STATE OF MICHIGAN
IN THE ISABELLA COUNTY TRIAL COURT

THEODORE VISNER and KATHY SMITH,

Plaintiffs,

v

SHELLY SWEET; ROBERT WHEELER; LARRY BEAN; SHERIFF'S DEPUTY CLINTON STEINERT, in his official capacity; CLINTON STEINERT, personally; ISABELLA COUNTY UNDERSHERIFF JOHN TELLIS, in his official capacity; ISABELLA COUNTY SHERIFF LEO MIODUSZEWSKI, in his official capacity; ISABELLA COUNTY PROSECUTING ATTORNEY, LARRY BURDICK, in his official capacity; ISABELLA COUNTY SHERIFF'S DEPARTMENT; and ISABELLA COUNTY,

Defendants.

Case No.
11-9480-CK

Hon. Paul H. Chamberlain

OPINION AND ORDER
ON DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION
AND DEFENDANT ROBERT WHEELER'S MOTION TO SET ASIDE DEFAULT

I. FACTS

Plaintiffs resided in a home owned by defendant Sweet (Sweet). Plaintiff Smith (Smith) allegedly entered into a "lease purchase contract" with Sweet to purchase the property. Plaintiffs tendered payment to Sweet pursuant to the contract. Plaintiffs claim that when Smith's sister fired Sweet from her job, Sweet breached the contract and attempted to sell the property. When plaintiffs demanded that Sweet refund the money they paid, Sweet allegedly refused. Sweet also instituted eviction proceedings. On August 10, 2010, plaintiffs filed for Chapter 7 bankruptcy. Plaintiffs claim that because their bankruptcy attorney failed to file an appearance in the eviction action, and plaintiffs failed to appear, the court entered a default judgment against them.

On September 27, 2010, plaintiffs allegedly noticed that someone had entered the home and changed the locks. Plaintiffs called 911 to receive assistance from law enforcement.

Defendant Steinert (Steinert) arrived at the scene. Sweet and defendant Wheeler (Wheeler) also arrived on the scene. Steinert asked plaintiffs to leave the scene because Sweet possessed a Notice of Intent to Sell from the bankruptcy court and determined she had rightful possession. Plaintiffs left the premises and plaintiff Visner (Visner) went to the Isabella County Sheriff's Department (ICSD). Visner filed a complaint against Steinert with the ICSD. Visner returned to the property and allegedly saw Sweet and Wheeler remove plaintiffs' personal property from the home. Steinert returned to the scene to address the issue. During such time, Smith arrived with a notice of hearing on a motion to set aside the default judgment against plaintiffs. When Steinert reviewed the such document, he allowed plaintiffs to reenter the home.

Plaintiffs entered the home and Visner allegedly noticed many personal items missing. He again called 911 to report a larceny. Plaintiffs claim that the ICSD dispatcher told them that Steinert would not accept calls from them in regard to the property. Visner called several more times. Eventually, Steinert returned to the property and arrested Visner for misuse of the emergency 911 system. The Michigan Attorney General's office dropped such charges after an investigation.

On September 28, 2011, plaintiffs filed a complaint against Sweet, Wheeler, Steinert, the ICSD and the County of Isabella (County). Plaintiffs alleged eleven counts. Plaintiffs filed an amended complaint on October 19, 2011, in which they added six more counts and sued the following additional defendants: Bean, Undersheriff Tellis (Tellis), and Prosecutor Larry Burdick (Burdick).

This court granted summary disposition in favor of Bean on March 16, 2012. On August 10, 2012, this court entered a stipulated order in which the parties agreed to allow plaintiffs to file a second-amended complaint. Plaintiffs alleged the following claims in such complaint: unlawful interference with possessory interest; statutory and common-law conversion; gross negligence; civil rights violations; false arrest and imprisonment; and abuse of process. The parties stipulated to dismiss Burdick on September 19, 2012. On September 28, 2012, the clerk entered a default against Wheeler for his failure to respond or defend against plaintiffs' second-amended complaint.

The County defendants filed a motion for summary disposition. This court grants their motion. Sweet filed a motion for summary disposition. This court grants her motion. Wheeler filed a motion to set aside the default and a motion for summary disposition. This court grants his motions.

II. ANALYSIS[1]

A. County Defendants' Motion for Summary Disposition

Defendants first claim that ICSD is not a proper party to this lawsuit. This court agrees. A sheriff's department is an agency of the county in which the sheriff was elected; as such, it is not a legal entity susceptible to liability or lawsuit. See *Bayer v Almstadt*, 29 Mich App 171, 173-175; 185 NW2d 40 (1970); *McPherson v Fitzpatrick*, 63 Mich App 461, 464; 234 NW2d 566 (1975); see also *Sumner v Wayne County*, 94 F Supp 2d 822, 827 (ED Mich, 2000). Thus, this court grants defendants' motion for summary disposition against the ICSD.

[1] Pursuant to MCR 2.116(D)(3) and (4), this court reviews defendants' motions despite the fact that they were filed after the original deadline, i.e. August 10, 2012.

