STATE OF MICHIGAN

COURT OF APPEALS

LARRY L. FAIRCHILD,

Plaintiff-Appellant,

v

BUENA VISTA CHARTER TOWNSHIP, THOMAS LYNCH, III, JOHN PAROTT, ROBERT PARRENT, DENNIS WILLIMS, and JULIUS BOARDEN,

Defendants-Appellees,

and

STEVEN BENNETT,

Defendant.

UNPUBLISHED
February 10, 2004

No. 241506
Saginaw Circuit Court
LC No. 95-007000-CZ

Before: Fitzgerald, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition in favor of defendants in this case involving a search of plaintiff's waste facility. We affirm.

I

This case has a protracted history and is before this Court for the third time. Plaintiff filed this trespass action against defendants, Buena Vista Charter Township and various township inspectors, after they entered plaintiff's property on October 30, 1991, in conjunction with officials of the Department of Natural Resources (DNR)[1] who were executing a search warrant pertaining to the alleged disposal of solid waste. Defendants conducted various

[1] Since the time of the search at issue, the Michigan Department of Natural Resources (DNR) has been reorganized, and the DNR officials involved in this case are now part of the Department of Environmental Quality (DEQ).

inspections, which resulted in an order to terminate utility services to plaintiff's facility because of fire and safety hazards.

In the first appeal, this Court reversed the trial court's grant of summary disposition by order of March 12, 1997, finding that "plaintiff's complaint facially pleads a viable cause of action for trespass as a constitutional tort." After further proceedings, the trial court again granted summary disposition in favor of defendants.

In a second appeal, this Court reversed the grant of summary disposition, with regard to all individual defendants except Bennett, holding that defendants' inspections exceeded the scope of the warrant and therefore were not shielded from liability for trespass.[2] *Fairchild v Buena Vista Charter Twp*, unpublished per curiam opinion of the Court of Appeals, Docket No. 210557, issued September 28, 1999. However, the panel remanded the case for a "determination of whether defendants' inspections fell within the pervasively regulated industry exception to the warrant requirement." *Id*. at 3.

On remand, the trial court conducted an extensive hearing over eight days and again granted summary disposition for defendants, concluding that their actions fell within the pervasively regulated industry exception to the warrant requirement. The court further concluded that defendants' search was proper under the plain view exception to search warrants. In regard to the latter conclusion, the court found "that the Defendants were properly on the premises under the authorized search warrant and that observations by DNR representatives were appropriately made of dangerous conditions justifying the closure of the Plaintiff's business."[3] We concur in this latter conclusion and affirm the trial court's grant of summary disposition on that basis.

II

This Court reviews de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

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[2] The previous panel concluded that Bennett, a police officer, did not exceed the scope of the warrant because the authority for assistance in providing security and detaining plaintiff's employees is implied in a search warrant founded on probable cause.

[3] On appeal, plaintiff objects to this ruling on the basis that defendants did not "plead" plain view; however, plaintiff has not properly argued the merits of his objection. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

III

As an initial matter, plaintiff claims that the trial court erred in conducting an evidentiary hearing on remand.[4] He argues that the trial court should have decided whether his business fell within the pervasively regulated industry exception on the evidence presented before the previous appeal to this Court. The trial court rejected this argument, as do we.

Plaintiff cites no specific authority for this contention and, in argument below, relied largely on the fact that this Court's prior opinion did not direct that additional evidence be received. However, "[w]hen an appellate court remands a matter to the trial court, the court may take any action that is consistent with the appellate court's opinion." *Allstate Ins Co v Miller (After Remand)*, 226 Mich App 574, 580; 575 NW2d 11 (1997). This Court's prior opinion stated:

> Defendants also argued that they were protected from liability for trespass because their presence and activities on plaintiff's premises were authorized under the "pervasively regulated industry" exception to the search warrant requirement. In *Tallman v Dep't of Natural Resources*, 421 Mich 585, 617-619; 365 NW2d 724 (1984), our Supreme Court adopted this exception to the search warrant requirement, which allows for warrantless inspections of pervasively regulated businesses under certain circumstances. Defendants argue that their inspections fell within the pervasively regulated industry exception because plaintiff's business was subject to the Solid Waste Management Act, MCL 299.401 *et seq*.; MSA 13.29(1) *et seq*., which provides for entry upon licensed solid waste facilities at any reasonable time for the purpose of inspecting or investigating conditions at the facility. MCL 299.415(3); MSA 13.29(15)(3). Plaintiff disputes that his business was subject to the act, characterizing his business as a recycling plant. *This Court has not been provided with enough information to determine whether defendants' inspections fell within the pervasively regulated industry exception. Because the trial court did not rule on this issue, we remand for the court to determine whether the exception applied to defendants' inspections.*[5]

