STATE OF MICHIGAN

COURT OF APPEALS

JANE WILKINSON, LEE WILKINSON, PIZZA MERCHANTS, INC. and ELAINE CATT,

Plaintiffs-Appellants,

v

CITY OF BATTLE CREEK, JEFFREY KRUITOFF, RANCE LEADERS, OFFICER DAVID TIMMER, OFFICER JEFFREY COONS, SGT. JACK SHEPPERLY, SGT. ROBERT BELOTE, and ARTHUR CARPENTER,

Defendants-Appellees,

UNPUBLISHED
April 30, 1999

No. 192207
Calhoun Circuit Court
LC No. 93-002103 CZ

Before: Markman, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment in favor of defendants entered by the trial court following a jury trial. We affirm.

I

This case arises out of an investigation by the Battle Creek Police Department in response to *Battle Creek Enquirer* newspaper articles which revealed that plaintiffs were engaged in fortune-telling for compensation, in violation of City Ordinance 660.02(10)[1] and MCL 750.267 *et seq.*; MSA 28.478 *et seq.*[2] On the evening of July 21, 1993, Battle Creek police officers conducted an investigation at Sambino's Restaurant, owned by plaintiff Pizza Merchants, Inc., during a time when the owners were conducting "Psychic Night" at the establishment. The police obtained the names of individuals doing fortune telling,[3] collected money from those who claimed they had received money for fortune telling that evening and gave receipts for the money. As a result of this investigation, the owners of the restaurant, several fortune tellers, and their manager initiated this suit for declaratory and injunctive relief, asking that the city ordinance and the state statute be declared unconstitutional. Amended complaints were filed which added causes of action under the federal Civil Rights Act, 42 USC 1983, against the City of Battle Creek and numerous municipal employees. The city was dismissed and certain claims originally

raised by plaintiffs were disposed of on motions for summary disposition in advance of trial, leaving only plaintiffs' § 1983 claims alleging false arrest, illegal search and seizure, and due process violations for trial. In addition, plaintiffs' request for declaratory and injunctive relief was deemed moot by the trial court in light of the subsequent repeal, after the investigation, of the statute and ordinance. Following a jury trial, the jury returned a verdict of no cause of action regarding the remaining § 1983 claims. The correlative judgment from which plaintiffs now appeal was thereafter entered.[4]

II

Plaintiffs first contend that the trial court committed error requiring reversal by improperly modifying the standard jury instruction regarding false imprisonment. We disagree.

This Court reviews alleged improper jury instruction for an abuse of discretion. *Joerger v Gordon Food, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997). Jury instructions are to be reviewed by this Court in their entirety and should not be extracted piecemeal. *Id*. Reversal is not required if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Id*.

In instructing the jury on plaintiffs' claim of false imprisonment, the trial court read verbatim from SJI2d 116.02, modifying the standard instruction in one respect, with the addition of the word "significantly." The court stated in pertinent part as follows:

> The first claim that I will be defining is that of false imprisonment. False imprisonment is the unlawful restraint of an individual's personal liberty or freedom of movement.
>
> To constitute a false imprisonment, there must be an intentional and unlawful restraint, detention or confinement that *significantly* deprives a person of his or – his or her personal liberty or freedom of movement against his or her will. [Emphasis added.]

Plaintiffs contend that by sua sponte inserting the qualifying word "significantly" into the standard jury instruction, the trial court misstated the law. Plaintiffs maintain that nothing in the law of Michigan so restricts the tort of false imprisonment; any restraint or deprivation, whether significant or not, is sufficient to form the basis for such a claim. See, generally, *Stowers v Wolodzko*, 386 Mich 119, 134-135; 191 NW2d 355 (1971); *Tumbarella v Kroger Co*, 85 Mich App 482, 490; 271 NW2d 284 (1978).

