

STATE OF MICHIGAN
COURT OF APPEALS

LARRY L. FAIRCHILD,

Plaintiff-Appellant,

v

BUENA VISTA CHARTER TOWNSHIP,
THOMAS LYNCH, III, JOHN PARROTT,
ROBERT PARRENT, DENNIS WILLIAMS,
JULIUS BOARDEN, and STEVEN BENNETT,

Defendants-Appellees.

UNPUBLISHED

September 28, 1999

No. 210557

Saginaw Circuit Court

LC No. 95-007000 CZ

Before: Talbot, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's opinion and order granting summary disposition to defendants pursuant to MCR 2.116(C)(10). Plaintiff brought a trespass action against defendant township and township officials arising from their entry onto his business premises where they conducted various inspections and ordered that his utility services be terminated. The trial court held that defendants were lawfully on plaintiff's premises under the authority of a search warrant issued to the Michigan Department of Natural Resources because the DNR had requested defendants' assistance in executing the warrant. We affirm in part and reverse in part.

We review de novo the trial court's summary disposition ruling to determine whether any genuine issue of material fact exists that would prevent entering judgment for defendants as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; ___ NW2d ___; *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

A trespass is defined as an unauthorized entry on the private property of another. *Adams v Cleveland-Cliffs Iron Co*, ___ Mich ___; ___ NW2d ___ (Docket No. 203481, issued August 6, 1999), slip op at 3-4; *Difronzo v Village of Port Sanilac*, 166 Mich App 148, 155; 491 NW2d 756 (1988). An authorized entry is therefore not a trespass. An initially authorized entry can become a trespass, however, if the authorization becomes invalid. *Antkiewicz v Motorists Mutual Ins Co*, 91 Mich App 389, 396; 283 NW2d 749, vacated in part on other grounds 407 Mich 936 (1979).

Therefore, even if defendants entered plaintiff's premises pursuant to legal authority, they may be held liable for trespass if they exceeded that authority.

A search warrant had been issued to the DNR, and the DNR asked defendants for assistance in executing the warrant. The warrant authorized the search of plaintiff's premises for various items, including business records, soil samples, and samples of the contents of storage containers. The warrant did not authorize the inspections that defendants conducted, however, nor did it authorize defendants to have plaintiff's company's power shut off. 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. *People v Cyr*, 113 Mich App 213, 227; 317 NW2d 857 (1982). Defendants' inspections exceeded the scope of the warrant; therefore, defendants are not shielded from liability for trespass, and the trial court erred in granting summary disposition to defendants on this basis.

One defendant, however, acted within the scope of the warrant. Defendant Steven Bennett was a police officer whose assistance was requested in providing security and detaining plaintiff's employees while the DNR executed the search warrant. The United States Supreme Court has held that a search warrant founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted. *Michigan v Summers*, 452 US 692, 705; 101 S Ct 2587; 69 L Ed 2d 340 (1981). Therefore, defendant Bennett did not exceed the scope of the warrant and was not liable for trespass. The trial court correctly granted summary disposition with regard to defendant Bennett.

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.

Plaintiff also argues that the trial judge was biased and should have granted his motion for disqualification. Defendant failed, however, to properly file a notice of hearing on that motion, and the trial court never ruled on the issue. By appearing at a subsequent hearing on an unrelated motion without further objecting to the trial judge's continued participation in the case, plaintiff tacitly agreed to the judge's continuing with the matter and has therefore failed to preserve this issue for appellate review. See *Reno v Gale*, 165 Mich App 86, 90-91; 418 NW2d 434 (1987). Therefore, this Court need not

review this issue but may do so to prevent manifest injustice. *Herald Co, Inc v City of Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998).

We conclude that no manifest injustice will result from failing to grant plaintiff relief because plaintiff failed to demonstrate actual bias or prejudice. *Cain v Dep't of Corrections*, 451 Mich 470, 494-495; 548 NW2d 210 (1996). Plaintiff's allegations of bias involve, at most, discourteous remarks. Such remarks ordinarily do not demonstrate actual bias. *Schellenberg v Rochester, Michigan Lodge No. 2225 of the Benevolent & Protective Order of Elks of the USA*, 228 Mich App 20, 39-40; 577 NW2d 163 (1998). Accordingly, plaintiff has failed to overcome the heavy presumption of judicial impartiality. *Cain, supra* at 497.

We affirm with respect to defendant Bennett, reverse with respect to all other defendants, and remand for a determination of whether defendants' inspections fell within the pervasively regulated industry exception to the warrant requirement. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey