Circuit Court for Prince George's County
Case No. CAL17-31724

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 664

September Term, 2018

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SELICE CARTER

v.

ADRIAN MEWSHAW, *et al.*

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Wright,
Shaw Geter,
Wells,

JJ.

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Opinion by Wright, J.

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Filed: June 28, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In the early morning of December 21, 2015, twelve Prince George's County Sherriff's Deputies, appellees, carried out a search warrant at an apartment where Selice Carter, appellant, was a guest.[1] Appellant alleged that she sustained injuries due to appellees' conduct during the execution of the warrant, and she filed a five-count complaint against appellees in the Circuit Court for Prince George's County on October 26, 2017.[2] Appellees filed a motion to dismiss on December 4, 2017, and argued that appellant failed to state a claim for which relief could be granted. The circuit court

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[1] The apartment belonged to Sean White, a wanted felon who was the subject of either an arrest warrant or a search warrant. With few exceptions, the Fourth Amendment prohibits a warrantless entry into a person's home. U.S. Const. amend. IV.

> As the Court of Appeals stated in *Jones v. State*, 425 Md. 1, 28-29 (2011), the Fourth Amendment rules for executing an arrest warrant in a home are not in doubt. The threshold rule, long accepted by the United States Supreme Court, is that, except when pursuant to valid consent or exigent circumstances . . . , 'the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant.' *Steagald v. United States*, 451 U.S. 204, 211, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981); *accord Kentucky v. King*, -- U.S. --, --, 131 S.Ct. 1849, 1846, 179 L.Ed.2d 865 (2011); *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006); *Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Johnson v. United States*, 333 U.S. 10, 13-15, 68 S.Ct. 367, 92L.Ed. 436 (1948). Consequently, '[i]n terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.' *Payton*, 445 U.S. at 490, 100S.Ct. 1371.

[2] The five counts in the complaint were the following: (i) battery; (ii) false imprisonment; (iii) intentional infliction of emotional distress; (iv) violation of state civil rights; and (v) negligence.

granted appellees' motion on April 17, 2018. Appellant now challenges the circuit court's ruling and presents the following question for review, which we have reworded and consolidated as follows:[3]

1. Did the circuit court err in granting appellees' Motion to Dismiss?

For the reasons presented below, we answer this question in the negative and affirm the circuit court's judgment.

## BACKGROUND

In the early morning of December 21, 2015, appellant and a man were sleeping on an air mattress in the living room of Sean White's apartment. At approximately 5:15 a.m., appellant was awakened by noises coming from outside the front door. As the door opened, appellant saw a group of individuals, later identified as appellees, standing outside; she then saw one individual motion for the others to enter the premises.

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[3] Appellant presented her questions to the Court as follows:

1. Where police officers, in attempting to effect a search warrant, blindly tossed a flammable "flash bang" device into a dwelling without first ascertaining the presence of innocent occupants on the premises, who were not the subject of the search, was it legally correct for the trial court to conclude that the officers' actions did not amount to gross negligence as a matter of law and thus grant the motion to dismiss?

2. Where Appellant was detained by Appellees naked, on the floor, where Appellees were in full combat gear, brandishing a weapon pointed at Appellant, and where Appellant was not the subject of the search warrant attempted to be effected [sic] by Appellees, was it legally correct for the trial court to conclude that said detention was reasonable under the circumstances?

Immediately thereafter, appellant observed one of the individuals throw an object from the doorway into the living room; the object emitted a loud noise when it was thrown.[4] The object landed on the blanket covering appellant, ignited, and caused the blanket to catch fire and immediately burn appellant. When appellant attempted to move away from the fire, appellees rushed into the apartment, told her to get down on the floor, and put her hands up. Even though appellant obeyed the orders, one appellee brandished a weapon at her, allegedly causing her to fear for her safety.

As appellant remained "partially naked" on the floor, she notified appellees that her legs were burning, and that she required medical attention. However, appellant was not permitted to get off the floor. Instead, she heard one of the appellees proclaim that the group was there to execute a search warrant for Sean White. After appellees asked appellant about White's location, White called out from his bedroom, and emerged with his young daughter. Though appellant continued to advise appellees that her legs were burning, her complaints went ignored while appellees took White into custody.