Defendants next claim that the County is immune from plaintiffs' tort claims pursuant to the Michigan Governmental Tort Liability Act, MCL 691.1401 *et seq*. MCL 691.1407 states in pertinent part:

> (1) Except as otherwise provided in this act, a governmental agency[2] is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function . . .
>
> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> > (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
> >
> > (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
> >
> > (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.
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> * * *
>
> (7) As used in this section:
>
> > (a) 'Gross negligence' means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Further, MCL 691.1401(b) states:

> 'Governmental function' means an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. Governmental function includes an activity performed on public or private property by a sworn law enforcement officer within the scope of the law

[2] The parties do not dispute whether the County is a "governmental agency" for purposes of this motion. See also MCL 691.1401(a) and (e).

enforcement officer's authority, as directed or assigned by his or her public employer for the purpose of public safety.

In this case, plaintiffs' allegations against the County arise from its operation of the ICSD and the actions of the Sheriff and his deputies. First, the parties do not dispute that operating and administrating a sheriff's department is a governmental function. See *Graves v Wayne County*, 124 Mich App 36, 41; 333 NW2d 740 (1983); *Mack v City of Detroit*, 467 Mich 186, 204; 649 NW2d 47 (2002). Secondly, a county is not responsible for the acts of its sheriff. Const 1963, art 7, § 1; see *Bayer, supra* at 175. Likewise, a sheriff is not liable for the acts, defaults, or misconduct of any deputy sheriff in the course of the deputy's duties. MCL 51.70; *Bridgman v Bunker*, 12 Mich App 44, 47; 162 NW2d 310 (1968). Therefore, the County is immune from plaintiffs' claims against it with regard to the Sheriff's actions, and the Sheriff is immune from plaintiffs' claims against him for the acts, defaults, or misconduct of any of his deputies, i.e. Tellis and Steinert. However, the County may be liable for the alleged wrongs committed by a deputy sheriff under the doctrine of *respondeat superior*. See *Graves, supra* at 42-43.

An employer-defendant may be vicariously liable for its employee's intentional torts if the employee committed such torts while acting during the course of employment and within the scope of the employee's authority. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 624-625; 363 NW2d 641 (1984); *Slanga v City of Detroit*, 152 Mich App 220, 223-224; 393 NW2d 487 (1986). However, a governmental agency can only be held vicariously liable for its employee's torts if the alleged tortfeasor acted as described in the two conditions above, and was "engaged in a nongovernmental or proprietary function or an activity which falls within a statutory exception." *Slanga, supra* at 224. As the Court explained in *Ross*:

> Where the individual tortfeasor is acting on behalf of an employer, the focus should be on the activity which the individual was engaged in at the time the tort was committed. A governmental agency can be held vicariously liable only when its officer, employee, or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity which is nongovernmental or proprietary, or which falls within a statutory exception. The agency is vicariously liable in these situations because it is in effect furthering its own interests or performing activities for which liability has been statutorily imposed. However, if the activity in which the tortfeasor was engaged at the time the tort was committed constituted the exercise or discharge of a governmental function (*i.e.*, the activity was expressly or impliedly mandated or authorized by constitution, statute, or other law), the agency is immune pursuant to [MCL 691.1407] of the governmental immunity act. [*Id.* at 625.]

In this case, Steinert was a deputy sheriff and Tellis served as Undersheriff. As such, they served the County through the direction of the Sheriff. Among other duties, a deputy sheriff has the authority to preserve the peace and to arrest and detain a person who violates a public offense. *Leelanau County Sheriff v Kiessel*, 297 Mich App 285; ___NW2d___ (2012); see also *People v Vasquez*, 465 Mich 83, 88; 631 NW2d 711 (2001) ("[A]n officer's efforts to 'keep the peace' include ordinary police functions that do not directly involve placing a person under arrest").

Steinert arrived at the property in response to a "civil complaint, reference a landlord-tenant issue." (8/3/2012 Deposition of Clinton Steinert, "CS," 10.) He received such request to respond from Central Dispatch. *Id.* Steinert testified that he remained on the scene to "keep the peace and to make sure that no criminal action had occurred and nobody was assaulted." *Id.* at 12. He further stated that on this initial visit, he did not interfere with anyone entering or exiting the residence, nor did he observe anyone remove any property, and that once he felt the situation was under control, he left. *Id.* at 13. Central dispatch received another call from Visner and Steinert returned to the property. *Id.* at 14. Steinert testified that on this second trip to the property, he admonished Visner not to call the 911 number any longer because such number is intended for emergency purposes only, not civil complaints. *Id.* at 23. He further testified that on this visit, he asked Visner to leave the property because "he was being loud and obnoxious." *Id.* at 27; see also (7/20/2012 Deposition of Kathy Smith, "KS," 35.) Steinert left the property, but returned a third time in response to Visner's report that a larceny occurred in the home. (CS, 19-20.) At this point, Steinert arrested Visner for misuse of the 911 emergency system. *Id.* at 29. Finally, while plaintiffs claim that Tellis failed to protect plaintiffs' interests in the property and that he violated Visner's rights when Steinert arrested him, the record is absolutely devoid of any evidence that Tellis appeared on the property or participated in Visner's arrest. In fact, the record only reveals that Tellis aided Visner when Visner filed a complaint against Steinert with the ICSD. (KS, 39.); (Affidavit of Ted Visner, 3.)

