

STATE OF MICHIGAN  
COURT OF APPEALS

---

TODD CAMERON CONNOLLY,

Plaintiff-Appellant,

v

COREY HAINES, GREGORY MULLINIX, SGT.  
GARY KOWALESKI, MICHAEL B. HARRIES,  
CITY OF MADISON HEIGHTS, JOHN  
LAWRENCE FURLONG, also known as DON  
FURLONG, and JOHN DOE #2,

Defendants-Appellees.

---

UNPUBLISHED

October 30, 2003

No. 239882

Macomb Circuit Court

LC No. 99-003385-NZ

Before: Owens, P.J., and Griffin and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from a grant of summary disposition in favor of defendants on all claims in this tort and Freedom of Information Act action based on plaintiff's arrest. We affirm.

Plaintiff first argues that the trial court erred in dismissing his abuse of process claim based on defendants' alleged violation of MCL 764.2a. We review this grant of summary disposition, apparently made pursuant to MCR 2.116(C)(10), de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court hearing the motion "considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial." *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The trial and appellate courts draw all reasonable inferences in the nonmoving party's favor. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995).

In order to recover for abuse of process, a plaintiff must show: "(1) an ulterior purpose, and (2) an act in the use of process that is improper in the regular prosecution of the proceeding." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992), citing *Friedman v Dozorc*, 412 Mich 1, 30-31; 312 NW2d 585 (1981). Even if a plaintiff shows an ulterior motive, his claim for abuse of process will not succeed unless he also shows "some irregular act in the use of process." *Friedman, supra* at 31. "[T]he mere harboring of bad motives on the part

of the actor without any manifestation of those motives will not suffice to establish an abuse of process.” *Vallance v Brewbaker*, 161 Mich App 642, 646; 411 NW2d 808 (1987), citing *Young v Motor City Apartments Ltd Dividend Housing Ass’n No 1 & No 2*, 133 Mich App 671, 682-683; 350 NW2d 790 (1984); *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 629-630; 403 NW2d 830 (1986).

This Court in *Three Lakes Ass’n v Whiting*, 75 Mich App 564, 573; 255 NW2d 686 (1977), quoting Prosser, *Torts* (4th ed), § 121, p 857, explained this cause of action as follows:

Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, but the use of the process as a threat or a club. *There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance of any formal use of the process itself, which constitutes the tort.* [Emphasis in original.]

And just as bad motives alone will not suffice, a mere procedural irregularity is not enough for a plaintiff to make a claim for abuse of process. *Vallance, supra* at 647.

Plaintiff takes a novel approach to his abuse of process claim by basing this tort cause of action on a violation of MCL 764.2a<sup>1</sup>, which provides:

A peace officer of a county, city, village, or township of this state may exercise authority and powers outside his own county, city, village or township, when he is enforcing the laws of this state in conjunction with the Michigan state police, or in conjunction with a peace officer of the county, city, village, or township in which he may be, the same as if he were in his own county, city, village, or township. [MCL 764.2a.]

Plaintiff advances this claim based on two theories. First, he argues that a civilian police dispatcher is not a “peace officer” as contemplated by MCL 764.2a. In the alternative, he argues that working “in conjunction with” a *police department* does not comport with the statute’s requirement that an out-of-jurisdiction *peace officer* work “in conjunction with” a peace officer from the jurisdiction in which he is acting. See *id.*

The trial court concluded that defendants acted properly outside their jurisdiction in pursuing plaintiff’s arrest in Sterling Heights – even if the arrest was pursued for an ulterior

---

<sup>1</sup> This statute was substantially revised by 2002 PA 483.

purpose. In the alternative, the court found that even if defendants failed to get the proper authority from the Sterling Heights Police Department, this failure to comply with MCL 764.2a was “a mere procedural irregularity and not an appropriate basis for an abuse of process claim.” This Court agrees with both conclusions.