After White was taken into custody and removed from the apartment, appellant was permitted to get up off the floor. At that time, one appellee attempted to administer a solution to appellant's burns and wrapped her legs with gauze. Appellant was then

[4] The parties have identified the object as a "flash bang device." A flash bang device is a "type of firecracker" which "makes a bright light" when deployed. *Lucas v. State*, 116 Md. App. 559, 563 (1997). "Its purpose is to stun the occupants [of the area in which it is deployed] for a few seconds, providing the entering officers sufficient time to gain control of the premises." *Id*.

advised that she was free to leave the premises, and she drove herself to the hospital to obtain medical treatment.

On October 26, 2017, appellant filed a five-count complaint against appellees in the circuit court. *See supra* n.2. Notably, the words "gross negligence" did not appear in appellant's original complaint. On December 4, 2017, appellees filed a motion to dismiss for failure to state a claim; appellees also asserted that they were immune from suit under the Maryland Tort Claims Act ("MTCA"). *See* Md. Code (1984, 2014 Repl. Vol.), State Government Article ("SG") §§ 12-101, *et seq*. Appellant filed an opposition to the motion and argued, for the first time, that her allegations amounted to "gross negligence." In her opposition, appellant conceded that her complaint failed to state a claim for intentional infliction of emotional distress, and that MTCA immunity barred her negligence claim.

A hearing on appellees' motion took place on April 17, 2018. At the end of the hearing, the judge ruled from the bench and found that appellees were entitled to immunity under the MTCA, and that appellant failed to state a claim under any of her other causes of action. As such, the circuit court granted appellees' motion to dismiss. Appellant subsequently filed the instant appeal.

## STANDARD OF REVIEW

In *Torbit v. Baltimore City Police Department*, 231 Md. App. 573, 583 (2017), this Court explained that:

> The standard of review of a grant of a motion to dismiss is whether the trial court was legally correct. We must determine whether the [c]omplaint, on

> its face, discloses a legally sufficient cause of action. In reviewing the complaint, we accept all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party. Dismissal is proper only if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff.

(Internal quotations and citations omitted).

## DISCUSSION

### A. Gross Negligence

In *Barbre v. Pope*, 402 Md. 157, 173-74 (2007), the Court of Appeals explained the MTCA's "state personnel" immunity provision as follows:

> The MTCA was enacted in 1981 as a waiver of the State's sovereign immunity for tortious acts or omissions committed within the scope of the public duties of "state personnel," and committed without malice or gross negligence. Under the immunity and non-liability provisions of the MTCA, "state personnel" are immune from suit and from liability in tort for acts or omissions committed within the scope of their public duties and without malice or gross negligence, and when the State waives its immunity pursuant to the MTCA. [*See* SG § 12-105].

(Citations and quotations omitted). "As a result [of the MTCA], the State does not waive its sovereign immunity for any tortious acts outside the scope of employment or when a 'state personnel' acts with malice or gross negligence." *Id.* at 175.

Here, the parties agree on several issues related to the application of the MTCA. First, both parties agree that appellees are covered by the MTCA. *See* SG § 12-101(a)(6) (establishing that the term "state personnel" includes sheriffs and deputy sheriffs). Second, they agree that appellees were acting in the "scope of their public duties" at the

time that appellant's injuries occurred. And third, the parties agree that appellees did not act with malice in the execution of the warrant.

Our task, then, is to determine whether appellant sufficiently pleaded facts that give rise to a cause of action based in gross negligence. If appellant did not adequately establish a cause of action for gross negligence, then appellees are immune from suit under the MTCA, and the circuit court properly granted the motion to dismiss.

Appellant contends she has made out "at least a *prima facie* case of gross negligence," and that the circuit court erred in granting appellees' motion to dismiss. She specifically states that she established a *prima facie* case by alleging the following four facts:

> 1. That the [a]ppellant and a companion were sleeping on an air mattress on the floor of the living room in the premises in question.
>
> 2. That [a]ppellant and her companion were not the subject of the search warrant attempting to be executed by [a]ppellees and, in fact, were not the occupiers of the premises.
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> 3. That without saying anything[,] giving any warning, or determining who was present on the premises, [a]ppellees threw a flammable distraction device directly in the areas where [a]ppellant was lying, causing her blanket to go up in flames, burning her.
>
> 4. That [appellees] were on the premises to execute a search warrant,[5] not an arrest warrant of a felon as alleged by [a]ppellees.

[5] We accept, as alleged by the appellant, that the appellees were on the premises to execute a search warrant rather than an arrest warrant. Neither party has presented a persuasive argument that our analysis would be different if it was one or the other.

Based on these facts, appellant contends that "it is clearly a question of fact for the jury to determine whether" appellees acted with gross negligence.

