

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY MINOR,

Plaintiff-Appellee,

v

CITY OF SYLVAN LAKE, JEFFREY FICK, and
OAKLAND COUNTY,

Defendants,

and

MARK SILVER,

Defendant-Appellant.

UNPUBLISHED
August 26, 2014

No. 314220
Oakland Circuit Court
LC No. 2010-109596-NO

JEFFREY MINOR,

Plaintiff-Appellee,

v

CITY OF SYLVAN LAKE, MARK SILVER, and
OAKLAND COUNTY,

Defendants,

and

JEFFREY FICK,

Defendant-Appellant.

No. 314230
Oakland Circuit Court
LC No. 2010-109596-NO

JEFFREY MINOR,

Plaintiff-Counterdefendant-
Appellee,

v

No. 316793
Oakland Circuit Court
LC No. 2010-109596-NO

CITY OF SYLVAN LAKE,

Defendant-Appellant,

JEFFREY FICK,

Defendant-Counterplaintiff,

and

MARK SILVER and OAKLAND COUNTY,

Defendants.

Before: MURPHY, C.J., and WHITBECK and TALBOT, JJ.

MURPHY, C.J. (*concurring*).

I respectfully disagree with the majority’s conclusion that there was no genuine issue of material fact that defendant police officer Jeffrey Fick had probable cause to arrest plaintiff Jeffrey Minor for violation of Sylvan Lake Ordinance, Part II, § 10-69, which makes it “unlawful for any owner to allow a dog to stray beyond his premises unless under the reasonable control of some person.” I conclude that there was documentary evidence sufficient to create a factual dispute regarding whether Fick had probable cause to arrest plaintiff for violation of the ordinance. I would hold, however, that the circumstances supported a conclusion that, as a matter of law, Fick had reasonable suspicion to briefly detain plaintiff to investigate a possible violation of the ordinance. And I would also conclude as a matter of law that plaintiff resisted and obstructed Fick during the attempted detention and that Fick therefore had probable cause to arrest plaintiff for resisting and obstructing a police officer in the performance of his duties. I would reverse on that basis.

Officer Fick testified in his deposition that he stopped his patrol car in front of plaintiff’s home because he observed the dog “run out – dart out to the road.” According to Fick, the dog had been in plaintiff’s yard when he first saw the animal, and the dog then ran into the street. The dog went only as far as the middle of the two-lane road. When the dog reached the center of the street, Fick heard plaintiff call for the dog. Fick then observed the dog immediately return to plaintiff in plaintiff’s yard. Fick later changed his testimony slightly, recalling that he may not have heard plaintiff call for the dog as his windows were rolled up, but the dog did quickly return to plaintiff’s property after first reaching the middle of the road. Fick claimed that he then rolled down his window and asked plaintiff his name and whether the dog belonged to plaintiff. Fick testified that plaintiff answered the questions. According to Fick, plaintiff acted “upset” in responding to his questions. Fick exited his patrol car to find out why plaintiff was upset and to issue plaintiff a ticket for violation of the ordinance. While Fick testified that the dog’s actions

in briefly darting into the road was not a big deal and that he would ordinarily have just given a warning, he chose to exercise his discretion and issue plaintiff a ticket.¹

Plaintiff testified that he was caring for the neighbor's dog, Molly, and that the dog was standing next to him in his driveway while plaintiff gardened and carried on a conversation with another neighbor who lived and was standing directly across the street from plaintiff's home. Plaintiff then turned away from the neighbor to attend to his gardening, and shortly thereafter plaintiff heard the neighbor yell, "No, Molly." Plaintiff testified that he spun around and saw Molly entering the street, at which time plaintiff yelled for her to get back. According to plaintiff, the dog quickly scampered back onto plaintiff's driveway, and plaintiff grabbed Molly by the collar and started leading her back to his home for a time-out. Plaintiff testified that it was then when Officer Fick rolled down his window and told plaintiff that they needed to talk. Plaintiff further testified that he informed Fick that he first needed to take the dog into the house and then they could talk. Plaintiff acknowledged that he was upset, but this was because Molly had run into the street and plaintiff was responsible for the dog. Plaintiff answered some initial questions posed by Fick, but then realized that Fick was being malicious and trying to give plaintiff a hard time. The majority opinion accurately describes what occurred thereafter, and plaintiff's conduct and actions can only be characterized as resisting and obstructing an officer in the performance of his duties. See MCL 750.81d.²

