STATE OF MICHIGAN

COURT OF APPEALS

TRAVIS TURNER, III,

Plaintiff-Appellant,

v

CITY OF GRAND RAPIDS and TIM HOORNSTRA,

Defendants-Appellees.

UNPUBLISHED
July 15, 2008

No. 276943
Kent Circuit Court
LC No. 06-012772-CZ

Before: Murphy, P.J., and Bandstra and Beckering, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants. We affirm and remand for determination of defendants' attorney fees and costs associated with this appeal as a sanction against plaintiff for a vexatious appeal.

In an amended complaint, plaintiff alleged that he and his wife were engaged in a domestic dispute on February 4, 2004, as he was preparing divorce documents, that plaintiff was arrested when police responded to the disturbance despite plaintiff not having struck the first blow, and that he was arrested simply because he is male. Documentary evidence regarding the incident submitted by the parties for purposes of summary disposition included an "affidavit"[1] by plaintiff averring that his wife physically assaulted him first before he bit her on the arm in self-defense and a police report which reflected that plaintiff had no apparent injuries, despite his claim that his wife assaulted him, that plaintiff's wife had visible bite marks on her arm, and that plaintiff was arrested. Plaintiff also submitted an "affidavit" from his wife that contained

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[1] The so-called affidavit submitted by plaintiff contains no seal, no certificate of acknowledgment, and is not attested or notarized; it is simply signed by plaintiff. Therefore, it is not a legally recognizable affidavit. See MCR 2.119(B); *Apsey v Mem Hosp*, 477 Mich 120, 128; 730 NW2d 695 (2007) (an affidavit is a "notarial act" controlled by the Uniform Recognition of Acknowledgements Act (URAA), MCL 565.261 *et seq.*); *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 711; 620 NW2d 319 (2000). The claimed affidavit fails to comply with the URAA. The affidavit signed by plaintiff's wife suffers from the same deficiencies.

averments confessing that she physically assaulted plaintiff as he had claimed and that she lied to police because of fears of losing custody of her and plaintiff's children.

Plaintiff further alleged that on March 5, 2004, he had his pickup truck towed by a towing company from the apartment where his wife lived, and where he formerly resided, to plaintiff's new residence. Plaintiff contended that his wife called the police because of the incident, falsely claiming that plaintiff, in violation of a personal protection order (PPO), came to her home and took the truck. Documentary evidence regarding this incident included plaintiff's affidavit that supported his allegations, a receipt from the towing company supporting plaintiff's allegations, and a police report that reflected that no action was taken because plaintiff's wife did not actually witness plaintiff taking the truck.

Plaintiff next alleged in the amended complaint that, later in the day on March 5, 2004, after the towing company gave him the truck, he charged the truck's battery, took the truck for refueling, and then returned home. According to the amended complaint, shortly thereafter, defendant Hoornstra, a city police officer, arrived at plaintiff's residence in response to a second incident and a new false complaint by plaintiff's wife and her neighbor that plaintiff had violated the PPO. Documentary evidence regarding this second incident on March 5 included a police report which stated that plaintiff's wife and the neighbor informed police that plaintiff showed up at the wife's residence in the truck, honking the horn and spinning the tires, that plaintiff denied being present at his wife's residence, claiming to have been at his mother's home except for the brief time that he ran out to get gas, and that plaintiff was arrested for violating the PPO and his bond on the earlier assault. In plaintiff's affidavit, he denied that he drove his truck to his wife's residence, and in his wife's affidavit she averred that she was mistaken in reporting that plaintiff violated the PPO, discovering after the fact that it was someone else's truck that she and the neighbor had observed.

Finally, plaintiff alleged in the amended complaint that he was arrested, spent five days in jail with common criminals, and that he suffered actual damages, mental anguish, and violations of his constitutional rights, given that he was cleared of wrongdoing for the events that transpired on February 4 and March 5, 2004, and obtained a civil judgment against the neighbor for making false and malicious police reports.[2] The full extent of plaintiff's allegations regarding a legal cause of action is found in the complaint's caption wherein he alleged, "14th [A]mendment violations of loss of liberty, 4th [A]mendment violation of unlawful seizure of his person and mental anguish, warrantless entry and deprivation of due process of the laws."

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[2] Documentary evidence submitted by plaintiff included a judgment showing a *nolle prosequi* with respect to the alleged domestic assault, with the handwritten notation "witness FTA'd." The record also includes an order dismissing the prosecution for the alleged PPO violation "per request of the Prosecuting Attorney." A default judgment in the amount of $10,000 in favor of plaintiff and against the neighbor is also included in the record. Plaintiff further submitted the following documentary evidence: orders for return of fingerprints, arrest card, and arrestee's description relative to the two arrests, plus two other arrests for domestic assault in 2003 and 2005; and, a police report of an alleged PPO violation called in by plaintiff's wife on March 3, 2004, with no result identified.

On plaintiff's motion for summary disposition, to which defendants responded and also requested summary disposition pursuant to MCR 2.116(I)(2), the trial court found that defendant city was not liable as a matter of law because the theory of respondeat superior was inapplicable and plaintiff failed to allege or show a city policy or custom that led to the alleged constitutional violations. In regard to defendant Hoornstra, the trial court ruled that he was shielded by immunity, where his conduct was objectively reasonable.[3]

The only claims set forth in plaintiff's complaint alleged, in broad and general terms, constitutional violations under the Fourth and Fourteenth Amendments of the United States Constitution.

We first address the action against defendant Hoornstra, which, according to the briefs, although not decipherable from the complaint,[4] related only to Hoornstra's involvement in arresting plaintiff for the PPO violation.