In response, appellees aver that appellant's complaint fell far short of establishing a claim for gross negligence. Specifically, they argue that "the deployment of a non-lethal distraction device during entry into a house to execute a warrant for a felon, by itself, fails to give rise to a reasonable inference that the deployment was reckless or with wanton disregard or indifference to [appellant's] life." As a result, appellees contend that they "enjoy State personnel immunity under the MTCA, and [that] the circuit court properly dismissed on that basis."

The Court of Appeals has defined gross negligence as:

> [A]n intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and [it] also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them. Stated conversely, a wrongdoer is guilty of gross negligence or acts wantonly and willfully *only* when he inflicts injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist.

*Barbre*, 402 Md. at 187 (quotations and citation omitted).

Though "'gross negligence' has been described as an amorphous concept, resistant to precise definition[,]" *Rodriguez v. State*, 218 Md. App. 573, 598 (2014), the Court of Appeals has explained that it is "something *more* than simple negligence, and likely more akin to reckless conduct[.]" *Taylor v. Harford County Dept. of Social Services*, 384 Md. 213, 229 (2004) (emphasis in original). Further, this Court has stated that "gross negligence is not just 'big negligence.'" *Torbit*, 231 Md. App. at 589. The determination

of “[w]hether or not gross negligence exists necessarily depends on the facts and circumstances of each case. It is usually a question for the jury and is a question of law only when reasonable men could not differ as to the rational conclusion to be reached.” *Rodriguez*, 218 Md. App. at 598-99 (quoting *Romanesk v. Rose*, 248 Md. 420, 423 (1968)).

In this appeal, appellant’s gross negligence claim is based on the contention that appellees used excessive force in their execution of the warrant. We have previously explained the relationship between gross negligence and excessive force claims:

> The [Court of Appeals] has, following United States Supreme Court precedent, explained that excessive force claims against police officers are to be analyzed under Fourth Amendment jurisprudence. *Richardson v. McGriff*, 361 Md. 437, 452 (2000) (citing *Graham v. Connor*, 490 U.S. 386 (1989)). In *Richardson*, the Court explained the relevant inquiry regarding claims of excessive force:
>
> > 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[.] 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 465. The [*Richardson*] Court further explained the Fourth Amendment “does not allow [a] ‘Monday morning quarterback’ approach because it only requires that the seizure fall within a range of objective reasonableness.” *Richardson*, 361 Md. at 455. Moreover:
>
> > The Fourth Amendment inquiry focuses *not* on what the most prudent course of action may have been or whether there were other alternatives available, but instead whether the seizure actually effectuated falls within a range of conduct which is objectively “reasonable” under the Fourth Amendment. Alternative measures

> which 20/20 hindsight reveal to be less intrusive (or more prudent), . . . are simply *not relevant* to the reasonableness inquiry.
>
> *Richardson*, 361 Md. at 455. The *Richardson* Court concluded that that principle of reasonableness "is the appropriate one to apply" to excessive force claims brought under common law claims for gross negligence. *Richardson*, 361 Md. at 452.

*Torbit*, 231 Md. App. at 592-93 (cleaned up) (emphasis added).[6]

Based on the above, we conclude that the circuit court was legally correct in granting appellees' motion to dismiss the gross negligence claim. Even accepting all the facts alleged by appellant, appellees' conduct did not rise to the level of gross negligence. Appellees' use of a distraction device to facilitate entry into the house of a wanted felon, without knowledge of what awaited them inside, does not evince an intent to cause injury, nor was such conduct "so utterly indifferent to the rights of others that [it was] as if such rights did not exist." *Barbre*, 402 Md. at 187 (quotations and citation omitted). Instead, we conclude that appellees' conduct was objectively reasonable under the circumstances.

Appellant contends that appellees could have given a warning before entering the house or could have determined who was present before throwing the flash bang device. First, we note that the failure to anticipate that individuals may be asleep on an air

[6] The Court of Appeals recently explained the recent use of "cleaned up" as a parenthetical. The parenthetical "signals that the current author has sought to improve readability by removing extraneous, non-substantive clutter (such as brackets, quotations marks, ellipses, footnote signals, internal citations, or made un-bracketed changes to capitalization) without altering the substance of the quotation." *Lopez v. State*, 458 Md. 164, 195 n.13 (2018).

mattress in White's living room falls far short of gross negligence. There is no specific allegation that the officers were even aware that there were persons in the living room; in fact, the subject of the warrant was in the bedroom. And most importantly, as this Court explained in *Torbit*, 231 Md. App. at 593 (emphasis added), "[a]lternative measures which 20/20 hindsight reveal to be less intrusive . . . are simply *not relevant* to the reasonableness inquiry."