Thus, this court finds that the County is not vicariously liable for the actions of Steinert or Tellis. Steinert arrived at the property to keep the peace and eventually arrested Visner for misusing the 911 system. Tellis only dealt with Visner when he accepted Visner's written complaint of Steinert. Both deputy sheriffs acted during the course of their employment and within the scope of their authority when dealing with plaintiffs. Further, the record does not reveal that either deputy sheriffs engaged in a "nongovernmental or proprietary function." *Slanga, supra.* Moreover, plaintiffs failed to show and the record does not show that any statutory exception exists to prevent the County from asserting its governmental immunity. *Id.* Accordingly, this court grants defendants' motion with regard to plaintiffs' claims that the County is vicariously liable for the actions of Steinert or Tellis.

Defendants next claim that plaintiffs' claims against the individual defendants, i.e. the Sheriff, Steinert, and Tellis, are barred by governmental immunity. This court agrees. In *Odom v Wayne County*, 482 Mich 459; 760 NW2d 217 (2008), the Michigan Supreme Court developed the following pertinent analysis for whether an individual may claim governmental immunity:

> (1) Determine whether the individual is a judge, a legislator, or the highest-ranking appointed executive official at any level of government who is entitled to absolute immunity under MCL 691.1407(5).
>
> (2) If the individual is a lower-ranking governmental employee or official, determine whether the plaintiff pleaded an intentional or a negligent tort.
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> * * *
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> (4) If the plaintiff pleaded an intentional tort, determine whether the defendant established that he is entitled to individual governmental immunity under the *Ross* test by showing the following:

(a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,

(b) the acts were undertaken in good faith, or were not undertaken with malice, and

(c) the acts were discretionary, as opposed to ministerial. [*Id.* at 479-480.]

The governmental employee bears the burden to raise and prove that he or she is entitled to such immunity as an affirmative defense. *Id.* at 479.

This court first notes that the sheriff, as an elected executive official of Isabella County and acting within the scope of his authority, is absolutely immune from plaintiffs' claims against him. MCL 691.1407(5); See *Am Transmissions, Inc v Attorney General*, 454 Mich 135, 139; 560 NW2d 50 (1997); see also *Rose v Saginaw County*, 353 F Supp 2d 900, 924 -925 (ED Mich, 2005). Further, plaintiffs do not allege that the Sheriff acted in any manner that would render him liable in tort. Therefore, this court grants defendants' motion for summary disposition as it relates to plaintiffs' claims against the Sheriff.

With regard to Steinert and Tellis, both individuals are lower-ranking governmental employees and plaintiffs claim that they committed intentional torts[3], i.e. conversion, false arrest, false imprisonment, and abuse of process. As discussed above, both defendants acted during the course of employment and acted, or reasonably believed they acted, within the scope of their authority.

The second prong of the analysis cited above requires Steinert and Tellis to show that they acted in good faith. An employee acts in good faith when he or she acts without malice or "a wonton or reckless disregard of the rights of another." *Odom, supra* at 474. Steinert arrived at the property twice before he arrested Visner. (CS, 10, 14, 29.) Both times he visited the property, he advised Visner that the dispute between plaintiffs and Sweet was a civil matter. (CS, 10-11, 17, 23); (KS, 35); (8/3/2012 Deposition of Shelly Sweet, "SS," 23, 32-34). On Steinert's second visit, he asked Visner to leave the property. (CS, 27);(KS, 35); (SS, 37.) He testified that he did not threaten to arrest Visner on either the first or second visit. (CS, 29.) While the parties dispute the time at which Steinert instructed Visner not to call the 911 system with regard to the civil complaint, they agree that Steinert did so before he arrested Visner. (CS, 14, 16, 20, 22-23, 29); (KS, 46-47.) The record suggests that Visner called the 911 system approximately six times before Steinert arrested him for misuse of such system. (KS, 45-46.); See Audio CD attached to Plaintiff's Brief in Opposition of Defendants' Motion for Summary Disposition. Steinert testified that before he left the second time, he told Visner "to quit misusing the 911 system for a civil complaint." (CS, 23.) Further, the record reveals that Steinert gave Smith his business card the second time he visited the property, which contained a non-emergency phone number through which plaintiffs could reach him. (KS, 44-45, 47.) In fact, Smith actually called Steinert at the number he provided to her on his business card after

[3] While plaintiffs entitled Count 4 of their Complaint, "Gross Negligence," they appeared to do so in order to plead facts that would defeat the County's governmental immunity. See MCL 691.1407(2)(c). This court previously decided such issue and held that the County is not vicariously liable for the other employee defendants in this case.

she and Visner searched the home together. (KS, 44-45.) Moreover, Steinert testified that he made approximately one or two calls to plaintiffs from a non-emergency number at the ICSD and instructed them not to call the 911 system for the ongoing civil dispute. (CS, 16, 22-23.); (KS, 44, 46-47.) The record also indicates that Tellis gave Visner a business card with his cellular phone number on it and that Visner actually called such number on September 27, 2010. Affidavit of Undersheriff Tellis, ¶¶ 3-4.

Thus, this court finds that Steinert acted in good faith when he arrested Visner. From Steinert's perspective, it seems that his good-faith belief that Visner misused the 911 system despite having an alternative number stems from the fact that he personally warned Visner not to call the 911 system, warned him on the phone through a non-emergency number, and provided Smith with an alternative number, to which she called after searching the home with Visner. Even when this court views the facts in a light most favorable to plaintiffs, the record does not suggest that Steinert acted with any malice against Visner. Steinert arrived at the property twice before he arrested Visner and instructed Visner to call him personally. Visner chose to continue to call the 911 system. Further, the record does not show that Steinert acted with "a wonton or reckless disregard" of Visner's rights. *Odom, supra*. Therefore, Steinert established the second element of individual governmental immunity.

