

STATE OF MICHIGAN
COURT OF APPEALS

MARK A. DOUGHERTY and MICHELLE L.
DOUGHERTY,

UNPUBLISHED
July 22, 2004

Plaintiffs-Appellants,

v

DEPARTMENT OF NATURAL RESOURCES
and DAVID H. ROCK,

No. 246756
Lapeer Circuit Court
LC No. 00-029319-NZ

Defendants-Appellees.

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Plaintiffs Mark and Michelle Dougherty appeal as of right the trial court's orders granting defendants Department of Natural Resources (DNR) and David H. Rock's motions for summary disposition pursuant to MCR 2.116(C)(10) and reconsideration, and dismissing all claims. We affirm.

I. Facts and Procedural History

This case arises from the shooting of a buck out of season in Lapeer County. Mr. Rock, a DNR conservation officer, obtained and executed a search warrant of plaintiffs' home in the course of investigating the matter, and seized all firearms and ammunition. Mr. Dougherty was subsequently eliminated as a suspect in the shooting, and defendants returned plaintiffs' firearms. Plaintiffs filed suit in Lapeer Circuit Court alleging violations of their federal constitutional rights pursuant to 42 USC 1983 and several state tort claims, including abuse of process, malicious prosecution, intentional infliction of emotional distress, defamation, and failure to return property.¹ Following defendants' motions for summary disposition and reconsideration, all of plaintiffs' claims were dismissed.

¹ Plaintiffs do not contest the dismissal of their defamation claim on appeal. Plaintiffs' failure to return property claim was rendered moot during the proceedings when plaintiffs' firearms were returned.

II. Legal Standard

This Court reviews a trial court's determination regarding a motion for summary disposition de novo.² A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.³ "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in the light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."⁴ "Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law."⁵

III. Jurisdiction

Plaintiffs challenge the trial court's conclusion that it lacked subject matter jurisdiction over any of plaintiffs' claims against the DNR. The existence of jurisdiction is a question of law which we review de novo.⁶

The circuit court is a state court of general jurisdiction, extending to "all civil claims and remedies except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state."⁷ State courts have concurrent jurisdiction with the federal courts over 42 USC 1983 claims.⁸ However, the Legislature limited the jurisdiction of the circuit court by vesting the Court of Claims with "exclusive" jurisdiction over all claims brought against the state.⁹

All of plaintiffs' claims against the DNR, as a state agency, are within the exclusive jurisdiction of the Court of Claims. Therefore, the circuit court properly determined that it did not have subject matter jurisdiction and dismissed all claims against the DNR.

² *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

³ *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

⁴ *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

⁵ *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

⁶ *W A Foote Memorial Hosp v Dep't of Public Health*, 210 Mich App 516, 522; 534 NW2d 206 (1995).

⁷ MCL 600.605. See also Const 1963, art 6, § 1.

⁸ *Gordon v Sadasivan*, 144 Mich App 113, 119; 373 NW2d 258 (1985).

⁹ MCL 600.6419(1)(a).

IV. 42 USC 1983

Plaintiffs also challenge the trial court's dismissal of their claims under 42 USC 1983 against Mr. Rock.¹⁰ The power of citizens to sue state officers in their individual capacities for actions of an official nature for a deprivation of their civil rights is granted in 42 USC 1983. The statute provides in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress^[11]

To establish a § 1983 claim, the facts, viewed in the light most favorable to the plaintiff, must show that a constitutional violation occurred.¹² If a violation is found, the court must then determine “whether the violation involved ‘clearly established constitutional rights of which a reasonable person would have known.’”¹³ If no constitutional violation occurred, the defendant has qualified immunity from liability.¹⁴ “Qualified immunity is ‘an entitlement not to stand trial or face the other burdens of litigation.’”¹⁵

Plaintiffs made several allegations against Mr. Rock relating to the search of their home and seizure of their firearms. The trial court, however, found the search warrant to be based on probable cause and Mr. Rock immune from liability for its execution. Generally, probable cause in a § 1983 action is a matter for the jury, unless reasonable minds could not differ on the determination.¹⁶ “Probable cause to issue a search warrant exists where there is a ‘substantial basis’ for inferring a ‘fair probability’ that contraband or evidence of a crime will be found in a particular place.”¹⁷ A reviewing court should read the underlying affidavit in a “common sense

¹⁰ As the trial court properly dismissed all of plaintiffs’ § 1983 claims against the DNR for lack of jurisdiction, we need not review those claims further. Accordingly, we are not required to review the propriety of dismissing plaintiffs’ gross negligence claim on the merits as the allegations relate only to the DNR’s failure to train and supervise Mr. Rock.

¹¹ 42 USC 1983.

¹² *Ewolski v City of Brunswick*, 287 F3d 492, 501 (CA 6, 2002).

¹³ *Id.*

¹⁴ *Saucier v Katz*, 533 US 194, 201; 121 S Ct 2151; 150 L Ed 272 (2001).

¹⁵ *Id.* at 200, quoting *Mitchell v Forsyth*, 472 US 511, 526; 105 S Ct 2806 (1985); 86 L Ed 2d 411.

¹⁶ *Pyles v Raisor*, 60 F3d 1211, 1215 (CA 6, 1995), citing *Yancey v Carroll Co*, 876 F2d 1238, 1243 (CA 6, 1989).

¹⁷ *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000); quoting *People v*
(continued...)

and realistic manner” and, giving due deference to the magistrate’s decision, determine if there was a substantial basis for the finding of probable cause.¹⁸

Mr. Rock’s affidavit stated that Greg Stoia heard a gunshot while attempting to hunt a buck with a bow and arrow on the property of Lynn Ish. Following the shot, the buck ran away and a man, fitting Mr. Dougherty’s description, entered the land from plaintiffs’ neighboring property. Mr. Ish found the downed buck the following day and, on the direction of Mr. Rock, dressed the buck and located the bullet. Plaintiffs allege that Mr. Rock presented false evidence in his affidavit in order to secure the search warrant and knowingly presented insufficient evidence to form a basis for probable cause. However, plaintiffs have presented no evidence to support either allegation.

