STATE OF MICHIGAN

COURT OF APPEALS

DANIEL DARIO TREVINO and HYDROWORLD, LLC, Plaintiffs-Appellants, v CHRISTOPHER BLACKBURN and CITY OF LANSING, Defendants-Appellees.	UNPUBLISHED November 27, 2018 No. 340474 Ingham Circuit Court LC No. 16-000423-CZ

Before: RIORDAN, P.J., and RONAYNE KRAUSE and SWARTZLE, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(10) (no genuine issue of material fact). This matter arises out of search and seizure warrants[1] executed at plaintiffs' properties by various law enforcement officers. The officers then requested that defendants perform an inspection of issues they observed. Following inspections performed by defendant Christopher Blackburn, an electrical inspector for defendant City of Lansing, electrical services to plaintiffs' properties were disconnected. Plaintiffs brought suit under 42 USC 1983,[2] alleging that the inspections and subsequent shutoffs violated the Fourth (prohibiting unreasonable searches) and Fourteenth Amendments (due process) to the United States Constitution. They also alleged that the City had an unconstitutional policy of not maintaining an Electrical Board of Appeals. The trial court determined that the facts were largely undisputed and that, for various reasons, plaintiffs' claims must be dismissed. We affirm.

I. BACKGROUND FACTS

[1] Neither the validity nor the subject matter of those warrants is at issue in this appeal.

[2] 42 USC 1983 "provides a remedy for the violation of rights guaranteed by the federal constitution or federal statutes." *York v Detroit (After Remand)*, 438 Mich 744, 757-758; 475 NW2d 346 (1991).

Plaintiff Daniel D. Trevino is the owner of Hydroworld, LLC. Plaintiffs own or lease three properties at issue: 611 Maplehill Avenue, 3308 South Cedar, and 1523 South Cedar. On May 3, 2016, Federal law enforcement officers obtained search and seizure warrants, issued by The United States District Court for the Western District of Michigan, for the aforementioned properties. Federal agents, Michigan State Police, and the Lansing Police Department executed the warrants on the same day. Also on the same day, Blackburn received a call from "dispatch" informing him that he was wanted at 1523 South Cedar. He waited outside the premises until law enforcement asked him to enter the property and perform an inspection.

Blackburn inspected the premises and determined that terminating the electrical service was warranted. Blackburn believed that there was an imminent danger on the basis of "[t]he tampering of the meter sockets," "[t]he open service panels," and "[t]he un-prevented [sic] wiring that's being run though the building haphazard." A "correction notice" was left at the property identifying the "MEC [Michigan Electrical Code] Part 8 80.18.1"[3] as the code section being violated; the notice also provided that "the electrical service has been disconnected at the pole" because of "hazardous wiring installed in the building." The notice explained that a licensed electrical contractor would need "to obtain a permit and make the electrical safe and have an inspection before power is restored."

Blackburn then proceeded to 3308 South Cedar at the request of law enforcement. He determined that the property was unsafe because of "the electrical work that had been done without a permit." He recalled the presence of haphazard wiring ("hanging, unconnected") at the property, and that "[t]he panel doors were off the electrical panels." The electrical service to the property was shut off on May 6, 2016, and Blackburn left a correction notice at the property, again citing "MEC Part 8 80.18.1" as the violated code section and providing a similar explanation for the shutoff. Electrical service at 3308 South Cedar was restored a month later, after the premises were brought back into compliance.

Blackburn did not go to 611 Maplehill on May 3, 2016, and he did not actually enter the building. On May 4, 2016, he posted a notice that service had been disconnected due to hazardous wiring. He decided to turn off electricity to the home "[b]ecause of the new wiring that had been installed without permits for the grow [operation] in the basement." The correction notice left at the home again cited "MEC Part 8 80.81" as the violated code section. It appears that all three properties were also "red tagged," meaning that they were unfit for occupancy. The electrical issues pertaining to 611 Maplehill were resolved in June 2017. Apparently, the issues at 1523 South Cedar remain unresolved.