Finally, Steinert must establish that his acts were discretionary. "Discretionary acts" are acts that require "personal deliberation, decision and judgment." *Ross, supra* at 634. Several Michigan courts have held that an officer's decision to arrest an individual is discretionary. *Oliver v Smith*, 290 Mich App 678, 689-690; 810 NW2d 57 (2010); *Watson v Quarles*, 146 Mich App 759, 764; 381 NW2d 811 (1985). Thus, this court finds that Steinert's decision to arrest Visner was discretionary, not ministerial. Accordingly, this court finds that Steinert's actions are protected by individual governmental immunity and it grants defendants' motion for summary disposition on this issue.

Steinert next argues that plaintiffs' claims against him pursuant to 42 USC 1983 are barred by governmental immunity. This court agrees. 42 USC 1983 states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

In an action brought under 42 USC 1983, a government official performing discretionary functions is entitled to qualified or good-faith immunity " 'insofar as [the official's] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Guider v Smith*, 431 Mich 559, 565; 431 NW2d 810 (1988), quoting *Harlow v Fitzgerald*, 457 US 800, 818; 102 S Ct 2727; 73 L Ed 2d 396 (1982). "For a constitutional right to be clearly established, 'the law must be clear in regard to the official's particular actions in the particular situation.' " *Thomas v McGinnis*, 239 Mich App 636, 644-645;

609 NW2d 222 (2000), quoting *Walton v Southfield*, 995 F2d 1331, 1335 (CA 6, 1993). The Court in *Walton* held:

> Thus the particular conduct of the official must fall clearly within the area protected by the constitutional right, such that a reasonable official would have known that his or her conduct violated the constitutional right . . . . This 'objective reasonableness' standard focuses on whether defendants reasonably could have thought that their actions were consistent with the rights that plaintiff claims have been violated. [*Id.* at 1336.]

Further, immunity is not available if the official knew or should have known that the actions would violate the plaintiff's constitutional rights or if the official acted with the malicious intention to deprive the plaintiff of his constitutional rights or otherwise injure the plaintiff. *Thomas, supra* at 645.

In this case, plaintiffs first claim that Steinert violated Visner's Fourth and Fourteenth Amendment rights when he arrested Visner without probable cause. See US Const, Ams IV and XIV. A plaintiff may not recover under 42 USC 1983 on a claim of false arrest if the defendant establishes that probable cause to arrest existed. *Tope v Howe*, 179 Mich App 91, 107; 445 NW2d 452 (1989). Probable cause that a particular person has committed a crime " 'is established by a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in the belief that the accused is guilty of the offense charged.' " *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 19; 672 NW2d 351 (2003), quoting *People v Coutu (On Remand)*, 235 Mich App 695, 708; 599 NW2d 556 (1999). "Probable cause" is not a finely tuned standard, nor is its meaning susceptible to precise articulation; instead, it is a fluid concept that can only be applied in context. *Ornelas v. United States*, 517 US 690, 697; 117 S Ct 1657; 134 L Ed 2d 911 (1996). Finally, whether the plaintiff could actually have been convicted is irrelevant because actual innocence is not an element of false arrest. *Peterson, supra* at 18.

The crime for which Steinert arrested Visner was for misuse of the 911 emergency system as proscribed by MCL 484.1605. MCL 484.1605 states in pertinent part:

> (1) A person shall not use an emergency 9-1-1 service authorized by this act for any reason other than to call for an emergency response service from a primary public safety answering point.
>
> * * *
>
> (4) This section does not apply to a person who calls a public safety answering point to report a crime or seek assistance that is not an emergency unless the call is repeated after the person is told to call a different number.

As stated above, Steinert arrived at the property twice before he arrested Visner. (CS, 10, 14, 29.) The parties do not dispute that Steinert repeatedly told Visner that the situation was a civil matter and that plaintiffs and defendant Sweet would have to settle it in court. (CS, 10-11, 17, 23); (KS, 35); (SS, 23, 32-34). Before Steinert arrested Visner, Visner called the 911 system six times to report a crime. (KS, 45-46.); See Audio CD attached to Plaintiff's Brief in Opposition

of Defendants' Motion for Summary Disposition. Each time, Central Dispatch informed Visner that Steinert was handling the situation and on several calls, Central Dispatch instructed Visner that he or she would have Steinert call Visner. See Audio CD attached to Plaintiff's Brief in Opposition of Defendants' Motion for Summary Disposition. After Steinert responded to the property twice, he informed Central Dispatch not to dispatch him to the property because he believed that Visner was misusing the 911 system. (CS, 14, 20, 23.) He also testified that after his second visit, he called plaintiffs and warned them not to misuse the 911 system. *Id.* at 16. Additionally, and as held above, the parties dispute the time at which Steinert instructed Visner not to call the 911 system, but they agree that Steinert did so before he arrested Visner. (CS, 14, 16, 22-23, 29); (KS, 46-47.) Further, Smith had Steinert's business card that contained a non-emergency number through which she could reach Steinert. (KS, 44.) Smith used such number after she searched the home with Visner. *Id.* at 44-45. Finally, Tellis gave Visner a business card, which contained his cellular phone number to use for non-emergency purposes, and Visner actually called such number on September 27, 2010. Affidavit of Undersheriff Tellis, ¶¶ 3-4.

