished, but he later returned to the apartment in an intoxicated state. Defendant Stacey Geik, a police sergeant with the Kalamazoo Public Safety Department, interviewed decedent regarding the fire. During the interview, decedent became increasingly agitated. After Geik left the apartment building, decedent called out to him from an upstairs window, reporting that several, but not all, of his firearms had been stolen. Geik agreed to take a stolen property report.

Defendant Geik then returned to decedent's apartment and knocked on the door. Decedent did not answer. Geik opened the apartment door and called out to him. Eventually, decedent walked into the living room, holding a handgun and asking Geik to shut the door and let him sleep. Geik drew his weapon and commanded decedent to drop the gun. Decedent began walking toward Geik, still holding the handgun and ignoring defendant's repeated commands to stop and drop the gun. When decedent was between eight and twelve feet away from defendant Geik, he began to raise the pistol and point it at defendant. Geik told decedent not to raise the

pistol, then fired twice, hitting decedent twice in the front of his body and killing him. The incident was recorded on audio tape, and a copy of the transcript was provided to the trial court.

Plaintiff argues that defendant Geik is not immune from liability under MCR 691.1407, because there exists a question of fact whether Geik was grossly negligent when he shot and killed decedent. We disagree. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In this case, however, plaintiff did not base her gross negligence claim on allegations of recklessness but on allegations that Geik used excessive force when he shot decedent. In *VanVorous v Burmeister*, 262 Mich App 467, 483-484; 687 NW2d 132 (2004), we rejected the plaintiff's argument that "gross negligence" analysis should apply to the issue of whether an intentional use of force was excessive. In fact, we held that the plaintiff's gross negligence claim was subject to dismissal under MCR 2.116(C)(8) for failure to state a claim. *Id*.

Nevertheless, the trial court reviewed the presented evidence in the case at bar and properly found that plaintiff failed to demonstrate any reason to subject Geik to suit. Governmental immunity shields a police officer from tort liability if the officer's actions are "justified." *Id*. at 480. "In Michigan, the killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). Although plaintiff claims in her complaint and on appeal that Geik shot an unarmed man without the benefit of enough light to see a firearm, the indisputable evidence presented below clearly demonstrates that Geik saw decedent's derringer, asked him what type of firearm it was, asked him to put it down, told him not to come any closer, told him to stop, and told him not to raise his pistol. This final command came immediately before Geik shot decedent, and Geik's deposition testimony corroborated what is clear from the transcript of the audio recording: decedent pointed a firearm directly at Geik. Although somewhat ancillary, the pistol was found cocked and loaded. Geik testified that he honestly felt threatened with serious injury, and plaintiff has failed to present any evidence to refute his testimony.[1] The undisputed facts demonstrate that the decedent was armed with a firearm and unlawfully threatening Geik with deadly force when Geik shot him. Therefore, Geik's perceptions were patently and objectively reasonable, his actions in shooting decedent were justified, and plaintiff has failed to present any factual issue for a jury.

Plaintiff also claims that she was denied her constitutional right to a trial by jury when the trial court dismissed her wrongful death claim under MCR 2.116(C)(10). We disagree. Our Supreme Court has noted:

> We have long recognized that a jury is charged with resolving disputed facts. *Kroes v Harryman*, 352 Mich 642, 648; 90 NW2d 444 (1958); *Christiansen v Hilber*, 282 Mich 403, 407; 276 NW 495 (1937); *Peoples Wayne Co Bank v Wolverine Box Co*, 250 Mich 273, 279; 230 NW 170 (1930). However, "[b]efore

[1] Under the circumstances, evidence to the contrary would be remarkable indeed.

> a jury is ever reached a preliminary decision must always be made, namely, whether or not there is anything to go to a jury." *Kroes* at 646. Where the facts of a case are uncontroverted and the only question left is what legal conclusions can be drawn from the facts, the question is for the court and not the jury. *Kroes* at 648; *Coddington v Robertson*, 160 Mich App 406, 410; 407 NW2d 666 (1987). [*Moll v Abbott Laboratories*, 444 Mich 1, 26; 506 NW2d 816 (1993).]

"If there are not issues of fact to be determined, one is not entitled in a civil case to trial by jury." *Peoples Wayne Co Bank*, *supra* at 281, citing *In re Peterson*, 253 US 300; 40 S Ct 543; 64 L Ed 919 (1920). Plaintiff was not denied her constitutional right to a trial by jury because the trial court correctly concluded, as a matter of law, that there was no conflicting evidence for a jury to consider.

Finally, plaintiff argues that she is entitled to amend her complaint to add intentional tort claims against defendant Geik. In this case, the trial court never denied plaintiff the opportunity to amend her complaint, but specifically instructed the plaintiff to file a separate motion to amend.[2] Because the trial court never decided whether plaintiff could amend her complaint, plaintiff's argument is not properly before this Court. *Allen v Keating*, 205 Mich App 560, 564-565; 517 NW2d 830 (1994). Moreover, plaintiff based her claim of gross negligence on allegations of excessive force, and the trial court correctly determined that she failed to establish the existence of a question of fact regarding whether defendant used excessive force. "An amendment is futile if it merely restates the allegations already made," so any amendment to include assault and battery claims on the basis of excessive force would be futile and equally unsupported by the undisputed facts. *Lane v KinderCare Learning Ctrs*, *Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kurtis T. Wilder

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[2] Plaintiff had included her request to amend her complaint in plaintiff's motion for reconsideration, and, instead of considering plaintiff's request on the merits, the trial court instructed plaintiff to file a separate motion to amend. Plaintiff never filed a motion to amend, and the trial court never considered the merits of her argument to amend her complaint.