As plaintiff points out, the statute does not define “peace officer.” But as plaintiff also points out, the term’s definition is fairly well settled by case law. This Court cited with approval the following definition of “peace officer,” which was adopted by our Supreme Court: “[G]enerally[,] it includes sheriffs and their deputies, constables, marshals, members of the police force of cities, and other officers whose duty is to enforce and preserve the public peace.” *Michigan State Employees Ass’n v Attorney General*, 197 Mich App 528, 531; 496 NW2d 370 (1992), quoting *People v Bissonette*, 327 Mich 349, 356-357; 42 NW2d 113 (1950). In addition, the Attorney General has interpreted MCL 764.2a’s phrase “in conjunction with” and determined this language “does not demand the actual physical presence” of an officer from the jurisdiction in which the arrest takes place. OAG 1976, No 5031, p 613 (September 17, 1976).

It is well settled that the purpose of MCL 764.2a “is not to protect the rights of criminal defendants, but rather to protect the rights and autonomy of local governments.” *People v Clark*, 181 Mich App 577, 581; 450 NW2d 75 (1989), citing *People v Meyer*, 424 Mich 143, 161, 165; 379 NW2d 59 (1985). Following plaintiff’s suggested interpretation of the statute would contravene this purpose and one of the principles of statutory interpretation – reading a statute in light of established common law. See *Nummer v Dep’t of Treasury*, 448 Mich 534, 544-545; 533 NW2d 250 (1995).

Defendants committed only a “mere procedural irregularity” in their arrest of plaintiff, see *Vallance, supra* at 647, and summary disposition was properly granted. The Madison Heights officers conducted surveillance in their own jurisdiction based on what they deemed a credible tip. They verified that the warrants for plaintiff were valid, and they made the Sterling Heights Police Department aware of their activities in Sterling Heights. Even drawing all inferences in plaintiff’s favor, *Bertrand, supra* at 617, there simply was no evidence creating a material factual question regarding whether the Madison Heights officers carried out the “process” to its “authorized conclusion” or whether they acted outside the scope of the process to gain some advantage from plaintiff. *Ritchie-Gamester, supra* at 76; *Three Lakes Ass’n, supra* at 573, quoting Prosser, Torts (4th ed), § 121. There is no evidence they wielded their power to arrest plaintiff on valid warrants as a “club” or as a means to coerce plaintiff in some way. *Id.*

Plaintiff next argues that defendants’ misuse of the Law Enforcement Information Network (LEIN) constitutes an abuse of process. We disagree and hold that the trial court properly granted summary disposition to defendants on this issue.

The LEIN allows police “to retrieve information regarding an individual’s driving record and to determine whether there are any outstanding warrants for his arrest.” *People v Walker*, 58 Mich App 519, 523; 228 NW2d 443 (1975). Use of the LEIN is strictly limited to “criminal justice agenc[ies]” and other enumerated governmental agencies whose duties are to “administer criminal justice” or “maintain[] vehicle registration and driver records.” 1981 AACS, R 28.5201(a)-(d). The administrative rule governing the dissemination of LEIN data expressly states, “The LEIN, or information received through the LEIN, shall not be used for personal reasons.” 1981 AACS, R 28.5208(3).

This case is distinguished from *Mitchell v Cole*, 176 Mich App 200, 209; 439 NW2d 319 (1989). Here, the LEIN was used to verify that plaintiff did, indeed, have valid warrants for his arrest. This check was done before surveillance was authorized on what was believed to be plaintiff's Madison Heights home. Plaintiff did not dispute that defendant Kowaleski was authorized to use the LEIN. The only argument plaintiff makes is that Kowaleski used the LEIN for personal reasons – i.e., to exact revenge on plaintiff on defendant Furlong's behalf. Contrary to plaintiff's argument, the circumstantial evidence in this case supports an inference that Kowaleski properly used the LEIN. Kowaleski did not depart from what apparently was the standard procedure as the defendant in *Mitchell* did. See *Mitchell, supra* at 208. It is good police practice to verify the validity of warrants before attempting to make arrests pursuant to those warrants.

There was even less evidence presented in support of plaintiff's abuse of process claim against defendant Furlong. Plaintiff makes a one-paragraph argument – without any supporting authority – stating simply that the trial court erred in determining that there was no evidence that defendant Furlong used his knowledge of the warrants to coerce plaintiff. This argument is not persuasive because there is, indeed, *no evidence of any kind* suggesting that defendant Furlong acted in furtherance of an illegitimate objective. *Three Lakes, supra* at 573, quoting Prosser, Torts (4th ed), § 121. As the trial court noted, although the evidence might support an inference that defendant Furlong harbored ill will toward plaintiff, there is no evidence supporting an inference that he committed the corroborative act that is required for a successful abuse of process claim.