Thus, this court finds that probable cause to arrest Visner existed. The record suggests that a reasonable suspicion existed to believe that Visner called the 911 system repeatedly and for non-emergency purposes, and that he was not only told to use a different, non-emergency number, but that he had possession of or access to two such numbers. Therefore, Steinert did not falsely arrest him or violate Visner's constitutional rights. Further, this court finds that Tellis and the Sheriff are not liable because Steinert did not incur any tortious liability. Accordingly, this court grants defendants' motion for summary disposition on this issue.

Plaintiffs claim that Steinert violated plaintiffs' constitutional rights to possess their property when Steinert arrived at the property and helped Sweet essentially evict them. In support of their argument, plaintiffs cite *Soldal v Cook County, Ill*, 506 US 56; 113 S Ct 538; 121 L Ed 2d 450 (1992). In *Soldal*, the owner of a mobile home park filed an eviction action against the plaintiff. *Id.* at 58. Before the owner received a judgment in her favor, she contacted the sheriff's department and requested that the officers assist the eviction "to forestall any possible resistance." *Id.* The owner's employees, while accompanied by the deputy sheriffs, removed the plaitniff's home and hauled it to another property. *Id.* at 59. The deputy sheriffs knew that the owner did not have an eviction order and that the owner's actions were unlawful. *Id.* When the plaintiff attempted to file a criminal-trespass complaint against the owner before she removed the home, the deputy sheriffs informed the plaintiff that they would not accept the complaint and told him it was landlord-tenant dispute. *Id.* at 58-59. The United States Supreme Court reversed the Court of Appeals and held that the deputy sheriffs dispossessed the plaintiff of his home, which amounted to a " 'seizure' within the meaning of the Fourth Amendment." *Id.* at 72. As such, the Court held that the plaintiff was entitled to the Fourth Amendment's protection from unreasonable seizures. *Id.* at 71-72. Thus, the Court held that the plaintiff could maintain an action under 42 USC 1983 against the deputy sheriffs and the county. *Id.*

In this case, Sweet regained possessed of the property on September 26, 2010. (SS, 15.) She testified that she based her decision to take possession of the property and to change the locks on a Notice of Intent to Sell she filed with the bankruptcy court. *Id.* Together with Wheeler, Sweet removed certain items from the home. *Id.* at 16. On September 27, 2010, Sweet and Wheeler returned to the property and noticed plaintiffs in the driveway. *Id.* at 22, 37. Sweet contacted Central Dispatch through the 911 system in order to "get some help out there so there wouldn't be an issue with former tenants." *Id.* Smith also called the 911 system to report that the locks were changed and she could not access the home. (KS, 27.) Steinert arrived and

informed the parties that it was a civil matter that they would have to resolve in court. (SS, 23, 32); (CS, 11-12.) Steinert testified that he was only present to "keep the peace and to make sure that no criminal action had occurred and nobody was assaulted." (CS, 12.) He further stated that he was not present when Sweet and Wheeler removed any property or when they changed the locks, and that he did not demand any documents of ownership from the parties. *Id.* at 18,23; see also (SS, 35.) Sweet stated that Steinert did not order her to give the keys to plaintiffs; instead, she stated that after she spoke with her attorney, she turned the property over to plaintiffs. *Id.* at 34.

Smith testified that she informed Steinert that there was a hearing scheduled for the next day to set aside the default judgment of eviction entered against her and Visner. (KS, 36, 39.) She stated that Steinert told her that Sweet was the rightful owner of the property based on the Notice of Intent to Sell. *Id.* at 36-37. Smith stated that Steinert asked her and Visner to leave the property and they complied. *Id.* at 38. Visner went to the ICSD and spoke with Tellis. *Id.* Visner told Smith to show Steinert the court documents for the motion to set aside the default, which she did. *Id.* Once Steinert saw the documents, Smith claims that he granted possession back to her and Visner. *Id.* at 42.

This court distinguishes this case from the *Soldal* case for several reasons. First, Sweet originally possessed the property before Steinert arrived. She changed the locks and removed property when Steinert was not present. Secondly, Steinert did not enter the property with the knowledge that Sweet's actions were unlawful. He merely informed the parties that the situation was a civil matter and that they would have to settle it in court. Finally, the record does not reveal that Steinert did much more than keep the peace between the parties. He was not present when Sweet regained possession of the property and he originally determined she was in possession of such property under color of right through the Notice of Intent to Sell. When Smith showed Steinert the notice of hearing for the motion to set aside the default, he then permitted plaintiffs to take possession of the home. However, he testified that he did not prevent anyone from entering the home, nor did he permit anyone to enter the home. (CS, 13.) The record shows that Steinert merely served as a type of buffer or medium between the parties.

Thus, this court finds that Steinert did not unreasonably "seize" the property, much less that he "seized" it at all. This court further finds that Steinert did not violate plaintiffs' constitutional rights. Accordingly, this court grants defendants' motion for summary disposition on this issue.