Plaintiffs' argument would warrant further consideration if the instruction related to a state law tort claim for false imprisonment. However, the theory submitted to the jury was not a claim of false imprisonment grounded in state law, but rather a claim of a Fourth Amendment violation under 42 USC 1983. These state and federal claims are not synonymous. *Daniels v Williams*, 474 US 327; 106 S Ct 662; 88 L Ed 2d 662 (1986). In *Daniels*, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment is not implicated by a state official's negligent act causing unintended loss or injury to life, liberty, or property. The *Daniels* Court explained:

> [I]n any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim. . . .
>
> * * *
>
> Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that " 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States,'" *Paul v Davis*, 424 US 693, 701; 96 S Ct 1155, 1160; 47 L Ed 2d 405 (1976), quoted in *Parratt v Taylor*, 451 US [527] at 544, 101 S Ct. [1908] at 1917 [68 L Ed 2d 420 (1981)].
>
> [W]e do not believe its [the Due Process Clause] protections are triggered by a lack of due care by prison officials. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner," *Estelle v Gamble*, 429 US 97, 106; 97 S Ct 285, 292; 50 L Ed 2d 251 (1976), and "false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official." *Baker v McCollan*, 443 US 137, 146; 99 S Ct 2689, 2695; 61 L Ed 2d 433 (1979). [*Id.* at 474 US at 330, 332, 333.]

Absent some show of physical force or show of authority, an encounter between a police officer and a member of the public is not a "seizure" within the meaning of the Fourth Amendment of the United States Constitution. *US v Mendenhall*, 446 US 544, 554-555; 100 S Ct 1870; 64 L Ed 2d 497 (1980). Where an allegation is made that a police officer has unreasonably "seized" a person under the Fourth Amendment, an "objective reasonableness" standard is employed. As explained in *US v Winfrey*, 915 F2d 212, 216 (CA 6, 1990):

> Not all encounters between the police and citizens are seizures within the meaning of the Fourth Amendment. . . . Police questioning, by itself, does not result in a Fourth Amendment violation. . . . The request for, and examination of, an airline ticket and driver's license do not amount to a seizure under the Fourth Amendment. . . .
>
> * * *
>
> A seizure, within the meaning of the fourth amendment, occurs only when a reasonable person, in view of the circumstances surrounding the encounter with law enforcement officials, believes he is not free to leave. [Citations omitted.]

See also *US v Borrero*, 770 F Supp 1178, 1185 (ED Mich, 1991).

Thus, a police officer who requests biographical information of a witness may do so without subjecting the witness to such *significant* intrusion on his liberty as to constitute an arrest or seizure

under the Fourth Amendment. The United States Constitution guarantees only against *unreasonable* search and seizure, i.e., a limited search or detention without articulable suspicion, and "significant pretrial restraint of liberty" without probable cause. *Baker v McCullen*, 443 US 137, 142-143; 99 S Ct 2689; 61 L Ed 2d 433 (1979). See also *Winfrey, supra; Borrero, supra*.

In the instant case, in addition to the contested instruction set forth above, the trial court instructed the jury that

> A restraint is not unlawful if it meets the requirements of a temporary investigative detention. If a police officer has a reasonable suspicion based on articulable facts that a crime may have been or is being committed, suspects can be temporarily detained even against their will to allow further investigation of crime.

Reading the instructions as a whole, we conclude that the jury in the instant case was properly instructed regarding the theory of false imprisonment brought under 42 USC 1983. The jury was correctly instructed that a brief detention for reasonable purposes, and reasonably conducted based on reasonable suspicion, is permissible. *Winfrey, supra*; *Borrero, supra*. The trial court's insertion of the modifying word "significantly" into the standard jury instruction therefore accurately reflects the elements of the underlying federal constitutional claim and does not constitute an abuse of discretion.

III

Plaintiffs next claim that the trial court erroneously instructed the jury regarding the circumstances under which non-weapons property may be seized. Plaintiffs contend that they are entitled to a new trial because the trial court failed to mention the requirement of probable cause.

However, we need not address the merits of this claim because plaintiffs concede that "the three plaintiffs who were allowed to present this issue to the jury are no longer part of this appeal" and the present plaintiffs have neither had property seized nor have surrendered property to defendants. Plaintiffs therefore lack standing to pursue this issue. *Sirovey v Campbell*, 223 Mich App 59, 67; 565 NW2d 857 (1997); *Michigan Bell Telephone Co v Public Service Comm*, 214 Mich App 1, 5; 542 NW2d 279 (1995).