Pursuant to 42 USC 1983, a person who experiences the deprivation of rights secured by the United States Constitution because of the actions of another person acting under color of state law may file an action seeking redress against the party that caused the deprivation. *Walsh v Taylor*, 263 Mich App 618, 635; 689 NW2d 506 (2004). Such a suit brought against a police officer for violation of a constitutional right permits the officer to invoke the defense of qualified immunity, and a plaintiff has the burden of establishing that a reasonable officer in the defendant's position could not have believed that his conduct was lawful. *Id.* at 635-636; see also *Thomas v McGinnis*, 239 Mich App 636, 644; 609 NW2d 222 (2000) (governmental official performing discretionary function is entitled to qualified or good-faith immunity if official's conduct does not violate a clearly established constitutional right of which a reasonable person would have known). The Fourth Amendment protects people from unlawful searches and seizures, requiring probable cause, and the Fourteenth Amendment precludes the state from depriving a person of life, liberty, or property without due process of law.

Here, defendant Hoornstra arrested plaintiff after plaintiff's wife and a neighbor reported that plaintiff showed up at the wife's residence in his truck, in violation of the PPO, honking the horn and spinning the tires. Even if we could consider the defective affidavit from plaintiff's wife, it acknowledged that this information was indeed reported to the police, regardless of her later claim that she had been mistaken. And even if we could consider plaintiff's defective affidavit, it would not call into question Hoornstra's actions or change the perception of events

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[3] The trial court also entertained dismissing the action under MCR 2.504 for plaintiff's failure to pay sanctions ordered in numerous frivolous lawsuits filed by plaintiff in the Kent Circuit Court. However, the trial court ultimately dismissed the action on the merits of the claims presented.

[4] We note that the complaint completely fails in adequately stating "the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.111(B)(1).

that confronted Hoornstra on March 5, 2004; there were two eyewitnesses claiming clear unlawful conduct on the part of plaintiff. The prior history of plaintiff and his wife that entailed police involvement was not such that Hoornstra was in a position to ignore the claimed PPO violation and not arrest plaintiff, especially given the supporting claim of a third party, the neighbor, and the initial lie by plaintiff's mother regarding plaintiff's whereabouts. The fact that charges for the alleged PPO violation were dropped and that plaintiff obtained a default judgment against the neighbor does not equate to a finding that Hoornstra lacked probable cause to arrest plaintiff at the time or that a reasonable police officer faced with the same circumstances would not have believed that arresting plaintiff was lawful.[5] In sum, on de novo review, the vague, cursory complaint failed to state a cause of action against Hoornstra, MCR 2.116(C)(8), and, viewing the documentary evidence in a light most favorable to plaintiff, there is no genuine issue of material fact that Hoornstra was entitled to summary disposition, MCR 2.116(C)(10), where his actions were entirely proper and constitutionally sound. See *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The trial court did not err in granting summary disposition under MCR 2.116(I)(2).

The action against the city is even more lacking in merit than the action against Hoornstra. "A plaintiff may sue a municipality in . . . state court under 42 USC 1983 to redress a violation of a federal constitutional right." *Jones v Powell*, 462 Mich 329, 337; 612 NW2d 423 (2000), citing *Monell v New York City Dep't of Social Services*, 436 US 658, 690 n 54; 98 S Ct 2018; 56 L Ed 2d 611 (1978). In *Monell, id.* at 694, the United States Supreme Court held:

> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

The doctrine of respondeat superior does not attach to § 1983 actions against municipalities. *Collins v City of Harker Heights, Texas*, 503 US 115, 123; 112 S Ct 1061; 117 L Ed 2d 261 (1992). There must be a direct causal link between a municipal policy or custom and the alleged constitutional deprivation, and the policy or custom must reflect a deliberate indifference to the rights of persons who come in contact with the police. *Id.* at 123-124; see also *Morden v Grand Traverse Co*, 275 Mich App 325, 333; 738 NW2d 278 (2007)(applying deliberate indifference standard to claim of Eighth Amendment violation relative to prison medical care).

As reflected in the cited cases, the city could not be held liable under 42 USC 1983 on the theory of respondeat superior. Moreover, plaintiff's complaint does not contain any allegations of an unconstitutional policy or custom employed by the city, let alone an allegation that a

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[5] The dropping of charges relative to the alleged domestic assault and PPO violation are likely attributable to plaintiff's wife changing her stories, but we cannot state whether the change was to speak the truth or to pacify plaintiff and get him off the hook.

custom or policy amounted to a deliberate indifference to plaintiff's constitutional rights. Accordingly, summary disposition was proper under MCR 2.116(C)(8) and MCR 2.116(I)(2). Furthermore, there was no documentary evidence establishing the existence of an unconstitutional custom or policy employed by the city, let alone evidence of a custom or policy that amounted to a deliberate indifference to plaintiff's constitutional rights. Accordingly, summary disposition was proper under MCR 2.116(C)(10) and MCR 2.116(I)(2).

Finally, we find, *sua sponte*, that plaintiff's appeal was vexatious because it "was taken for purposes of hindrance or delay" and "without any reasonable basis for belief that there was a meritorious issue to be determined on appeal." MCR 7.216(C)(1)(a). Plaintiff is ordered to pay defendants' reasonable attorney fees associated with defending the appeal, along with defendants' costs. MCR 7.216(C)(2); MCR 7.219(I).

Affirmed and remanded for determination of defendants' attorney fees and costs associated with this appeal and entry of an order thereon.

/s/ William B. Murphy
/s/ Richard A. Bandstra
/s/ Jane M. Beckering