# STATE OF MICHIGAN

# COURT OF APPEALS

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MARY MCCORMICK,

Plaintiff-Appellant,

v

MICHAEL E. MCCORMICK SR., FRANK K. RHODES III, DIANE L. AIMAR-SAYLOR, FRANK K. RHODES AND ASSOCIATES, P.C., ERIC A. BRAVERMAN, WAYNE COUNTY SHERIFF ROBERT A. FICANO, DEPUTY SHERIFF BLACKMORE, DEPUTY SHERIFF COOK, DEPUTY SHERIFF FRANCES BAKER, and COUNTY OF WAYNE,

Defendants-Appellees

and

DIMANTIN, M.D.,

Defendant.

UNPUBLISHED
August 1, 1997

No. 193967
Wayne Circuit Court
LC No. 95-532266-CZ

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Before: Markey, P.J., and Jansen and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from a March 1, 1996, order of the Wayne Circuit Court granting summary disposition in favor of defendants. We affirm.

The circumstances leading up to the instant appeal arise out of a divorce action between plaintiff and Edward J. McCormick. That action resulted in a default judgment of divorce entered on August 3, 1987. Plaintiff appealed from the property and alimony provisions of the divorce judgment. In consideration of the filing of the claim of appeal, the circuit court ordered certain accounts held with Olde Discount Brokers and Michigan National Bank that were part of the marital estate to be frozen

pending resolution of the appeal. In *McCormick v McCormick*, unpublished opinion per curiam of the Court of Appeals, issued September 9, 1991 (Docket No. 102806), this Court reversed with respect to certain aspects of the property division and remanded for further proceedings regarding those issues.

On October 24, 1992, before the issues on remand were decided, Edward McCormick died. Without any notice to McCormick's estate, plaintiff petitioned the court to dismiss the postdivorce action. On March 15, 1993, the court ordered the dismissal and removed the injunctive order pertaining to the bank accounts. Thereafter, plaintiff removed the funds from those accounts. Subsequently, upon a motion by the estate, the court reinstated the case and removed it to probate court for resolution of the remanded issues. In addition, the court ordered plaintiff to return the $21,000 that she removed from the previously frozen accounts. Following a June 25, 1993, hearing, plaintiff was ordered jailed by the court on a contempt citation when she refused to return the money. Over the next five months, plaintiff was held in jail and continued to refuse to return the money. On November 2, 1993, the court ordered that plaintiff be released and dismissed the contempt proceedings.

In the meantime, plaintiff filed a delayed application for leave to appeal challenging the order of reinstatement. This Court denied the application in an unpublished order on September 2, 1993 (Docket No. 165493). In lieu of granting plaintiff's delayed application for leave to appeal, the Supreme Court remanded the case to this Court for consideration as on leave granted. *McCormick v McCormick*, 445 Mich 860 (1994). On remand, that case was consolidated with plaintiff's appeal from the probate court's amended judgment of divorce. This Court affirmed the reinstatement of the postdivorce action, but vacated the order removing the case to probate court and the probate court's amended judgment of divorce, and remanded the case to the circuit court for further proceedings. *McCormick v McCormick*, 221 Mich App 672; 562 NW2d 504 (1997).

Meanwhile, plaintiff filed the instant action in circuit court against defendants for alleged federal civil rights violations and state tort claims arising out of her imprisonment for contempt. Defendants filed motions for summary disposition on various bases and the trial court granted the motions, thereby dismissing plaintiff's claims in their entirety. In addition, the trial court found the complaint frivolous. On that basis, the court sanctioned plaintiff and her attorney by awarding defendants costs and attorney fees. Plaintiff now appeals from the court's orders.

On appeal, plaintiff first asserts that the trial court erred in granting summary disposition with respect to her federal civil rights claims brought under 42 USC 1983 and 1985. A trial court's grant of summary disposition is reviewed de novo. *Johnson v Wayne Co*, 213 Mich App 143, 148-149; 540 NW2d 66 (1995).