In any event, plaintiffs failed to raise a timely objection to the instruction as given and thus have waived the issue on appeal. Given the inapplicability of the challenged instruction to the present plaintiffs, no manifest injustice occurred. *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997).

IV

Plaintiffs allege further instructional error, claiming that in contravention of *People v Lolly*, 113 Mich App 567, 570; 317 NW2d 342 (1982), the trial court improperly instructed the jury that a police officer could search incident to a warrantless arrest for a misdemeanor on probable cause alone or without probable cause. Plaintiffs also maintain that the trial court did not instruct the jury that a search

conducted under exigent circumstances requires probable cause. *People v Houze*, 425 Mich 82, 90; 387 NW2d 807 (1986) (opinion by Cavanagh, J.).

This issue has not been preserved by objection and hence has been waived for appellate review. *Phinney, supra*. Based on the testimony of record, we find no manifest injustice that would require reversal of the jury verdict. *Id*. It is apparent from the testimony of the sole affected plaintiff, Elaine Catt, that whatever search was conducted occurred within the scope of the investigation and was based on her decision to open her purse when asked if she was paid for palm reading. According to her testimony, she volunteered to show the police officer $25 in her purse. Although she had more money in her pocket, she did not consent to the police officer seeing it, and she was not searched beyond her consent. The jury instructions which were given concerning consensual search sufficiently and accurately advised the jury regarding the applicable law. Plaintiffs' argument is therefore without merit.

V

Plaintiffs next contend that the trial court erred in dismissing their selective enforcement claims. We disagree.

Plaintiffs alleged in their fourth amended complaint that the ordinance in question was selectively enforced against plaintiffs "but not against other restaurants or others who tell or purport to tell the future for gain, such as weather forecasters, stockbrokers or economic analysts, doctors, or parole board members," and "not against a certain spiritualist church," thus violating plaintiffs' right to equal protection and religious freedom.

Plaintiffs maintain that the trial court sua sponte entered summary disposition in favor of defendants on this claim, without a motion to dismiss or for summary disposition ever having been filed that related specifically to the selective enforcement claim.

However, the record indicates that defendants filed comprehensive pretrial motions for summary disposition, plaintiffs answered, and in response thereto, the trial court issued a twenty-three page written opinion, in which it ruled on the various motions for summary disposition, concluding in pertinent part that "[p]laintiffs are therefore entitled to proceed to the finder of fact on issues of false arrest, certain of their allegations of illegal search and seizure, and certain allegations of deprivation of property without due process of law." In so doing, the trial court did not specifically address plaintiffs' selective enforcement claim. However, immediately prior to trial, the parties engaged in oral argument concerning this issue, and the trial court ruled as follows:

> Well, the debate can go on interminably because of the, I believe four Amended Complaints that were filed in this case, as to exactly what claims were made and as to exactly what theories.
>
> But for this record and for this trial, the day of trial, the Court is going to rule that the Court's Order and finding on order of December the 5th, left standing only

> those claims specifically stated therein, in that finding. That is illegal arrest, illegal search and seizure and illegal deprivation of property. Selective enforcement or failure to enforce the law uniformly, shall be – not be made a claim before this jury.

Thus, adequate procedural foundation existed for a ruling on the merits of plaintiffs' claim and the trial court did not sua sponte dismiss the selective enforcement issue.

This Court reviews a trial court's determination regarding motions for summary disposition de novo. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). A motion for summary disposition under MCR 2.116(C)(10) tests whether factual support exists for the claim. The trial court considers the affidavits, pleadings, depositions, admissions, and other admissible documentary evidence within the action. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). The court's task is to review the record evidence and all reasonable inferences therefrom and determine whether a genuine issue of material fact exists to warrant a trial. *Id*. In reviewing a trial court's summary disposition decision, this Court makes all legitimate inferences in favor of the nonmoving party. *Id* at 162.