Finally, the County claims that it is not liable pursuant to 42 USC 1983 because it did not create or implement policies that violated any of plaintiffs' constitutional rights. A governmental entity cannot be found liable under 42 USC 1983 on a *respondeat superior* theory. *Payton v City of Detroit*, 211 Mich App 375, 398; 536 NW2d 233 (1995). Rather, such liability can be imposed only for injuries inflicted pursuant to a governmental "policy or custom." *Jackson v City of Detroit*, 449 Mich 420, 433; 537 NW2d 151 (1995), citing *Monell v Dep't of Social Services of New York City*, 436 US 658, 694; 98 S Ct 2018; 56 L Ed 2d 611 (1978). A plaintiff must establish a direct causal link between the policy or custom and the particular constitutional violation. *Payton, supra* at 398-399. Further, the policy or custom "must originate with the decisionmaker possessing final policy-making authority with respect to the omission or commission at issue." *Jackson, supra* at 434. A governmental entity may be liable under 42 USC 1983 if it had a policy or custom of failing to train its employees and such failure caused the constitutional violation. *Payton, supra* at 400, citing *Collins v Harker Heights*, 503 US 115, 121; 112 S Ct 1061; 117 L Ed 2d 261 (1992). In *Collins*, the Court held:

> [T]he inadequate training of police officers could be characterized as the cause of the constitutional tort if-and only if-the failure to train amounted to 'deliberate indifference' to the rights of persons with whom the police come in contact. [*Id.* at 123-124.]

In this case, this court first notes that it found that neither Steinert nor Tellis violated plaintiffs' constitutional rights. Thus, there was no constitutional violation that resulted from any policy or custom the County created or implemented. Further, while Steinert testified that he has not had any training in serving process for eviction cases, he claims that he did receive general training where he learned to distinguish civil from criminal cases. (CS, 24-26.) Plaintiffs do not claim they were improperly served with a notice of eviction, which would be the only issue that would concern Steinert. Quite simply, the record does not contain any evidence that would suggest the County created or implemented a policy or custom that caused any constitutional violation. Thus, this court grants defendants' motion for summary disposition on this issue.

Accordingly, on reviewing the record in a light most favorable to plaintiffs, this court finds that no genuine issues of material fact exist as to any of plaintiffs' claims against the County defendants. Therefore, this court grants their motion for summary disposition.

B. Defendant Shelly Sweet's Motion for Summary Disposition

Sweet first claims that she is entitled to summary disposition pursuant to MCR 2.116(C)(7) because plaintiffs' claim under MCL 600.2918 is barred by the one-year statute of limitations period found in the same statute. When deciding a motion under MCR 2.116(C)(7), the court accepts the non-moving party's well pleaded allegations as true and construes them in the non-moving party's favor. *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000). In doing so, the court must consider the pleadings, affidavits, depositions, admissions, and documentary evidence filed or submitted by the parties to determine whether a genuine issue of material fact exists." *Id;* MCR 2.116(G)(5). If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7), including a claim barred by the applicable statute of limitations, is a question of law for the court to decide. *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995). "However, if a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate." *Id.*

MCL 600.2918 states in pertinent part:

> (1) Any person who is ejected or put out of any lands or tenements in a forcible and unlawful manner, or being out is afterwards held and kept out, by force, if he prevails, is entitled to recover 3 times the amount of his actual damages or $200.00, whichever is greater, in addition to recovering possession.
>
> (2) Any tenant in possession of premises whose possessory interest has been unlawfully interfered with by the owner, lessor, licensor, or their agents shall be entitled to recover the amount of his actual damages or $200.00, whichever is

greater, for each occurrence and, where possession has been lost, to recover possession. Unlawful interference with a possessory interest shall include:

(a) The use of force or threat of force.

(b) The removal, retention, or destruction of personal property of the possessor.

(c) A change, alteration, or addition to the locks or other security devices on the property without forthwith providing keys or other unlocking devices to the person in possession.

(d) The boarding of the premises which prevents or deters entry.

(e) The removal of doors, windows, or locks.

(f) Causing, by action or omission, the termination or interruption of a service procured by the tenant or which the landlord is under an existing duty to furnish, which service is so essential that its termination or interruption would constitute constructive eviction, including heat, running water, hot water, electric, or gas service.

(g) Introduction of noise, odor or other nuisance.

(3) The provisions of subsection (2) shall not apply where the owner, lessor, licensor, or their agents can establish that he:

(a) Acted pursuant to court order or

* * *

(c) Believed in good faith the tenant had abandoned the premises, and after diligent inquiry had reason to believe the tenant does not intend to return, and current rent is not paid.

* * *

(6) An action to regain possession of the premises under this section shall be commenced within 90 days from the time the cause of action arises or becomes known to the plaintiff. An action for damages under this section shall be commenced within 1 year from the time the cause of action arises or becomes known to the plaintiff.

In this case, Sweet changed the locks and regained possession of the property on September 26, 2010. When plaintiffs arrived at the property on September 27, 2010, they discovered Sweet made such changes that effectively dispossessed them of the property.

Plaintiffs filed their complaint on September 28, 2011. Thus, Sweet claims that plaintiffs failed to comply with MCL 600.2918(6) because they filed their complaint more than one year after their claim arose; as such, Sweet claims that the statute of limitations bars their complaint.