We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The applicability of governmental immunity and the statutory exceptions to immunity are likewise reviewed de novo on appeal. *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011). MCR 2.116(C)(7) provides for summary disposition when a claim is "barred because of . . . immunity granted by law" The movant may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The complaint's contents must be accepted as true unless contradicted by the documentary evidence. *Id.* This Court must consider the documentary evidence in a light most favorable to the nonmoving party for purposes of MCR 2.116(C)(7). *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). "If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide." *Id.* When, however, a relevant factual dispute does exist, summary disposition is not appropriate. *Id.*

The doctrine of qualified immunity protects a government official from liability for civil damages sought pursuant to 42 USC 1983 when the official's conduct does not violate clearly

¹ The prosecutor who handled the criminal charges against plaintiff testified in her deposition as follows: "[T]his is what I gathered from talking to Officer Fick, no one had ever been taken into custody or arrested for a dog at-large violation, that had never happened before."

² MCL 750.81d did not "abrogate[] the common-law right to resist illegal police conduct." *People v Moreno*, 491 Mich 38, 41; 814 NW2d 624 (2012). As explained below, I conclude, as a matter of law, that Fick made a lawful command to briefly detain plaintiff.

established constitutional rights of which a reasonable person would have been aware. *Stanton v Sims*, ___ US __; 134 S Ct 3, 4-5; 187 L Ed 2d 341 (2013). Qualified immunity provides government officials some breathing room to make reasonable but mistaken judgments, and it protects all but the plainly incompetent or officials who knowingly violate the law. *Id.* at 5. “If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.” *Atwater v City of Lago Vista*, 532 US 318, 354; 121 S Ct 1536; 149 L Ed 2d 549 (2001); see also MCL 764.15(1)(a). “Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). In *People v Cipriano*, 431 Mich 315, 342; 429 NW2d 781 (1988), our Supreme Court observed:

An arresting officer's subjective characterization of the circumstances surrounding an arrest does not determine its legality. Rather, probable cause to justify an arrest has always been examined under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved. [Citations omitted.]

Here, in my view, the documentary evidence gave rise to a factual dispute regarding whether Fick had probable cause to arrest plaintiff for violating the ordinance, which is a misdemeanor based on a presumption under the Sylvan Lake Code of Ordinances for ordinance violations that are not specifically designated as civil infractions, such as § 10-69. See Sylvan Lake Ordinance, Part II, § 1-7(b) (“Unless a violation of an ordinance is specifically designated in the text of the ordinance to be a municipal civil infraction, a violation shall be deemed to be a misdemeanor.”).³ Again, § 10-69 makes it a misdemeanor “for any owner to allow a dog to stray beyond his premises unless under the reasonable control of some person.” Given its misdemeanor status and the possibility of jail time, one must read a *mens rea* element into the ordinance for the reasons explained below, assuming that the word “allow” in the ordinance does not already require some type of criminal intent or knowledge.

³ Sylvan Lake Ordinance, Part II, § 1-7(c)(1)[a] provides:

A person convicted of violating an ordinance provision punishable as a misdemeanor shall be guilty of a misdemeanor, and shall be sentenced by the court for a period not to exceed 90 days in jail and/or ordered to pay a fine not to exceed \$500.00, unless the ordinance corresponds to a violation of state law that is a misdemeanor for which the maximum period of imprisonment is 93 days, in which case the sentence of the court shall be for a period not to exceed 93 days in jail and/or a fine not to exceed \$500.00.

“[C]riminal offenses that do not require a criminal intent are disfavored.” *People v Tombs*, 472 Mich 446, 453; 697 NW2d 494 (2005). There is a “longstanding presumption that all crimes require criminal intent.” *Id.* at 454. The United States Supreme Court “has expressly held that the presumption in favor of a criminal intent or *mens rea* requirement applies to each element of a statutory crime.” *Id.* at 454-455. The existence of *mens rea* is the rule of Anglo-American criminal jurisprudence, rather than the exception. *Id.* at 455. Silence with respect to criminal intent does not, by itself, suggest a legislative desire to dispense with the conventional *mens rea* element. *Id.* at 456. “Liability without criminal intent will not be found in the absence of an express or implied indication of congressional intent to dispense with the criminal intent element.” *Id.* at 453. The *Tombs* Court then reiterated that “[t]he Court will infer the presence of the [criminal intent] element unless a statute contains an express or implied indication that the legislative body wanted to dispense with it.” *Id.* at 454.