The courts recognize the civil claim of denial of equal protection by selective enforcement. *Oyler v Boles*, 368 US 448, 455-456; 82 S Ct 501; 7 L Ed 2d (1962). A selective enforcement claim requires a plaintiff to demonstrate (1) membership in a protected group; (2) a prosecution; (3) that others in a similar situation not members of the protected group would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent. *Futernick v Sumpter Twp*, 78 F3d 1051, 1056 n 7 (CA 6, 1996). Selective enforcement can lead to § 1983 liability if the plaintiff pleads "purposeful discrimination" intended to accomplish some forbidden aim, *id*. at 1056, or it is clear that selective enforcement is intended to discourage or punish the exercise of a constitutional right. *Id*. at 1057. Only arbitrary classifications can serve as a basis for selective enforcement liability. *Id*. at 1058.

The plaintiff must make at least a prima facie showing that similarly situated persons outside his category were not prosecuted. *Stemler v City of Florence*, 126 F 3d 856, 873 (CA 6, 1997). The "standard is a demanding one": there is a strong presumption that state actors have properly discharged their official duties and to overcome that presumption, a plaintiff must present clear evidence to the contrary. *Id.* As noted by the *Oyler* Court, *supra* 368 US at 456, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" if "the selection was [not] deliberately based on an unjustifiable standard." See also *Futernick, supra* at 1056.

Our review of the evidence on record reveals a dearth of evidence demonstrating even the requisite elements of a selective enforcement claim. Plaintiffs have not demonstrated that they were prosecuted because they were members of a protected group. Moreover, there is no indication that the investigation undertaken by defendants was motivated by either a desire to foreclose the exercise of constitutional rights or purposeful discrimination intended to accomplish a forbidden aim. To overcome the presumption that defendants were properly engaged in the carrying out of their duties, plaintiffs were required to put forth evidence tending to show a desire or intent on the part of defendants to punish plaintiffs for a protected act rather than an intent to concentrate limited resources on the most notorious or easy to locate violators. *Futernick, supra* at 1056, n 7. Plaintiffs have not done so. In the absence

of a genuine issue of material fact concerning this claim, the trial court properly dismissed plaintiffs' selective enforcement theory of recovery.

VI

During pretrial proceedings, the trial court granted defendants' motion in limine, which requested that plaintiffs be prohibited from making any mention of the repeal (subsequent to the defendants' actions in this case) of both the statute and ordinance, *supra*, that were the foundations of the police raid at the restaurant. The court found such evidence to be irrelevant, thus eliminating the issue whether the City of Battle Creek had been indifferent to the alleged constitutional problems presented by the statute and ordinance. In conjunction with this ruling, the trial court granted summary disposition in favor of defendants on the basis of qualified immunity regarding plaintiffs' claims of infringement of their First Amendment rights.

On appeal, plaintiffs contend that the trial court improperly excluded the evidence regarding the repeal of the statute and ordinance and further, that it erroneously granted summary disposition in favor of defendants on the basis of qualified immunity regarding plaintiffs' First Amendment claims. We disagree.

A trial court's decision to grant or deny a motion in limine is reviewed for an abuse of discretion. *Kochovian v Allstate Ins Co*, 168 Mich App 1, 12; 423 NW2d 913 (1988); *Bartlett v Sinai Hospital*, 149 Mich App 412, 417-418; 385 NW2d 801 (1986).

It is acknowledged by plaintiffs that the individual defendants in this matter can claim good-faith immunity under the tests enunciated in *Mitchell v Forsyth*, 472 US 511, 524-530; 105 S Ct 2806; 86 L Ed 2d 411 (1985) and *Harlow v Fitzgerald*, 457 US 800; 102 S Ct 2727; 73 L Ed 2d 396 (1982). Under the standard of qualified immunity, a government official is entitled to immunity so long as his actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow, supra* 457 US at 818. An official is immune unless his actions violated "clearly established" law. *Id*.