Alternatively, plaintiffs claim that Sweet waived such affirmative defense. Affirmative defenses, such as a statute of limitations defense, must be stated in a party's responsive pleading. MCR 2.111(F)(3). "[A] defendant waives a statute of limitations defense by failing to raise it in his first responsive pleading." *Walters v Nadell*, 481 Mich 377, 389; 751 NW2d 431 (2008). A defendant may cure such failure to raise an affirmative defense in the first responsive pleading by amending the pleading pursuant to MCR 2.118. *Florence Cement Co v Vettraino*, 292 Mich App 461, 475-476; 807 NW2d 917 (2011). Here, Sweet did not assert a statute of limitations defense in her answer to the complaint or her answer to plaintiffs' first-amended complaint. Thus, Sweet waived such defense at this juncture.

However, Sweet requested that this court grant her leave to amend her first-amended answer to include such affirmative defense. A party may amend a pleading only by leave of the court or by written consent of the adverse party and leave must be freely given when justice so requires. MCR 2.118(A)(2). A motion for leave to amend should ordinarily be granted absent "any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment." *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000). Further, the amendment relates back to the original date of the original pleading if the amendment arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. MCR 2.118(A)(2).

Sweet claims that originally, neither she nor plaintiffs hired counsel to represent them. She claims that plaintiffs' complaint and first-amended complaint were convoluted due to their contents and format. When plaintiffs hired counsel, they filed a second-amended complaint that made plaintiffs' allegations much clearer and even eliminated some of their original claims. Sweet raised her statute-of-limitations affirmative defense in her second-amended answer. Due to the unique posture of this case, this court finds that no undue delay, bad faith, or dilatory motive exists on Sweet's behalf. Further, with regard to "undue prejudice," prejudice in this context does not mean that the allowance of the proffered amendment may cause the opposing party to ultimately lose on the merits. *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 657; 213 NW2d 134 (1973). Rather, "prejudice" exists if the amendment would prevent the opposing party from receiving a fair trial, if for example, the opposing party would not be able to properly contest the matter raised in the amendment because important witnesses have died or necessary evidence has been destroyed or lost. *Id.* at 663. Moreover,

> [a] trial court may find prejudice when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial. [*Weymers v Khera*, 454 Mich 639, 659-660; 563 NW2d 647 (1997).]

Sweet included the one-year statute of limitations in her answer to plaintiffs' second-amended complaint, which provided plaintiffs with adequate notice that she would rely on such

affirmative defense. Additionally, the statute of limitations Sweet relies on is stated directly in the statute, i.e. MCL 600.2918, on which plaintiffs base their claim. They cannot reasonably claim they were unaware of such limitation. Therefore, this court grants Sweet's motion to amend her answer pursuant to MCR 2.118. This court further finds that because Sweet included such affirmative defense in her answer to plaintiffs' second-amended complaint, requiring her to file a new answer that would presumably allege the same affirmative defenses would be redundant. Thus, this court finds that plaintiffs' claim against Sweet under MCL 600.2918 is barred by the statute of limitations set forth in MCL 600.2918(6). Accordingly, this court grants Sweet's motion for summary disposition on this issue pursuant to MCR 2.116(C)(7).

Finally, Sweet claims that plaintiffs cannot maintain a conversion claim against her because they are not the real parties in interest for the personal property they claim she converted. Sweet claims that when plaintiffs filed for bankruptcy, their possessions became a part of the bankruptcy estate. 11 USC 541 states in pertinent part:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> > (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

Plaintiffs filed for bankruptcy on August 10, 2010. Thus, their possessory interest in the estate vested with the trustee and became a part of their bankruptcy estate. Therefore, Sweet could not have converted such personal property from plaintiffs because they had no possessory interest in the property. Accordingly, this court grants Sweet's motion for summary disposition on this issue.

C. Defendant Robert Wheeler's Motions to Set Aside Default and for Summary Disposition

On August 16, 2012, plaintiffs served Wheeler with their second-amended complaint. Pursuant to an August 10, 2012 stipulated order, Wheeler had 28 days to respond to plaintiffs' second-amended complaint, i.e. by September 13, 2012. The clerk entered a default against Wheeler on September 28, 2012, because he failed to respond or otherwise defend against plaintiffs' complaint. On October 8, 2012, Wheeler filed this motion to set aside the default.

MCR 2.603 governs default and default judgments. Subsection (A)(1) states that if a party against whom a judgment is sought has failed to plead or otherwise defend and that fact is made aware, then the clerk must enter default of that party. The decision to grant or deny a motion to set aside a default or a default judgment is within the discretion of the trial court. *Park v American Cas Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996).

MCR 2.603(D)(1) states:

> A motion to set aside a default or default judgment, except when grounded in lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts containing a meritorious defense is filed.

In addition, when the court's file shows proper proof of service, the entry of default is regular. *Dades v Central Mutual Auto Insurance Co*, 263 Mich 260, 262; 248 NW 616 (1933); *Thomas v Thomas*, 81 Mich App 499, 501; 265 NW2d 390 (1978). MCR 2.603(2) states that if personal service was made on the party against whom the default is taken, the default and default judgment may be set aside only if the motion is filed before entry of a default judgment or if a default judgment has been entered, within 21 days after the default judgment was entered.