Trevino appealed the shutoffs to the City's Electrical Board of Appeals. The City informed Trevino in a letter that it did not currently have enough members on its Electrical Board of Appeals to satisfy the requirements of 1972 PA 230, i.e., the Stille-DeRossett-Hale Single State Construction Code Act, MCL 125.1501 *et seq.* The City explained that the letter

[3] This code section, which will be discussed in more detail later, authorizes the "[d]isconnection of dangerous electrical equipment." Mich Admin Code, R 408.30817.

constituted a denial of the appeals and that he could pursue an appeal to State Construction Code Commission. However, Trevino did not pursue that course of action.

II. PROCEDURAL HISTORY

On May 25, 2016, plaintiffs brought suit under 42 USC 1983. They alleged that, with respect to each property, Blackburn committed an "unlawful search" in violation of the Fourth Amendment to the United States Constitution by entering the properties without a warrant, probable cause, or an exception to the warrant requirement.[4] Additionally, plaintiffs brought three counts alleging that the orders "to vacate dwellings" at each property violated the due process clause to the Fourteenth Amendment to the United States Constitution. Plaintiff also presented a claim of municipal liability, alleging in part that the City failed to provide "an adequate post-deprivation remedy."

In June 2017, defendants moved the trial court for summary disposition under MCR 2.116(C)(10). They argued that Blackburn was entitled to qualified immunity, in part because it was reasonable for him to rely on the criminal warrant to enter the premises rather than obtaining a separate administrative warrant. Defendants also argued that plaintiffs were afforded sufficient due process because the correction notices were adequate and plaintiffs were provided with a post-deprivation remedy.

In response, plaintiffs argued that Blackburn was not entitled to qualified immunity because, pursuant to *Wilson v Layne*, 526 US 603; 119 S Ct 1692; 143 L Ed 2d 818 (1999), a reasonable inspector would not believe that he could rely on a criminal search warrant to enter a building. Regarding their procedural due process claims, plaintiffs argued that the circumstances of the notices and shutoffs in this case were insufficient to satisfy the factors set forth in *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976). Plaintiffs also maintained that the City of Lansing's failure to maintain an Electric Board of Appeals constituted an unconstitutional policy.

The trial court heard oral argument in August 2017. The parties agreed that a United States District Court case had addressed issues substantially similar to those in the instant matter.[5] The trial court found that case persuasive, and, on that basis, it granted defendants summary disposition on plaintiffs' claims. Additionally, the court concluded that the issue regarding "the notice of appeal" was "moot since an appeal was taken at least in regard to the electrical board." The court also ruled that Blackburn was entitled to qualified immunity.

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[4] Plaintiffs later conceded that dismissal of the count pertaining to 611 Maplehill was appropriate because Blackburn did not enter the home on May 3, 2016.

[5] *Gardner v Evans*, unpublished opinion of the United States District Court for the Western District of Michigan, issued January 28, 2015 (Case Nos. 1:12-cv-1338 and 1:12-cv-914) (*Gardner I*), rev'd in part on other grounds 811 F3d 843 (CA 6, 2016) (*Gardner II*); *Gardner v Evans*, unpublished opinion of the United States District Court for the Western District of Michigan, issued August 11, 2017 (Case Nos. 1:12-cv-1338 and 1:12-cv-914) (*Gardner III*).

III. STANDARD OF REVIEW

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the nonmoving party and grants summary disposition only when the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. We otherwise review de novo the trial court's determinations of law; however, any factual findings made by the trial court in support of its decision are reviewed for clear error, and ultimate discretionary decisions are reviewed for an abuse of that discretion. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470-472; 719 NW2d 19 (2006). Constitutional issues are reviewed de novo, with the primary goal of ascertaining the purpose and intent of any constitutional provisions at issue. *Mahaffey v Attorney General*, 222 Mich App 325, 334-335; 564 NW2d 104 (1997). We also review de novo, as a question of law, whether a defendant is entitled to qualified immunity. *Thomas v McGinnis*, 239 Mich App 636, 644; 609 NW2d 222 (2000).