We conclude that the facts alleged by appellant, and the inferences we draw from them, fail to afford relief to appellant on a cause of action based on gross negligence. *See Torbit*, 231 Md. App. at 583. We hold that under the MTCA, appellees are immune from liability. The circuit court properly granted appellees' motion to dismiss the gross negligence claim. *See* SG § 12-105; *see also Barbre*, 402 Md. at 173-74.[7]

**B. False Imprisonment**

Appellant also contends that she set out a *prima facie* case for false imprisonment, and that the circuit court therefore erred in granting appellees' motion to dismiss for failure to state a claim. Specifically, she avers that "[appellees] intentionally and

[7] We note that appellant supplemented her Reply Brief with: (1) a redacted section of the Prince George's County Police Department General Order Manual; (2) an Americans for Effective Law Enforcement (AELE) Monthly Law Journal article titled "Civil Liability for Use of Distraction Devices, Part 2;" and (3) an article titled "Flash Bang 101" from PoliceOne.com. There is no indication that any of these materials were in the circuit court record, and we therefore will not consider them on appeal. As we explained in *Community Realty Co., Inc. v. Siskos*, 31 Md. App. 99, 102 (1976), "parties are not entitled to supplement the record by inserting into their record extract such foreign matter as they may deem advisable."

unreasonably held a gun to her person while [she] lay naked on the floor, command[ed] her to stay [on the floor], knowing full well that she was not the subject of their warrant. As such, [appellant argues that] the detention falls far outside the parameters of applicable, well-reasoned jurisprudence."[8]

In response, appellees argue "[t]he law makes clear that [they] were authorized to briefly detain [appellant] while they executed a warrant for a wanted felon at the premises and that [they] were not required to pause to give her special treatment." Additionally, they assert that appellant was "only detained long enough for [a]ppellees to locate and arrest the suspect who was the subject of the warrant." For those reasons, appellees contend that appellant did not sufficiently plead facts that would, if true, provide her with relief for her claim of false imprisonment.

"For a successful cause of action based on . . . false imprisonment, [a] plaintiff must establish that the defendant deprived him or her of his or her liberty without consent and without legal justification." *Okwa v. Harper*, 360 Md. 161, 190 (2000) (quotations and citations omitted). Here, appellees concede that appellant was deprived of her liberty without her consent; therefore the only dispute is whether there was legal justification for her detention.

[8] We note that at oral argument, appellant asserted that she made a viable claim for false imprisonment because appellees allegedly did not render emergency treatment to her wounds in a reasonable amount of time. We are unaware of any case law in this State or any other that considers failure to render emergency treatment as an element of false imprisonment.

Since appellant's detention constituted a "seizure,"[9] the Fourth Amendment guides our analysis of whether the detention was legally justified. We have previously explained the protections provided by the Fourth Amendment as follows:

> The Fourth Amendment provides that the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The amendment's protections extend to brief investigatory stops of persons that fall short of traditional arrest. The central requirement of the Fourth Amendment is that searches and seizures be "reasonable." As a corollary, the Fourth Amendment is not a guarantee against *all* searches and seizures, but only against unreasonable searches and seizures. Reasonableness, of course, depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers. The public interest includes the substantial public concern for the safety of police officers lawfully carrying out the law enforcement effort.

*Fields v. State*, 203 Md. App. 132, 142 (2012) (cleaned up).

In *Michigan v. Summers*, 452 U.S. 692 (1981), the Supreme Court analyzed the reasonableness of a detention that occurred during the execution of a search warrant. In *Summers*, police officers "were about to execute a warrant to search a house for narcotics [when] they encountered [Summers] descending the front steps." *Id.* at 693. The officers detained Summers while they searched the house, and "[a]fter finding narcotics in the basement and ascertaining that [Summers] owned the house, the police arrested him, searched his person, and found in his coat pocket an envelope containing 8.5 grams of

[9] "A Fourth Amendment seizure occurs when, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Lewis v. State*, 237 Md. App. 661, 673 (2018) (quotations and citations omitted).

heroin." *Id*. (footnote omitted). The issue before the Court was whether the heroin should be suppressed as "the product of an illegal search in violation of the Fourth Amendment[.]" *Id*. at 694 (footnote omitted).