Plaintiff next argues that defendant Madison Heights violated FOIA in failing to comply with his request for certain documents he claimed pertained to his arrest. We disagree. We review this issue de novo. *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 106-107; 649 NW2d 383 (2002), citing *Lincoln v General Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 73 (2000).

Plaintiff's arguments miss the point of the trial court's decision and, consequently, the reason for FOIA. It is clear that the trial court dismissed the FOIA claim based on the FOIA provision that states, "*This act does not require a public body to create a new public record, except as required in section 11, and to the extent required by this act for the furnishing of copies, or edited copies pursuant to section 14(1) of an already existing public record.*" MCL 15.233(5) (emphasis added). As a "disclosure" statute, FOIA creates a right to certain properly-requested information and a corresponding duty in a public body to provide access to that information. *Walloon Lake Water System, Inc v Melrose Twp*, 163 Mich App 726, 731; 415 NW2d 292 (1987), citing MCL 15.233(1)-(2); *Pennington v Washtenaw Co Sheriff*, 125 Mich App 556, 564; 336 NW2d 828 (1983); *State Employees Ass'n v Dep't of Management & Budget*, 428 Mich 104, 109; 404 NW2d 606 (1987). But "the FOIA does not require that information be recorded; it only gives a right of access to records in existence." *Walloon Lake, supra* at 731, citing *Bredemeier v Kentwood Bd of Ed*, 95 Mich App 767, 771; 291 NW2d 199 (1980).

Plaintiff does not argue on appeal that defendant Furlong was identified as the source of the tip regarding plaintiff's warrants. And, according to the trial court, Furlong's identity apparently was not documented anywhere.

The Court has reviewed the materials the parties have submitted, and it is not aware of any document which identifies Larry Furlong as the source of [defendants'] information regarding plaintiff's outstanding warrants. As such, regardless of whether Furlong could legitimately be considered a confidential source, plaintiff could not have inspected or obtained a document from defendant City identifying Furlong.

There simply is no duty to record information in order to comply with a FOIA request, and there is no duty to release information that is not recorded. See *Walloon Lake, supra* at 731, citing *Bredemeier, supra* at 771. Therefore, plaintiff's claim was properly dismissed.

Plaintiff's argument that he was entitled to fees and costs because he prevailed in his FOIA claim is not considered on appeal because it was not preserved for review by this Court. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992).

Plaintiff next argues that the trial court erred in denying his motion to amend his complaint to add alleged FOIA violations he purports to have found during discovery. This issue is reviewed for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). But because plaintiff did not adequately brief this issue, we deem it abandoned. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Finally, plaintiff argues that the trial court erred in granting defendant Furlong's motion for summary disposition. We disagree. We review this issue de novo. *Spiek, supra* at 337; *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). The trial court appears to have granted summary disposition on the civil conspiracy claim based on MCR 2.116(C)(8), and the other claims – abuse of process and intentional infliction of emotional distress – based on MCR 2.116(C)(10).

Summary disposition under MCR 2.116(C)(8) is appropriate when a party has failed to state a claim on which relief may be granted. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). This motion tests the legal sufficiency of a claim, and all “well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant.” *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A (C)(8) motion should be granted only “where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). The trial court will grant a motion for summary disposition brought under MCR 2.116(C)(10) where there is no genuine issue of material fact to warrant a trial. *Ritchie-Gamester, supra* at 76.

A civil conspiracy exists where two or more persons “by some concerted action” combine “to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means.” *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). In order to make a successful claim for civil conspiracy, “it is necessary to prove a separate, actionable tort.” *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986).

Defendant Furlong's motion for summary disposition was decided several months after all the other defendants had already been granted summary disposition in this case. He was the only remaining defendant. The trial court found this dispositive in granting his motion for summary disposition. This Court finds no fault with this reasoning. But it can also be noted that plaintiff's civil conspiracy claim against defendant Furlong was properly dismissed based on the trial court's dismissal of plaintiff's other claims against him. See *Early Detection Center, supra* at 632.

Affirmed.

/s/ Donald S. Owens  
/s/ Richard Allen Griffin  
/s/ Bill Schuette