MCR 2.603(D)(1) establishes that, to set aside a default, a defendant must demonstrate both good cause and a meritorious defense. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999); *Saffian v Simmons*, 477 Mich 8, 14; 727 NW2d 132 (2007). It is important that the "good cause" and "meritorious defense" elements of a motion to set aside be considered separately. *Alken-Ziegler, supra* at 229-234. In order to establish good cause, a party must show: (1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 221; 760 NW2d 674 (2008). However, "[m]anifest injustice is not an independent factor in establishing good cause. It is the result that would occur if a default were allowed to stand *after* a party had demonstrated good cause and a meritorious defense." *Saffian v Simmons*, 267 Mich App 297, 301-302; 704 NW2d 722 (2005) (emphasis added).

Further, a party must file an affidavit of meritorious defense in addition to showing good cause in order to obtain relief from a default or default judgment. MCR 2.603(D); *Mason v Marsa*, 141 Mich App 38, 41-42; 366 NW2d 74 (1985). Finally, when considering each factor for setting aside a default judgment, the *Alken-Ziegler* court held:

> '[M]anifest injustice' is not a discrete occurrence such as a procedural defect or a tardy filing that can be assessed independently. Rather, manifest injustice is the result that would occur if a default were to be allowed to stand where a party has satisfied the 'meritorious defense' and 'good cause' requirements of the court rule. When a party puts forth a meritorious defense and then attempts to satisfy 'good cause' by showing (1) a procedural irregularity or defect, or (2) a reasonable excuse for failure to comply with the requirements that created the default, the strength of the defense obviously will affect the 'good cause' showing that is necessary. In other words, if a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense were weaker, in order to prevent a manifest injustice. [*Id.* at 233-234.]

In his motion, Wheeler claims that he signed the stipulated order to permit plaintiffs to file their second-amended on a condition that plaintiffs dismiss the County Prosecutor, Larry Burdick, from the lawsuit. Wheeler claims that plaintiffs' attorney did not dismiss Burdick by the date of case evaluation or by the date of his motion. However, the record reveals that the parties stipulated to a dismissal of Burdick on September 19, 2012. Wheeler filed his answer on October 8, 2012, which is within 28 days of the stipulated dismissal. Because Wheeler alleges he conditioned his stipulation to allow plaintiffs to file a second-amended complaint on Burdick's dismissal, this court finds that Wheeler presents good cause for his failure to file his answer until plaintiffs filed the stipulation, which he did within the 28-day deadline.

Further, while Wheeler failed to provide an affidavit of meritorious defense, he does

provide a meritorious defense because a ground for summary disposition pursuant to MCR 2.116(C)(8) exists, i.e. plaintiffs failed to state a claim against Wheeler upon which this court may grant relief. See *Shawl v Spence Bros, Inc*, 280 Mich App 213, 238-239; 760 NW2d 674 (2008). Wheeler assisted Sweet with her repossession of the property acting under her direction. Therefore, he asserts the same defenses she asserts. More specifically, Wheeler claims that he is not liable for converting plaintiffs' property because plaintiffs had no possessory interest in the property since it was the property of the bankruptcy estate. 11 USC 541. Additionally, this court finds that a manifest injustice would result if Wheeler was somehow solely liable for helping Sweet, despite the fact that this court dismissed her from this case because this court found that her actions were not improper. Thus, this court grants Wheeler's motion to set aside the default.

Finally, for the reasons stated above, this court grants Wheeler's motion for summary disposition because plaintiffs failed to state a claim against him upon which this court may grant relief. MCR 2.116(C)(8).

THEREFORE IT IS ORDERED that the County defendants' motion for summary disposition is granted.

IT IS FURTHER ORDERED that Sweet's motion for summary disposition is granted.

IT IS FURTHER ORDERED that Sweet's motion to amend her answer is granted.

IT IS FURTHER ORDERD that Wheeler's motion to set aside the default is granted.

IT IS FURTHER ORDERED that Wheeler's motion for summary disposition is granted.

This order resolves the last pending claim and closes the case.

Date: February 6, 2013

Hon. Paul H. Chamberlain P31682
Chief Judge
Isabella County Trial Court

STATE OF MICHIGAN
IN THE ISABELLA COUNTY TRIAL COURT

THEODORE VISNER and KATHY SMITH,

Plaintiffs,

v

SHELLY SWEET; ROBERT WHEELER; LARRY BEAN; SHERIFF'S DEPUTY CLINTON STEINERT, in his official capacity; CLINTON STEINERT, personally; ISABELLA COUNTY UNDERSHERIFF JOHN TELLIS, in his official capacity; ISABELLA COUNTY SHERIFF LEO MIODUSZEWSKI, in his official capacity; ISABELLA COUNTY PROSECUTING ATTORNEY, LARRY BURDICK, in his official capacity; ISABELLA COUNTY SHERIFF'S DEPARTMENT; and ISABELLA COUNTY,

Defendants.
/

Case No.
11-9480-CH

Hon. Paul H. Chamberlain

PROOF OF SERVICE

Matthew N. Hagen, an employee of the Isabella County Trial Court, certifies that **February 6, 2013**, he served a copy of the OPINION AND ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION AND DEFENDANT ROBERT WHEELER'S MOTION TO SET ASIDE DEFAULT, on the following individuals by placing the same in an envelope addressed to the following individuals, placing proper postage on it, and placing it into the United States Mail:

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Matthew N. Hagen
Law Clerk

FILED
FEB 07 2013
COUNTY CLERK
ISABELLA COUNTY
MT. PLEASANT, MICH.