Based on the honest information presented, there was a substantial basis for the magistrate to determine that Mr. Dougherty shot the buck. As there is no evidence that Mr. Rock acted in bad faith by presenting false information or insufficient evidence to support the issuance of a search warrant, Mr. Rock was permitted to execute that warrant.¹⁹ Accordingly, Mr. Rock is immune from liability in seeking the warrant.

Plaintiffs also allege that Mr. Rock violated their rights by executing the search warrant in an unreasonable manner. However, Mr. Rock was armed with a valid search warrant when he entered plaintiffs’ home. Mr. Rock took only the exact property listed in the warrant—all firearms and ammunition. Plaintiffs’ allegations are, again, not supported by the evidence. Mr. Rock is also immune for his actions in executing the valid search warrant.

V. Malicious Prosecution

Plaintiffs’ state law claim of malicious prosecution is completely without merit and does not warrant extensive review. Plaintiffs cannot establish “that the defendant has initiated a criminal prosecution against him.”²⁰ Mr. Dougherty was investigated as a possible suspect in the shooting, but charges were never brought against him and he was never subject to prosecution.

VI. Abuse of Process

We agree with the trial court’s determination that plaintiffs merely alleged in a conclusory manner that Mr. Rock had an ulterior purpose for pursuing charges against Mr. Dougherty. To establish a state law claim of abuse of process, a plaintiff must show an ulterior

(...continued)

Russo, 439 Mich 584, 604; 487 NW2d 698 (1992).

¹⁸ *Russo*, *supra* at 603-604.

¹⁹ See *United States v Leon*, 468 US 897, 914-921; 104 S Ct 3405; 82 L Ed 2d 677 (1984) (evidence will not be suppressed where an officer sought a search warrant in good faith and relied on a magistrate’s determination of probable cause to issue the warrant).

²⁰ *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 378; 572 NW2d 603 (1998).

purpose and the use of a proper legal procedure “for a purpose collateral to the intended use of that procedure.”²¹ The ulterior purpose must be demonstrated by a corroborating act.²²

Plaintiffs’ claim that Mr. Rock had an ulterior purpose in executing a baseless search warrant is without proof. Plaintiffs failed to present any evidence to corroborate their allegations.

We reject plaintiffs’ contention that Mr. Rock’s eighteen-day delay in sending the recovered bullet to the forensic lab is corroborating evidence of an ulterior purpose. Plaintiffs’ reliance on *Mitchell v Cole*²³ for this assertion is misplaced. In *Mitchell*, officials in the Department of Corrections learned that a union representative assigned to represent two corrections employees in a disciplinary procedure had an outstanding bench warrant for his arrest.²⁴ The Department officials held the information for six days and contacted the police to arrest the union representative just prior to the meeting to harass and humiliate the representative.²⁵ The Department officials’ delay in reporting the information corroborated their ulterior purpose.²⁶ However, in *Mitchell*, there was independent evidence of the adversarial relationship between the parties. Plaintiffs, conversely, have presented no evidence that Mr. Rock harbored ill will toward plaintiffs prior to or during this investigation. Therefore, the trial court properly dismissed plaintiffs’ claims.

VII. Intentional Infliction of Emotional Distress

We also find that plaintiffs’ state law intentional infliction of emotional distress claim is without merit. A claim of intentional infliction of emotional distress requires a showing of “(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) ‘severe emotional distress’”²⁷ The plaintiff must demonstrate that the defendant’s conduct 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.”²⁸

²¹ *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992).

²² *Id.* To “corroborate” is to “support or confirm by *new* evidence” American Heritage Dictionary (2d college ed) (emphasis added).

²³ *Mitchell v Cole*, 176 Mich App 200; 439 NW2d 319 (1989).

²⁴ *Id.* at 206.

²⁵ *Id.*

²⁶ *Id.* at 209.

²⁷ *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999), citing *Haverbush v Powelson*, 217 Mich App 228; 551 NW2d 206 (1996).

²⁸ *Id.*, citing *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995).

Plaintiffs contend that Mr. Rock's acts of "improperly" obtaining a search warrant and invading their home with other officers to seize all firearms eighteen days after the alleged shooting took place amounted to outrageous conduct. However, properly executing a properly issued search warrant in the investigation of a crime cannot be "regarded as atrocious and utterly intolerable in a civilized community." Therefore, the trial court properly dismissed plaintiffs' claim.

VIII. Motion for Reconsideration

We review a trial court's decision on a motion for reconsideration for an abuse of discretion.²⁹ We first reject plaintiffs' allegation that defendants failed to file their motion for reconsideration within fourteen days of the initial order partially denying their motion for summary disposition as required by MCR 2.119(F)(1). The record shows that the motion for reconsideration was filed within five days. The trial court also did not abuse its discretion in granting the motion on the merits. The trial court found that its failure to consider the issues of its jurisdiction over the DNR and the potential immunity of Mr. Rock in partially denying defendants' initial motion for summary disposition amounted to palpable error.³⁰ The court granted reconsideration to reach issues that had been raised, but had not been ruled upon. This comports with the requirements of MCR 2.119(F)(3), and was within the discretion of the trial court.

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Jessica R. Cooper

²⁹ *Kokx v Bylenga*, 241 Mich App 655, 658-659; 617 NW2d 368 (2000).

³⁰ MCR 2.119(F)(3).