I see no express or implied indication in § 10-69 that the city’s legislative body intended to dispense with the criminal intent element and make it a strict-liability ordinance. See *People v Janes*, 302 Mich App 34, 37-38; 836 NW2d 883 (2013) (concluding that a statute making it a crime to own a dangerous animal causing injury, MCL 287.323[2], although silent as to criminal intent, must be construed to require proof that the owner knew that his or her animal was dangerous; it is not a strict-liability offense). Indeed, the term “allow,” as used in § 10-69, would suggest that criminal liability does not arise unless the owner intentionally permitted his or her dog to stray off the property or had knowledge that the dog was straying and did nothing. See *Random House Webster’s College Dictionary* (2001) (first definition for the word “allow” is “to give permission to or for; permit”). Absent a *mens rea* requirement, an individual’s dog could bolt from a home’s door that was momentarily and accidentally left open, with the owner then facing arrest and a potential jail sentence under § 10-69 if the dog runs beyond the property line. In my opinion, the ordinance must be read to encompass only those situations in which a dog’s owner intentionally or knowingly allowed his or her dog to stray beyond the premises absent reasonable control of the animal.

Officer Fick’s testimony revealed that he merely saw the dog run from plaintiff’s property into the street and then immediately return to plaintiff’s property. A reasonable juror could conclude that Officer Fick did not have knowledge of facts and circumstances sufficient to warrant a man of reasonable caution that the ordinance had been violated. See *Champion*, 431 Mich at 342 (defining probable cause). A rational view of the evidence might suggest that Fick did not have any or adequate information that would support a conclusion that criminal intent existed or that plaintiff “allowed” the dog to stray from the property. Indeed, Fick’s observations and the circumstances could be construed as directly undermining a finding of criminal intent, and plaintiff’s account of the incident certainly detracts from a finding that he intentionally or knowingly allowed the dog to stray from the property.

With respect to reasonable suspicion, the Court in *Champion*, 452 Mich at 98-99, observed:

Police officers may make a valid investigatory stop if they possess “reasonable suspicion” that crime is afoot. Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or “hunch,” but less than the level of suspicion required for probable cause.

A valid investigatory stop must be justified at its inception and must be reasonably related in scope to the circumstances that justified interference by the police with a person's security. Justification must be based on an objective manifestation that the person stopped was or was about to be engaged in criminal activity as judged by those versed in the field of law enforcement when viewed under the totality of the circumstances. The detaining officer must have had a particularized and objective basis for the suspicion of criminal activity.

While I believe that it presents a close call, I would conclude that there was no genuine issue of material fact that Officer Fick had at least reasonable suspicion that the ordinance had been violated, such that he was entitled, minimally, to make inquiry and briefly detain plaintiff for purposes of an explanation. There is no dispute that the dog strayed off of plaintiff's property and that the dog was not under plaintiff's control at the time. Plaintiff had been standing outside with the dog absent any restraints whatsoever, so one might infer that plaintiff was knowingly allowing the dog free reign, although it did not definitively establish as a matter of law that Fick had probable cause to arrest plaintiff under the ordinance. Under the totality of the circumstances, I think reasonable suspicion existed as a matter of law and that it was entirely reasonable for Fick to briefly detain plaintiff, pose some questions to him, and attempt to obtain some answers concerning the officer's observation of the dog running in the street. Officer Fick, therefore, made a lawful command to plaintiff, and I would hold that there was no genuine issue of material fact that plaintiff responded by resisting and obstructing Fick, whom plaintiff knew was a police officer, in the performance of his duties, violating MCL 750.81d. See *People v Corr*, 287 Mich App 499, 503; 788 NW2d 860 (2010) (to prove charges of resisting and obstructing under MCL 750.81d, the prosecution must show acts of resistance and obstruction committed by the defendant against a police officer and that the defendant knew or had reason to know that he or she was resisting or obstructing the police officer in the performance of his or her duties); MCL 750.81d(7)(a) (“‘Obstruct’ includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command.”). Accordingly, I would also hold that there was no genuine issue of material fact that Fick had probable cause to arrest plaintiff for resisting and obstructing an officer. I would reverse the trial court's ruling on that basis, rather than the basis proffered by the majority, i.e., that Fick, as a matter of law, had probable cause to arrest plaintiff for violating § 10-69. Thus, I respectfully concur.

/s/ William B. Murphy