IV. FOURTH AMENDMENT VIOLATIONS

Plaintiffs first argue that Blackburn's search of the 3308 and 1523 South Cedar properties violated the Fourth Amendment. Because we rule that Blackburn is entitled to qualified immunity, we decline to address whether the administrative searches of the premises were unconstitutional. See *Pearson v Callahan*, 555 US 223, 236; 129 S Ct 808; 172 L Ed 2d 565 (2009).

"The Fourth Amendment of the United States Constitution and art 1, § 11 of the Michigan Constitution of 1963 grants individuals the right to be secure against unreasonable searches and seizures." *In re Forfeiture of $176,598*, 443 Mich 261, 264-265; 505 NW2d 201 (1993) (footnotes omitted). Searches conducted without warrants are presumptively unreasonable. *United States v Doxey*, 833 F3d 692, 703 (CA 6, 2016). The Fourth Amendment's protections extend to administrative searches. *Camara v Muni Court*, 387 US 523, 534; 87 S Ct 1727; 18 L Ed 2d 930 (1967); *See v Seattle*, 387 US 541, 545; 87 S Ct 1737; 18 L Ed 2d 943 (1967). However, a qualified immunity analysis applies to claims brought under 42 USC 1983. See *Wilson*, 526 US at 609. Specifically, "[a]n officer conducting a search is entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment." *Pearson*, 555 US at 243-244.

That qualified immunity depends on whether it would have been reasonably apparent to the officer that the challenged conduct was illegal. See *Ziglar v Abbasi*, ___ US ___, ___; 137 S Ct 1843, 1866-1867; 198 L Ed 2d 290 (2017). It must be "clear" that the challenged conduct was improper under the circumstances. See *id*.; *Reichle v Howards*, 566 US 658, 664; 132 S Ct 2088; 182 L Ed 2d 985 (2012); *Ashcroft v al-Kidd*, 563 US 731, 742; 131 S Ct 2074; 179 L Ed 2d 1149 (2011). We find no reason to conclude that Blackburn should have clearly known that foregoing a warrant would be unlawful under the circumstances.

Plaintiffs argue that, pursuant to *Wilson*, Blackburn, or any reasonable building official or inspector, would have known that he could not rely on a criminal warrant as authority to inspect a building. In *Wilson*, law enforcement officers[6] invited media members to accompany them during the execution of an arrest warrant. *Id*. 606-607. The Court held "that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant." *Id*. at 614. Nevertheless, the Court found that the practice of "media ride-alongs" was widespread, and little to no case law had established that the practice became unlawful when the media entered a home. *Id*. at 615-617. The Court found that no "legitimate law enforcement purposes" justified the media's intrusion into the home, but did observe that an "important public purpose" was served by media coverage of police activities. *Id*. at 612-615. The Court concluded that the officers were entitled to qualified immunity because it would not have been clear that it was unlawful to bring the media members into the homes. *Id*. at 616-618.

It would have been reasonable for Blackburn to rely on law enforcement officers' concerns about possible hazards they observed in plain view during the execution of their warrants. Therefore, Blackburn arguably had authority to enter the premises under Mich Admin Code, R 408.30811,[7] based on a reasonable belief that there were conditions or violations of the electrical code that made the sites unsafe, unsanitary, dangerous, or hazardous. Although reliance upon a formal regulation or policy does not preclude a Fourth Amendment violation, such reliance in the absence of clear case law to the contrary can be reasonable. See *Wilson*, 526 US at 617. Additionally, it is well-known that exceptions to the general warrant requirement do exist, particularly in exigent circumstances. See *Camara*, 387 US at 539-540; *City of Los*

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[6] *Wilson* is distinguishable from the instant matter, because the alleged Fourth Amendment violations in *Wilson* were committed by the officers executing the warrant. Nonetheless, the parties seemingly presume that if the officers here violated the Fourth Amendment by inviting Blackburn into premises, then Blackburn also committed an unlawful search.

