

STATE OF MICHIGAN
COURT OF APPEALS

JAMES SCOTT and HELEN SCOTT,
Plaintiffs-Appellants,

UNPUBLISHED
December 17, 2013

v

MICHIGAN STATE POLICE DEPARTMENT,
STATE OF MICHIGAN, RAY COLLINS,
UNNAMED POLICE OFFICERS, and OFFICER
KEVIN REIF,

No. 312378
Wayne Circuit Court
LC No. 12-005378-AW

Defendants-Appellees.

Before: K. F. KELLY, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' motion for summary disposition on plaintiffs' complaint seeking a writ of mandamus. Plaintiffs have also sought review of the trial court's subsequent denial of their motions for leave to amend their complaint and reconsideration. We affirm.

I. STATEMENT OF FACTS

This action arose out of the search of plaintiffs' residence, their business, and a vacant lot near their business following the issuance of facially valid search warrants for each of these properties. During the execution of the search warrants, various items, including multiple vehicles, documents, and cash, were seized. Before the criminal investigation was completed, three vehicles were returned to plaintiffs because they informed defendants that the vehicles were necessary for the operation of their business. Defendants held onto an additional 21 vehicles at that time.

Subsequently, the Michigan Attorney General's Office exercised its prosecutorial discretion to not seek criminal charges against plaintiffs. Based on the decision to not prosecute, defendants claim they returned all of plaintiffs' property, and the record reflects release authorizations signed by plaintiffs' authorized representative. Despite defendants' release of the vehicles, plaintiffs did not pick-up the vehicles from the storage facility because the facility required them to pay thousands of dollars in storage fees, which plaintiffs either could not or chose not to pay.

Plaintiffs filed a petition seeking a writ of mandamus and demanding that defendants return the seized property. Defendants Michigan State Police and Lieutenant Ray Collins (collectively referred to as “state defendants”) moved for summary disposition.¹ Defendants argued that mandamus was not a proper remedy because the property had been seized pursuant to a facially valid warrant and had already been returned to plaintiffs. In response to the motion, plaintiffs claimed that there were documents missing from the returned files, that \$180,000 in cash was taken from plaintiffs’ residence but not listed on the search warrant return and tabulation and had not been returned, and that the vehicles were effectively not returned due to the excessive fees charged by the storage facility.

During oral argument on defendants’ motion, the trial court queried whether mandamus was a proper remedy given that defendants claimed that all property had been returned to plaintiffs. After hearing arguments from all parties, the trial court noted on the record that while it had “certainly” looked as if “there may be a basis to pursue a claim or claims against some defendants out there, including the named defendants here,” mandamus was inappropriate because the trial court could not order the “impossible,” which would be requiring defendants to return property that they did not have. The court therefore granted the motion. Consistent with this ruling, the trial court signed a stipulated order indicating that the case was dismissed with prejudice and that the order “disposes of all pending claims and closes the case.”

More than two weeks after the trial court entered the order closing the case, plaintiffs filed motions for leave to amend their complaint and for reconsideration. The trial court denied the motion for reconsideration without hearing. After hearing arguments on plaintiffs’ motion for leave to amend, the court denied the motion because “the language in the order couldn’t be any clearer” and there was “no extant complaint to amend” since the “the case had been closed.” Plaintiffs now appeal as of right.

II. DENIAL OF PETITION SEEKING MANDAMUS

Plaintiffs first argue that the trial court erred when it granted defendants’ motion for summary disposition in lieu of requiring an evidentiary hearing before denying the writ of mandamus.

This Court reviews a trial court’s decision on a motion for summary disposition de novo, *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006), while we review a trial court’s grant or denial of a writ of mandamus for an abuse of discretion. *Township of Casco v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). However, while the underlying question of whether the writ should issue is reviewed for an abuse of discretion, “this Court reviews de novo as questions of law whether a defendant has a clear legal duty to perform and whether a plaintiff has a clear legal right to performance.” *Barrow v Detroit Election Comm*, 301 Mich App 404, 411; 836 NW2d 498 (2013).

¹ Officer Reif concurred in the state defendants’ motion for summary disposition.

“[A] writ of mandamus is an extraordinary remedy and will only be issued where (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result.” [*Sal-Mor Royal Village, LLC v Macomb Co Treasurer*, 301 Mich App 234, 237; 836 NW2d 236 (2013), quoting *Citizens Protecting Michigan’s Constitution v Secretary of State*, 280 Mich App 273, 284; 761 NW2d 210 (2008).]

Here, it is undisputed that plaintiffs had a clear legal right to the return of the property, and that defendants had a clear legal duty to return the property to plaintiffs. It is also undisputed that the action of returning the property to plaintiffs is ministerial in nature. However, defendants insist that all the property was returned to plaintiffs; plaintiffs insist that it was not. Thus, while there is no legal dispute regarding whether defendants are legally required to return the property to plaintiffs, there is a *factual* dispute regarding whether all the property was returned to plaintiffs. This factual dispute precluded a writ of mandamus from being issued.

In this regard, the Supreme Court held long ago in *Miller v City of Detroit*, 250 Mich 633, 636; 230 NW 936 (1930) (quotation marks and citation omitted), that “mandamus will not lie to compel a public officer to perform a duty dependent upon disputed and doubtful facts, or where the legal result of the facts is subject of legal controversy.” This Court reiterated this requirement more succinctly in *Garner v Michigan State Univ*, 185 Mich App 750, 762; 462 NW2d 832 (1990), where we held that “mandamus may not be issued where disputed facts exist.”

Viewing the facts in the light most favorable to plaintiffs, there is a factual dispute regarding whether defendants are in possession of certain items that plaintiffs claim were not returned to them. Because “[t]he party seeking mandamus has the burden of establishing that the official in question has a clear legal duty to perform,” *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 367; 820 NW2d 208 (2012), and since plaintiffs did not (and could not) establish that defendants failed to turn over property that they had in their possession, the trial court did not err in denying plaintiffs’ mandamus request. See *City of Owosso v Mich United R Co*, 202 Mich 37, 40; 167 NW 919 (1918).²

Plaintiffs also argue that the trial court erred in not permitting an evidentiary hearing regarding the applicability of MCL 257.252d, which according to plaintiffs, required defendants,

² We also conclude that because plaintiffs failed to show that there was “no other remedy . . . that might achieve the same result,” *Sal-Mor Royal Village*, 301 Mich App at 237, the mandamus denial was also appropriate as a result of plaintiffs’ failure to meet the fourth requirement set forth in *Sal-Mor*. The trial court correctly noted at oral argument on defendants’ motion that the court had “certainly . . . heard enough to indicate that there may be a basis to pursue a claim or claims against some defendants out there, including the named defendants here” but that “[t]here is an insufficient basis to grant a writ of mandamus in this case.”

not plaintiffs, to pay the storage fees for the vehicles. Plaintiffs never raised this issue before the trial court. Therefore, plaintiffs have waived this issue for appellate review. *Admire v Auto-Owners Ins Co*, 494 Mich 10, 17 n 5; 831 NW2d 849 (2013); *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008).

In any event, we are not persuaded that MCL 257.252d assists plaintiffs. In fact, assuming the statute applies to vehicles seized pursuant to a search warrant, the current version of MCL 257.252d(1) specifically provides that “[a] police agency or a governmental agency . . . may provide for the immediate removal of a vehicle from public or private property to a place of safekeeping *at the expense of the last-titled owner of the vehicle . . .*” (Emphasis added.) In addition, the statutory scheme provides a challenge procedure should the owner of the vehicle believe the towing and storage fees are unreasonable. See MCL 257.252a(6). Therefore, if the statute applies, it provides another legal remedy for plaintiffs to pursue, providing reinforcement to our conclusion that the trial court correctly held that the writ of mandamus should not issue. *Sal-Mor Royal Village*, 301 Mich App at 237.

Accordingly, the trial court did not abuse its discretion when it denied plaintiffs’ petition for a writ of mandamus and granted defendants’ motion for summary disposition.

III. PLAINTIFFS’ POST-JUDGMENT MOTIONS

Plaintiffs argue that the trial court abused its discretion when it failed to grant their motions for leave to amend their complaint and for reconsideration.

This Court reviews a trial court’s decision regarding both a motion for leave to amend pleadings and a motion for reconsideration for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). An abuse of discretion occurs when the trial court’s decision “falls outside the range of reasonable and principled outcomes.” *Capital Area Dist Library v Michigan Open Carry Inc*, 298 Mich App 220, 227; 826 NW2d 736 (2012).

With regard to the denial of the motion for leave to amend their complaint, we note that the trial court had entered a final order disposing of the entire case 20 days before plaintiffs ever sought leave to amend. Because plaintiffs did not seek leave to amend their complaint before the order dismissing the case was entered, even though they were clearly aware of other potential claims and the trial court’s concerns regarding mandamus, we believe that this case is akin to *Amburgey v Sauder*, 238 Mich App 228; 605 NW2d 84 (1999) and *Wormsbacher v Seaver Title Co*, 284 Mich App 1; 772 NW2d 827 (2009).

In *Amburgey*, 238 Mich App at 230, the trial court granted the defendant summary disposition and denied the plaintiff’s motion to amend to file her first amended complaint. There, the plaintiff had brought a one-count complaint alleging a common-law strict liability theory of liability as a result of her being bitten by a horse boarded at the defendant’s stables. *Id.* at 245. After the grant of summary disposition, the plaintiff sought to amend her complaint to add a negligence claim, which the trial court denied as “untimely and prejudicial[.]” This Court stated that while “[i]t is undisputed that the issue was discussed during mediation and within defendant’s motion for summary disposition, [in] both instances the issue was alluded to by

defendant only to show the overall absence of any liability under the circumstances of the case.” *Id.* at 247-248. In affirming the trial court’s denial of the plaintiff’s motion for leave, we stated:

Because plaintiff’s proposed amendment would cause defendant to defend a claim that arose from the identical facts on which plaintiff’s properly pleaded claim of strict liability arose, we agree with the trial court that defendant would be prejudiced by allowing the issue of negligence to be introduced after the dismissal of the case. We therefore conclude that the trial court did not abuse its discretion in denying plaintiff’s motion to amend. [*Id.* at 249 (citation omitted).]

Likewise, in *Wormsbacher*, 284 Mich App 1, we affirmed the trial court’s denial of the plaintiff’s motion for leave to amend to add a claim for breach of contract, stating:

[P]laintiff’s motion to amend was not timely. Plaintiff could have asserted the breach of contract claim in his original complaint, in his response to defendants’ motion for summary disposition, or during oral argument on defendants’ motion for summary disposition. Plaintiff failed to do so. As counsel for the defendants argued, “He rolled the dice, he lost, you’ve ruled. Anything afterward, the *Amburgey* case, says its [sic] not timely.” [*Id.* at 9].

Similarly, here, plaintiffs never sought to amend their complaint before the summary disposition hearing. In fact, plaintiffs waited more than two weeks after the trial court granted defendants’ summary disposition motion, denied plaintiffs’ petition for mandamus, and entered the order closing the case with prejudice. In addition, plaintiffs stipulated to the order closing the case. As such, we cannot conclude that the trial court’s decision to deny leave to amend was “outside the range of reasonable and principled outcomes.” *Capital Area Dist Library*, 298 Mich App at 227.³

We also hold that the trial did not abuse its discretion when it denied plaintiffs’ motion for reconsideration. In order to prevail on a motion for reconsideration, the movant generally “must show that the trial court made a palpable error and that a different disposition would result from correction of the error.” *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 82; 669 NW2d 862 (2003). If the movant merely presents the same issues already ruled on, the motion generally will not be granted. *Id.* at 82-83. Additionally, when considering a motion for reconsideration, the trial court need not consider legal theories that a party could have argued before the trial court’s original order. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 630; 750 NW2d 228 (2008).

³ Plaintiffs’ concerns, whether founded or ill-founded, regarding the potential of res judicata barring some or all of their additional claims in a new lawsuit, does not change our analysis. It is neither the trial court’s nor this Court’s job to protect plaintiffs from their strategic choices.

A review of plaintiffs' motion for reconsideration establishes that the arguments made were substantially similar to the arguments made by plaintiffs when they moved for leave to amend. Plaintiffs' failure to seek leave to amend their complaint either before or after summary disposition was entered in this case does not constitute palpable error. *Herald Co*, 258 Mich App at 82. In addition, because plaintiffs' res judicata argument could have been brought before the trial court's original order, the trial court was under no obligation to consider plaintiffs' new legal theory. *Woods*, 277 Mich App at 630. Accordingly, plaintiffs have not established that the trial court abused its discretion when it denied their motion for reconsideration.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray
/s/ Michael J. Riordan