

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

A QUANTITY OF MARIJUANA, DRUG
PARAPHERNALIA, 3551 EAST ALLEN ROAD,
\$360, NUMEROUS FIREARMS AND
AMMUNITION, SKI-DOO SNOWMOBILE,
1965 CHEVROLET NOVA, and CAR TRAILER,

Defendants,

and

GERALD OSTIPOW and ROYETTA OSTIPOW,

Claimants-Appellants,

and

STEVEN PAUL OSTIPOW,

Claimant.

FOR PUBLICATION

January 11, 2011

No. 291993

Saginaw Circuit Court

LC No. 08-900017-CF

Before: O'CONNELL, P.J., and BANDSTRA and MARKEY, JJ.

O'CONNELL, P.J. (*dissenting*).

I respectfully dissent.

In a forfeiture action, the burden of proof is on the claimant to establish the innocent owner defense. *In re Forfeiture of \$53*, 178 Mich App 480, 486; 444 NW2d 182 (1989). To avoid forfeiture, the claimant must establish that the illegal activities that formed the basis of the forfeiture action were committed without the claimant's knowledge or consent. *Id.* at 496; MCL 333.7521(f). In this case, the majority concludes that claimants' affidavits were sufficient to avoid summary disposition on the innocent owner defense, even though the affidavits contained merely claimants' conclusory assertions that they knew nothing of their son's illegal activity. In

my view, the trial court correctly determined that claimants' affidavits were insufficient to create a question of fact on the innocent ownership defense. Accordingly, I would affirm the trial court's well-reasoned decision.

As this Court has repeatedly recognized, "mere conclusory allegations within an affidavit that are devoid of detail are insufficient to create a question of fact." *Hamade v Sunoco, Inc (R & M)*, 271 Mich App 145, 163; 721 NW2d 233 (2006), citing *Quinto v Cross & Peters*, 451 Mich 358, 362-363; 547 NW2d 314 (1996); see also MCR 2.119(B)(1)(b). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Here, claimants' affidavits stated they had no knowledge of any criminal activity associated with their real or personal property. Neither the affidavits nor the pleadings presented any specific facts to support these statements.¹ As the trial court explained, the pleadings filed by claimants' attorney "just deny criminal activity and assert they are innocent owners, but I . . . didn't see any affirmative defenses. I don't see any answer that gives the prosecutor some basis on which to respond as to why they are innocent owners." The trial court concluded, and I agree, that claimants presented no evidence sufficient to withstand summary disposition.² See *Bennett v Detroit Police Chief*, 274 Mich App 307, 317-319; 732 NW2d 164 (2006) (moving party is entitled to summary disposition when nonmoving party's unsupported, speculative evidence was insufficient to create a fact issue).

I would affirm the decision of the trial court.

/s/ Peter D. O'Connell

¹ I recognize that it might be difficult for claimants to assert specific facts regarding innocent ownership, in light of the Saginaw County Sheriff's Department seizure of an indoor marijuana grow consisting of several hundred marijuana plants, processed marijuana, drug paraphernalia, and records related to the manufacture and sale of marijuana. Nonetheless, I am of the opinion that claimants must assert some facts to establish they were unaware that several hundred marijuana plants were growing in the house.

² The majority states that once claimants presented evidence to support their affirmative defense, "the burden shifted back to the prosecutor to produce clear and decisive evidence to negate the defense." In my view, this statement rests on the incorrect assumption that claimants actually presented evidence. The record indicates that claimants presented conclusory assertions; they did not present facts admissible as evidence. Where, as here, a nonmoving party has the burden of proof on an issue, that party must come forward with specific facts to show a genuine factual issue. *Quito*, 451 Mich at 362-363. If that party fails to present sufficient evidence, the burden never shifts, and the moving party is entitled to summary disposition. *Id.*