[7] That regulation provides as follows:

> 80.14.3. Right of Entry. Whenever it is necessary to make an inspection to enforce the provisions of this code, or whenever the code official has reasonable cause to believe that there exists in any building or upon any premises any conditions or violations of this code that make the building or premises unsafe, unsanitary, dangerous, or hazardous, the code official shall have the authority to enter the building or premises at all reasonable times to inspect or to perform the duties imposed upon the code official by this code. If the building or premises is occupied, the code official shall present credentials to the occupant and request entry. If the building or premises is unoccupied, the code official shall first make a reasonable effort to locate the owner or other person having charge or control of the building or premises and request entry. If entry is refused, the code official shall have recourse to every remedy provided by law to secure entry. [Mich Admin Code, R 408.30811.]

Angeles v Patel, ___ US ___, ___; 135 S Ct 2443, 2452; 192 L Ed 2d 435 (2015). The totality of the circumstances surrounding Blackburn's "dispatch" and a request by multi-jurisdictional law enforcement officers to perform an immediate inspection could reasonably connote an emergency.

We find nothing in *Wilson* establishing that Blackburn should have reasonably known, under the circumstances, that entering the premises was unlawful. Indeed, the United States Supreme Court has suggested that warrants may be unnecessary for administrative searches when "there has been a citizen complaint or there is other satisfactory reason for securing immediate entry." *Camara*, 387 US at 539-540. Blackburn also entered the premises to perform an "important public purpose," see *Wilson*, 526 US at 615, of ensuring the safety of the premises. We conclude that a reasonable building inspector would not have found it clear that entering the premises was unlawful under the circumstances, and therefore the trial court properly ruled that Blackburn was entitled to qualified immunity with respect to plaintiffs' Fourth Amendment claims.

V. PROCEDURAL DUE PROCESS

Next, plaintiffs argue that they were denied due process because Blackburn did not have authority to disconnect the electrical services, and because he did not cite the underlying code violations in the correction notices. Again, because we conclude that Blackburn is entitled to qualified immunity, we will not address whether plaintiffs were actually denied due process.

The Fourteenth Amendment to the United States Constitution precludes states from depriving any person of life, liberty, or property, without due process of law. US Const, Am XIV. "[T]he essential elements of due process of law" are "notice and an opportunity to be heard." *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 271; 566 NW2d 514 (1997) (quotation marks and citations omitted). "A procedural due process analysis requires a dual inquiry: (1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient." *Galien Twp Sch Dist v Dep't of Ed (On Remand)*, 310 Mich App 238, 241; 871 NW2d 382 (2015) (quotation marks and citations omitted). Defendants have not challenged the first prong, so we presume, although we do not decide, that it is satisfied.

A. DISCONNECTION OF ELECTRICAL SERVICES

Plaintiffs do not clearly articulate how disconnection of their electrical services constituted a procedural due process violation. Nevertheless, we presume, but do not decide, that a due process violation occurred as a consequence of Blackburn overestimating his authority. We conclude that any such overestimation was reasonable and likely harmless. Consequently, he is entitled to qualified immunity for the disconnection of the electrical services.

Blackburn relied on the following regulation for authority to shut off electricity:

> 80.181. Disconnection of dangerous electrical equipment. If the use of any electrical equipment is found imminently dangerous to human life or property, the enforcing agency may condemn the equipment or disconnect it from its source of electric supply, *except that the enforcing agency shall not disconnect the service*

> *entrance equipment or utility service drop wires unless the entrance equipment or utility wires in themselves constitute a hazard to life or property*. If the enforcing agency condemns or disconnects dangerous equipment, then the agency shall place a notice on the equipment listing the causes for the condemnation or disconnection and the penalty under the act for the unlawful use of the equipment. The agency shall give written notice of the condemnation or disconnection and the causes for condemning or disconnecting the equipment to the owner or the occupant of the building, structure, or premises. A person shall not remove the notice or reconnect the electrical equipment to its source of electric supply, or use or permit the use of electrical current in the electrical equipment, until the causes for the condemnation or disconnection are remedied and a permit for the electrical repairs of the equipment is obtained from the enforcing agency. [Mich Admin Code, R 408.30817 (emphasis added).]