The trial court's action of conducting an evidentiary hearing is consistent with this Court's prior opinion. *Allstate Ins Co, supra.* Although plaintiff pointed out that the opinion states that "the trial court did not rule on this issue" and remanded for the trial court to "determine" whether the exception applied, the opinion also notes that this Court was not provided with enough information to determine this issue. If this Court lacked sufficient

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[4] We note that plaintiff's argument does not coincide with his questions presented. Technically, plaintiff's statement of the questions does not claim error in the court's decision of the substantive issue decided on remand. Nonetheless, we address both the procedural and substantive issues raised.

[5] The SWMA was repealed by 1994 PA 451, and reenacted in the same or substantially the same form as part of the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*. Solid waste is currently governed by MCL 324.11501 *et seq*.

information to determine the issue, it is implicit that the record was insufficient, and additional evidence and argument may be necessary for a proper determination. Plaintiff's claims pertaining to the hearing are without merit.[6]

III

The trial court's determination that defendants' inspections fell within the pervasively regulated industry exception to the warrant requirement was not improper given the previous panel's decision and remand. However, in light of the evidence adduced in the evidentiary hearing, which was not before the previous panel, we are convinced that the facts and the law legitimately place this case in the context of a search and seizure emanating from a valid warrant rather than the pervasively regulated industry exception. We conclude that defendants' inspections are properly upheld on the basis of the search warrant, plain view and exigent circumstances.[7]

A. Validity of Defendants' Search Pursuant to the DNR Warrant

In the previous appeal, this Court held that the criminal search warrant issued to the DNR did not authorize the inspections that defendants conducted or the seizure of electricity. *Fairchild, supra,* slip op p 2. As authority for this ruling, the Court cited *People v Cyr*, 113 Mich App 213, 227; 317 NW2d 857 (1982), which merely states the general rule that a search warrant must describe the premises to be searched and the property to be seized with particularity, and the executing officers must narrowly follow that description. However, in *People v Wilson,* 257 Mich App 337; 668 NW2d 371 (2003), issued after the previous panel's decision in this case, this Court discussed the legal contours of pretextual search warrants, and cited several cases in which the evidence seized pursuant to a warrant was not suppressed even though the warrant was unrelated to that evidence. Given the factual circumstances revealed on remand in this case, the analysis and holding in *Wilson* provide authority for upholding defendants' search and seizure in conjunction with the DNR search under the warrant.

In *Wilson*, officers investigating an automobile dealership allegedly involved in a stolen vehicle crime ring obtained a warrant to search the defendant's home for tax records because he had financial dealings with the dealership and had represented himself as an agent of the dealership. *Id*. at 340-341, 357. The officers discovered two vehicles that had replacement parts from stolen vehicles and were missing their identification labels. *Id*. at 340-341. The defendant argued "that the search warrant for financial and tax records that authorized the officers'

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[6] We also reject plaintiff's additional argument that defendants waived any claim of the pervasively regulated industry exception, although this argument is moot in light of our decision. Plaintiff waived this claim by failing to timely appeal any error in the previous panel's decision.

[7] Disposition on this basis is not precluded by the law of the case doctrine because the previous panel did not hold that defendants' entry was illegal, but only that defendants' search exceeded the scope of the warrant. The law of the case doctrine holds that a ruling by an appellate court with regard to a particular issue binds the appellate court and all lower tribunals with respect to that issue. *Driver v Hanley (After Remand),* 226 Mich App 558, 565; 575 NW2d 31 (1997).

presence in his home was a ruse to gain entry and examine the vehicles, and that the officers' examination of the VINs of various parts of the vehicles in the garage exceeded the scope of the warrant, and that the plain view exception was inapplicable." *Id*. at 350-351. The Court disagreed, citing several federal cases with circumstances similar to those in this case. *Id*. at 357.