It is significant to note, as did the trial court in its written findings, that at the time of the investigation, the state of the law was unsettled regarding the constitutional status of laws similar to the ordinance or statute in question. In *People v Elmer*, 109 Mich 493; 67 NW 550 (1896), our Supreme Court upheld a defendant's conviction under the law that prohibited fortune telling. Further, 1993 PA 282, which repealed those sections of the Michigan Penal Code prohibiting fortune-telling for money or gain, was introduced and became effective April 1, 1994, *after* the defendant's actions in the present case. The city ordinance at issue was repealed following the repeal of the statute by the Legislature. Consequently, it cannot reasonably be concluded that defendants' actions clearly violated established law at the time. We therefore agree with the trial court that the allegation that the city attempted to enforce a law that was clearly unconstitutional or a law that had been repealed by the Legislature is without merit and that the exclusion of evidence regarding the repeal of the statute and ordinance was warranted.

Defendant City of Battle Creek cannot similarly assert the good-faith qualified immunity of its employees and policy makers, *Owen v City of Independence, Mo*, 445 US 622; 100 S Ct 1398; 63 L Ed 2d 673 (1980). 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." *Id*. at 631, quoting *Monell v New York Dep't of Social Services*, 436 US 658, 694; 98 S Ct 2018; 56 L Ed 2d 611 (1978). Plaintiffs have failed to demonstrate that the city made it a practice or policy to enforce suspect or unconstitutional laws, particularly where the "policy" consisted of enforcement of an ordinance that was not even being considered for repeal at the time of the investigation and the viability of which had not yet been questioned.

In conclusion, the trial court properly granted defendants' motion in limine prohibiting any reference to the alleged unconstitutionality of the ordinance and its repeal. Given the status of the law, any mention of the repeal of the ordinance by the city, following the Legislature's action in repealing the statute, would not have been probative of any material issue in the case and would have been unfairly prejudicial to all defendants. MRE 402, 403. Related to this conclusion, the trial court's dismissal on the basis of qualified immunity of plaintiffs' First Amendment claims was proper under the circumstances.

VI

Finally, plaintiffs contend that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant City of Battle Creek regarding the claim of negligent training of the city police officers. Plaintiffs assert that the officers sent out to investigate the psychic readings at the restaurant were given no guidance regarding the appropriate manner to investigate the alleged activity and as a result engaged in actions that violated the constitutional rights of plaintiffs. The trial court, in its written findings, held that plaintiffs had failed to submit sufficient evidence to establish a genuine factual question supporting the proposition that defendant city permitted training deficits to exist in the areas of arrest, search and seizure. We find no error in this conclusion.

A municipality may be held liable in certain circumstances for constitutional violations caused by its failure to train employees. *City of Canton v Harris*, 489 US 378, 387; 109 S Ct 1197; 103 L Ed 2d 412 (1989). Where "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. . . . [F]ailure to provide proper training may fairly be said to represent a policy for which the city is responsible." *Id*. However, a single incident of allegedly unconstitutional activity is insufficient to impose liability unless proof exists that the incident was caused by an existing unconstitutional municipal policy that can be attributed to a policy maker. *Oklahoma City v Tuttle*, 471 US 808; 105 S Ct 2427; 85 L Ed 2d 791 (1985).

Other than the incident in question, plaintiffs have failed to show other instances of alleged unlawful arrest or illegal search and seizure so as to make the city aware that claimed deficiencies in

training existed. Further, plaintiffs have not set forth proofs demonstrating the "deliberate

indifference" essential to such a claim. Therefore, we hold that the trial court properly granted summary disposition in favor of defendant city on this issue.

Affirmed.

/s/ Stephen J. Markman
/s/ Richard Allen Griffin
/s/ Kathleen Jansen

[1] The ordinance provided that "[n]o person shall engage in fortune telling or pretend to tell fortunes for hire, gain or reward."

[2] MCL 750.267; MSA 28.478 states in pertinent part:

> Any person who shall pretend for money or gain, to predict future events by cards, tokens, trances, the inspection of the hands . . . shall be guilty of a misdemeanor.

[3] At oral argument, plaintiffs' counsel argued a narrow definition of "fortune telling" and refused to admit that it had occurred.

[4] As to the present appeal, the only remaining plaintiffs are the owners of the restaurant in question, Jane Wilkinson and Lee Wilkinson, Pizza Merchants, Inc., and psychic Elaine Catt. Of the original defendants, several were dismissed from the suit prior to trial or appeal as to them has been abandoned. The present appellees consist of the City of Battle Creek, six police officers, and the chief of police.