According to Blackburn's deposition testimony, he believed that if he found an imminent danger related to the electrical services, then he could disconnect electrical services altogether. This may be an overstatement. The regulation stresses that the entrance equipment or the utility wires shall not be disconnected unless they, "in themselves," constitute a hazard to life or property. The regulation contemplates that specific electric equipment can be disconnected if found to be imminently dangerous. An electrical inspector does not appear to have the authority to automatically disconnect electrical services altogether as a panacea for any hazardous electrical condition discovered at the premises.

However, to the extent Blackburn may have overestimated his authority under Mich Admin Code, R 408.30817, government officials are entitled to "breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft*, 563 US at 743 (internal quotation omitted). "The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson*, 555 US at 231 (internal quotation omitted).

We think it obvious that if electrical equipment plugged directly into the service entrance equipment or utility service drop wires is hazardous, disconnection may be impossible except by disconnecting service altogether. Put another way, if disconnecting the entrance equipment or utility wires was the only way to disconnect the hazardous equipment, Blackburn could not have exceeded his authority under the regulation by doing so. Plaintiffs dispute that any hazards were present, but they have not established a question of fact on that matter. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In contrast, Blackburn provided testimony explaining why he believed there were imminent dangers at the properties, it is undisputed that electrical work had been performed without permits, and defendants provided photographs of the properties suggesting that the electrical equipment was indeed hazardous.

The record shows that Blackburn could have reasonably believed he had no realistic or safe alternative but to disconnect electrical service altogether. Plaintiff has not provided us with any case law tending to show that doing so violated a clearly established right, or any case law examining the contours of Mich Admin Code, R 408.30817. The trial court properly found

Blackburn entitled to qualified immunity regarding his decision to disconnect the electrical services to the properties.

B. CITATION TO CODE VIOLATIONS

Plaintiffs assert that they were entitled to have Blackburn specify the code provisions allegedly being violated at the premises. The provision that Blackburn cited merely provided his authority to disconnect the electrical services, not the actual code violations. Failure to specify the actual code violations is not optimal. However, we do not follow plaintiffs' contention that they could not pursue an appeal to the state construction commission without a specified code section because "there would be nothing for them to review." The notices left by Blackburn did explain that the reason for the disconnection was "hazardous wiring" and that a licensed electrical contractor would be required to obtain a permit and make the premises safe. Furthermore, if no explanation had been provided, we would expect a total lack of justification to be an excellent basis for obtaining appellate relief. We cannot conclude that a reasonable electrical inspector would have found the notices inadequate. Consequently, plaintiffs have not coherently identified any prejudice, see *Graham v Mukasey*, 519 F 3d 546, 549-550 (CA 6, 2008), and in any event, Blackburn was entitled to qualified immunity.

VI. UNCONSTITUTIONAL POLICY

Finally, plaintiffs argue that the City's failure to maintain an Electrical Board of Appeals is an unconstitutional policy. Plaintiffs do not specify any particular constitutional provision. Nevertheless, plaintiffs correctly observe that the City is required to maintain a "construction board of appeals," consisting of at least three members. MCL 125.1514(1). It was established that the City has not had three members on its Electrical Board of Appeals for considerable time. As a result, the board could not hear plaintiffs' appeals. However, the City sent plaintiffs a letter clearly explaining that it constituted a denial of their appeals. Consequently, plaintiffs were entitled to pursue a further appeal to the State Construction Code Commission. See MCL 125.1516(1). Plaintiffs failed to do so. Generally, failure to exhaust administrative remedies precludes review of a matter by the courts. See *Cummins v Robinson Twp*, 283 Mich App 677, 705, 711-714; 770 NW2d 421 (2009). Plaintiffs have not explained why an appeal to the State Construction Code Commission would have been futile. *Hendee v Putnam Twp*, 486 Mich 556, 574-578; 786 NW2d 521 (2010). This issue is therefore not properly before us, so it was properly dismissed.

VII. CONCLUSION

Affirmed. Defendants, being the prevailing parties, may tax costs. MCR 7.219(A).

/s/ Michael J. Riordan
/s/ Amy Ronayne Krause
/s/ Brock A. Swartzle