The Court explained that three important law enforcement interests justify detaining individuals that are present during the execution of a search warrant. First, "is the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found. Second, less obvious, but sometimes of greater importance, is the interest in minimizing the risk of harm to the officers." *Summers*, 452 U.S. at 702. On this point, the Court explained that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id*. at 702-03. Third, the Court stated that the law enforcement interest in the "orderly completion of the search may be facilitated if the occupants of the premises are present." *Id*. at 703. Applying these considerations to the facts of the case, the Court held that Summers' detention and ultimate search were "constitutionally permissible." *Id*. at 705.

Maryland's appellate courts have repeatedly relied on *Summers* to analyze detentions that take place during the execution of search warrants. In *Cotton v. State*, 386 Md. 249, 254, 258-59 (2005), the Court of Appeals relied on *Summers* to hold that police officers reasonably detained Cotton when executing a search warrant on a location known to be an open-air drug market; Cotton was merely a bystander at the time of the search. The Court explained:

> In executing a warrant . . . police [officers] . . . are entitled, for their own safety and that of other persons, to take command of the situation and, except for persons who clearly are unconnected with any criminal activity and who clearly present no potential danger, essentially immobilize everyone until, acting with reasonable expedition, they know what they are confronting. It really cannot be otherwise. The police do not know who may be at the scene when they arrive. The people they find there, in or on the property to be searched, are not wearing identifying labels[.] It would be decidedly *unreasonable* to expect the police simply to give a friendly greeting to the folks there and proceed to search the house without another thought as to who those people are or what they may do.

*Id*. at 258-59 (emphasis in original).

In *Fields*, 203 Md. App. at 137-38, this Court considered whether police officers were justified in detaining Fields when he was walking toward the front of a house at which the officers were executing a search warrant. We first explained that "*Michigan v. Summers* and other cases have established that, when executing a search warrant, police officers may reasonably detain persons found in and about the premises for reasons of safety and to secure the premises being searched." *Id.* Further, in noting that the authority to detain an individual during the execution of a warrant does not depend on the presence of a threat, this Court stated that:

> [A] person who is subjected to a limited detention pursuant to *Summers* may not dictate the contours of the police response simply on the basis of good behavior. Indeed, a 'perceived' threat is not a prerequisite for the detention authorized by *Summers*; instead, [t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercised *unquestioned command* of the situation. Hence, the limited detention that is sanctioned by *Summers* does not depend on the presence of a threat, actual or perceived, to the officers executing the warrant.

*Id.* at 148 (emphasis in original) (quotations, citation, and footnote omitted).

Finally, the Court explained that "[t]he detention authorized by *Summers* is

objectively justified by the existence of a search warrant for the target residence and the necessity of executing the warrant in a safe, orderly fashion." *Id*. at 149. The Court therefore held that "the police acted reasonably in detaining Fields after he encroached into the yard of the residence." *Id*. at 150.

These cases make clear that appellant's detention was legally justified. As was the case in *Cotton*, 386 Md. at 258, appellees were "entitled, for their own safety and that of other persons, to take command of the situation and . . . immobilize everyone[, including mere bystanders,] until . . they [knew] what they are confronting." This is exactly what appellees did – they required appellant to remain on the ground until they could secure the subject of their warrant, and they allowed appellant to leave the premises immediately after arresting White. The fact that appellant was not the subject of the warrant and that she allegedly did not pose an apparent threat to appellees does not change our analysis. As we explained in *Fields*, "a 'perceived threat' is not a prerequisite for the detention authorized by *Summers*[.]" 203 Md. App. at 148. Rather, "[t]he risk of harm . . . is minimized if the officers routinely exercise unquestioned command of the situation." *Id*. (citation omitted).

We therefore conclude that appellant's detention fell squarely within the limits previously set forth by the Supreme Court, the Court of Appeals, and this Court, and that her detention was legally justified. We hold that the circuit court properly granted appellees' motion to dismiss for failure to state claim upon which relief could be granted.

As a final point, we will address appellant's argument that a ruling in appellees'

favor on the issue of false imprisonment "will give carte blanche to police officers to commit acts against innocent persons in contradiction of basic human nature." We do not agree. As explained above, the authority to detain individuals during the execution of a search warrant has been repeatedly upheld by both the Supreme Court and Maryland's appellate courts. Rather than altering the scope of permissible police conduct during the execution of a warrant, our holding merely reaffirms the important law enforcement interests that are promoted by allowing officers to exercise control over an unknown and potentially dangerous situation.

**JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.**