In *United States v Ewain*, 88 F3d 689 (CA 9, 1996), a postal inspector had information that the defendant was counterfeiting mailbox keys and trading them for methamphetamine, but the inspector did not have sufficient probable cause for a warrant for mail theft. *Wilson, supra* at 353. The worker informed a state narcotics detective, who arranged a controlled buy and then obtained a warrant to search for evidence of drug dealing. *Id*. The narcotics detective asked the postal inspector to join the search under the warrant because the worker was skilled at detecting evidence of postal crimes. *Id*. at 353-354. The court denied suppression of the postal theft evidence obtained in the search. *Id*. at 354. The court found that the fact that the narcotics officer brought the postal inspector along on the search was not determinative because the crucial question was whether the officers confined the search to the areas relevant to the warrant. *Id*. at 354-355.

In *United States v Van Dreel*, 155 F3d 902 (CA 7, 1998), the police were investigating the defendant for drug violations. During two authorized searches of his property, they found little evidence of drugs, but did find evidence of hunting violations. *Wilson, supra* at 356. State DNR officers then obtained a new search warrant to search for evidence of deer-poaching violations, including carcasses, documentation of meat sales, weapons, ammunition, and other relevant items. During the search, a drug task force officer, who joined the search hoping to find evidence of drug dealing, pushed forward the seat of a junked pickup truck and found plastic wrap stained with a suspicious red grease, which linked the defendant to another suspected drug trafficker, whose car had a secret compartment containing the same red grease. *Id*. at 356. The court denied the defendant's motion to suppress the drug evidence, finding that the drug officer did not exceed the limits of the hunting-violation warrant when he looked under the truck seat because this was a place where he might have found ammunition, an item listed in the search warrant. *Id*. at 356-357.

Given these decisions, and similar rulings by the United States Supreme Court, the *Wilson* Court held that as long as the warrant was valid, and the officers confined their search to areas permitted by the warrant, their subjective intent was irrelevant. *Id*. at 356. Further, the fact that auto-theft investigators were involved in a search related to tax violations did not alter the analysis, provided the search was properly limited, even if the officers expected to find evidence of stolen vehicle parts. *Id*. at 357-358. Further, the Court held that the search of the vehicles was permissible under the plain-view doctrine. *Id*. at 361.

Applying this line of authority to the facts of this case supports a conclusion that defendants' search validly followed from the warrant issued the DNR. Defendants and the DNR officers testified that they joined the search at the request of the DNR pursuant to the DNR's warrant. Testimony established that defendants followed the DNR officers into plaintiff's building and stood near the office while the DNR officers' searched records in the office. Defendants observed the electrical hazards in plain view. The plain-view exception to the warrant requirement allows an officer to seize items in plain view if the officer is lawfully in the position to have that view and the evidence is obviously incriminatory. *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996); *Wilson, supra* at 361. The plain-view exception is

predicated on convenience. *Champion, supra* at 101. "It would be unreasonably inconvenient to require the police, once they have made a valid intrusion and have discovered probable evidence in plain view, to leave, obtain a warrant, and return to resume a process already in progress." *Id.* at 102.

Once defendants encountered the electrical hazards in plain view, they were entitled on the basis of their statutory authority and exigent circumstances to take action to eliminate the hazard. Thus, we conclude that defendants' entry was proper in conjunction with the DNR search, and their subsequent inspection of the electrical panel was proper under the plain view exception to the search warrant requirement. Similarly, their action of requesting a shut-off of the utilities was also proper.

B. Pervasively Regulated Industry Exception

Our above conclusion renders moot the question whether defendants' search is valid under the pervasively regulated industry exception, although we believe the trial court reached the correct result in this regard under the unique factual circumstances of this case, where the search and seizure occurred in conjunction with the DNR search warrant.[8] We leave the adoption of the pervasively regulated industry exception, and appropriate limitations, to the proper case.

Affirmed.

/s/ Janet T. Neff

I concur in result only.

/s/ E. Thomas Fitzgerald

[8] As plaintiff points out, defendants did not emphasize the pervasively regulated business exception in argument before the lower court until after this Court's remand. In effect, the issue arose by default. That is, it is apparent that defendants' entry on plaintiff's property was not intended as a warrantless administrative inspection.