Section 1983 provides a remedy against anyone who, under color of state law, deprives a person of the rights protected by the Constitution or laws of the United States. *Payton v Detroit*, 211 Mich App 375, 398; 536 NW2d 233 (1995); *Davis v Wayne Co Sheriff*, 201 Mich App 572, 576; 507 NW2d 751 (1993). A cause of action is stated when a plaintiff establishes (1) that she was deprived of a federal right, and (2) that the defendant deprived her of that right while acting under the color of state law. *Davis*, *supra*, pp 576-577.

With respect to defendants McCormick, Rhodes, Braverman, and Saylor, plaintiff's allegation was that they deprived her of her civil rights by seeking reinstatement of the divorce action and requesting that the court order her to return the money from the bank accounts. Plaintiff's assertion is that these actions were wrongful because defendants knew that she was Edward McCormick's wife at the time of his death and, therefore, she was entitled to the funds in the accounts. After plaintiff filed the instant complaint, this Court held that "plaintiff's marriage was dissolved and the actual divorce was final before Edward McCormick died." *McCormick*, *supra*, p 678. Moreover, this Court specifically held that the circuit court had jurisdiction to reinstate the postdivorce action in order to resolve the issues on remand. *Id.*, p 679. Therefore, we conclude that there is no genuine issue of fact that these defendants deprived plaintiff of any right by seeking to protect the assets of the estate.

Plaintiff's claim against Sheriff Ficano is premised on the alleged misdeeds of his deputies. A governmental entity cannot be found liable under § 1983 on a respondeat superior theory. Rather, such liability can be imposed only for injuries inflicted pursuant to a governmental policy or custom. *Jackson v Detroit*, 449 Mich 420, 430; 537 NW2d 151 (1995). Plaintiff did not present sufficient evidence of such a custom or policy to survive defendants' motions. Accordingly, the trial court did not err in dismissing this claim.

According to plaintiff, Blackmore violated plaintiff's civil rights by taking plaintiff into custody at the court's instruction without a written order from the court. Plaintiff's assertion is not supported by the record because there is a written contempt order signed by the circuit court dated June 28, 1993.

Concerning defendants Cook and Baker, plaintiff alleged that they mistreated her while she was in the Wayne County jail. A party opposing a motion for summary disposition brought under MCR 2.116(C)(10) may not rest on the allegations in the pleading, but must set forth specific facts which show that there is a genuine issue of fact. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). While plaintiff submitted an affidavit containing allegations of mistreatment, the affidavit did not mention Cook, and contained insufficient allegations regarding Baker. Further, the only evidence plaintiff provided is a single inmate complaint form where she reported that Baker verbally harassed her. Mere verbal abuse by a prison guard is not actionable under § 1983. *McDowell v Jones*, 990 F2d 433, 434 (CA 8, 1993). Thus, we find that the trial court did not err in dismissing these claims.

With respect to Wayne County, plaintiff alleged that its policies and customs resulted in her being housed with felons and persons with communicable disease, and resulted in her being forced to sleep on the floor when she was assigned to a cell without enough beds. Additionally, plaintiff claims that the county's policies failed to provide her with proper medical care. Again, plaintiff fails to provide any specific evidence or legal authority to establish that she was deprived of any rights. Additionally, plaintiff failed to carry her burden of showing that "a policy or custom tantamount to a deliberate indifference for the constitutional rights of others actually cause the violation" that plaintiff complains of. *Davis*, *supra*, p 572. Plaintiff identifies no Wayne County policies, nor sets forth any evidence of custom. Rather, plaintiff merely reiterates the allegations of mistreatment and asserts that they result from some unspecified policy or custom. Accordingly, we conclude that plaintiff has failed to establish a genuine issue of material fact with respect to this claim.

In addition to her § 1983 claim, plaintiff alleged a claim under § 1985 against defendants McCormick, Rhodes, Braverman, and Saylor. Section 1985 provides a remedy to a party where two or more persons conspire to interfere with that party's civil rights. Plaintiff's complaint asserts that these four defendants conspired to "swindle" money from her by reinstating the postdivorce action and seeking a return of the funds taken from the bank accounts. As stated previously, the estate did not act improperly in seeking to protect the assets of the estate through the judicial process. Therefore, there is no genuine issue of fact that defendants did not conspire to interfere with plaintiff's civil rights.

Next, plaintiff asserts that the trial court erred in dismissing her claim for false imprisonment. In order to state a claim for false imprisonment, the plaintiff has the burden of establishing that she was "intentionally and unlawfully restrained" against her will. *Willoughby v Lehrbass*, 150 Mich App 319, 350; 388 NW2d 688 (1986). Plaintiff's claim against defendants McCormick, Rhodes, Braverman, and Saylor is premised on their actions in having the postdivorce action reinstated and in seeking a return of the funds taken from the bank accounts. This Court previously held that the motion for reinstatement was not inappropriate and that plaintiff was divorced from Edward McCormick at the time of his death. *McCormick*, *supra*, p 678. Accordingly, it was not unlawful for defendants to move for reinstatement of the case or to seek a return of the funds plaintiff removed from the marital estate. Moreover, the restraint that plaintiff complains of was caused by her own failure to cooperate with the court's order. Therefore, the trial court did not err in finding that there was no genuine issue of material fact that these defendants did not falsely imprison plaintiff.

Plaintiff's claim of false imprisonment against Sheriff Ficano, Blackmore, Cook, Baker, and Wayne County is premised on the allegation that her imprisonment was unlawful because it was not pursuant to a written order. Contrary to plaintiff's assertion, the record shows that the court did enter a written order finding plaintiff to be in contempt and ordering her jailed. Finally, as the claim relates to Ficano and Wayne County, it is barred by governmental immunity. MCL 691.1407(1); MSA 3.996(107)(1); *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 633-634; 363 NW2d 641 (1985).

Plaintiff also asserts that the trial court erred in granting summary disposition of her claim of intentional infliction of emotional distress. The elements of such a claim are: "(1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress." *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). Liability pursuant to such a claim has only been found where the conduct of the defendant is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id*. Mere insults, indignities or annoyances are not actionable under such a claim. *Id*. It is initially for the court to decide whether the defendant's conduct rises to such a level, but where reasonable persons may differ on the issue, the question is one for the factfinder. *Id*., p 92.

We find that defendants' conduct in resorting to the judicial process to reinstate the postdivorce action and seek a return of the funds is not extreme and outrageous. Moreover, we find no extreme and outrageous conduct with respect to Blackmore taking plaintiff into custody at the direction of the court.

With respect to Wayne County and Ficano, plaintiff has failed to establish that any exception to governmental immunity is applicable. MCL 691.1407(1); MSA 3.996(107)(1); *Ross*, *supra*, pp 633-634. Plaintiff has also failed to support her allegations of mistreatment and harassment by Baker and Cook with any evidence. Accordingly, plaintiff has failed to establish a genuine issue of fact on these claims.

Defendants admit that plaintiff was strip-searched on her return to jail after a court hearing, but assert that this was because she was found to be carrying in unauthorized prescription drugs. While such a search is doubtless an indignity, we find that the conduct was not outrageous considering the prison setting, especially in light of the attempt to smuggle in prescription drugs. Therefore, we conclude that the trial court did not err in dismissing plaintiff's intentional infliction of emotional distress claim.

Having found no error with the court's dismissal of all of plaintiff's claims, we find no need to reach plaintiff's challenges to the amendment of the case caption with respect to Braverman.

Next, plaintiff argues that the trial court erred in finding that her claims were frivolous and awarding sanctions on that basis. We will not disturb a trial court's determination that a claim was subject to sanctions for being frivolous unless clearly erroneous. *Siecinski v First State Bank*, 209 Mich App 459, 466; 531 NW2d 768 (1995). As more fully discussed above, we find that all of plaintiff's claims are without merit. Therefore, we conclude that the trial court did not clearly err in finding that plaintiff's claims were frivolous.

Defendants also assert that they are entitled to costs and attorney fees for a vexatious appeal pursuant to MCR 7.216(C)(1). We deny defendants any fees and costs under MCR 7.216(C)(1). However, defendants, being the prevailing parties on appeal, may tax costs pursuant to MCR 7.219.

Affirmed.

/s/ Jane E. Markey
/s/ Kathleen Jansen