IP 01-1719-C T/K Long v. Barrett
Judge John D. Tinder Signed on 2/26/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LONG, CHINA ANN, LONG, WILLIE, Plaintiffs, vs. BARRETT, PHILIP INDIVIDUALLY AND AS A DEPUTY FOR THE MARION COUNTY SHERIFF'S DEPARTMENT* DISMISSED 2/26/02, DAVIDSON, RICHARD INDIVIDUALLY AND AS A DEPUTY FOR THE MARION COUNTY SHERIFF'S DEPARTMENT* DISMISSED 2/26/02, WHITE, JOHN K INDIVIDUALLY AND AS A DEPUTY FOR THE BARTHOLOMEW COUNTY SHERIFF'S DEPARTMENT* DISMISSED 2/26/02, PATTINGHILL, DEENA INDIVIDUALLY AND AS A DEPUTY FOR THE BARTHOLOMEW COUNTY SHERIFF'S DEPARMENT* DISMISSED 2/26/02, THE MARION COUNTY SHERRIFF'S DEPARTMENT* DISMISSED 2/26/02, AN UNNAMED POLICE OFFICER INDIVIDUALLY AND AS A POLICE OFFICER FOR THE CITY OF COLUMBUS INDIANA, KELLY SERVICES INC, TOYOTA INDUSTRIAL EQUIPMENT MFG, Defendants.	CAUSE NO. IP01-1719-C-T/K

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CHINA ANN LONG and WILLIE LONG,	)	
Plaintiffs,	)	
vs.	)	IP 01-1719-C-T/K
PHILLIP BARRETT, Individually and as a Deputy for the Marion County Sheriff's Department; RICHARD DAVIDSON, Individually and as a Deputy for the Marion County Sheriff's Department; JOHN K. WHITE, Individually and as a Deputy for the Bartholomew County Sheriff's Department; DEENA PATTINGILL, Individually and as a Deputy for the Bartholomew County Sheriff's Department; THE MARION COUNTY SHERIFF'S DEPARTMENT; THE BARTHOLOMEW COUNTY SHERIFF'S DEPARTMENT; AN UNNAMED POLICE OFFICER, Individually and as a Police Officer for the City of Columbus, Indiana; THE CITY OF COLUMBUS, INDIANA; KELLY SERVICES, INC.; and TOYOTA INDUSTRIAL EQUIPMENT MFG., INC.,	)	
Defendants.	)	

ENTRY ON DEFENDANTS' MOTION TO DISMISS[1]

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[1] This Entry is a matter of public record and is being made available to the public on the court's web site, but it is not intended for commercial publication either electronically

(continued...)

Defendants filed a Motion to Dismiss. Plaintiffs oppose the Motion. This court now **GRANTS** the Motion in part and **DENIES** the Motion in part.

I. Factual and Procedural Background

In 1992, a bench warrant for forgery was issued by the Bartholomew County Superior Court for the arrest of China G. Long with a social security number of 264-65-1854. The charges stemmed from allegations that Long forged the signature of her supervisor and collected wages she did not earn. At the time, Long was employed by Kelly Services and worked at the Toyota facilities in Columbus. Although it is not clear whether the information was in the warrant, the complaint alleges that China G. Long[2] was apparently Caucasian and Defendants do not contest this fact. Eight years later, the bench warrant was reissued identifying the person to be arrested as China Long residing at 3805 Devon Drive, Indianapolis, Indiana, with a birth date of June 20, 1959, and with the same social security number as in the original warrant. It is unclear whether the warrant listed the person's race.

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[1](...continued)
or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion to be sufficiently novel or instructive to justify commercial publication of the Entry or the subsequent citation of it in other proceedings.

[2]The China Long named in the original warrant is referred to as both China G. Long and China R. Long in the Plaintiffs' Complaint. As the court does not know which is correct, the court will use the same references to the other China Long that were used in the complaint despite the variances.

On November 27, 2000, Deputies Barrett and Davidson of the Indianapolis Police Department arrested Plaintiff, China Long, at her home, 3805 Devon Drive. China informed the police that she was not the China Long in the warrant, she had never been to Columbus, and had a different social security number than the one listed in the warrant. China is African-American. Despite her protestations, the officers arrested China and transported her to the Marion County Jail. According to the Complaint, the officers made no attempt to ascertain her true identity. On November 28, China was transferred to the Bartholomew County Jail by Deputies John White and Deena Pattingill. China was released on bail on November 29 and on December 18, the charges against her were dismissed. On October 15, 2001, Plaintiff and her husband, Willie Long, filed suit against the Marion County Sheriff's Department, Deputies Barrett and Davidson, the Bartholomew County Sheriff's Department, Officers White and Pattingill, an Unnamed Officer of the Columbus Police Department, the City of Columbus, Kelly Services, Inc., and Toyota Industrial Equipment Mfg. Plaintiffs bring a § 1983 claim against Barrett, Davidson, the Marion County Sheriff's Department,[3] White, Pattingill, the Bartholomew County Sheriff's Department, the Unnamed Police Officer, and the City of Columbus. The Longs also claim that Barrett, Davidson, White, and Pattingill committed the torts of false arrest and imprisonment, that the Unnamed Police Officer, Kelly Services, and Toyota maliciously prosecuted China, that Kelly Services and Toyota committed the tort of intentional infliction

[3]The court should qualify this by saying Plaintiffs are perhaps asserting § 1983 claims against the Marion and Bartholomew County Sheriff's Departments because, as discussed later, the Plaintiffs specifically disavow these claims in their brief.

of emotional distress, and that all Defendants negligently and carelessly altered the warrant. Willie also makes a claim of loss of consortium. Some of the Defendants filed this Motion to Dismiss as will be described in the sections addressing the various claims that are the subjects of this motion. The Plaintiffs oppose the Motion. This court now rules as follows.

II. Motion to Dismiss Standard

Under Rule 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss tests the sufficiency of the complaint, not the merits of the suit. *See Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990).

Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief," that will "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (citation and quotations omitted). When considering a motion to dismiss, the complaint's allegations are accepted as true and viewed in the light most favorable to the plaintiff. *See Hentosh v. Herman M. Finch Univ. of Health Sciences/The Chicago Med. Sch.*, 167 F.3d 1170, 1173 (7th Cir. 1999).

The court must review the plaintiff's statement of the claim to determine whether the plaintiff has set forth facts supporting a cause of action that would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Beam v. IPCO Corp.*, 838 F.2d 242, 244 (7th Cir. 1988). However, the court is not required to accept legal conclusions, inferences, or allegations unwarranted by the facts as presented in the pleadings. *Mid-Am. Reg'l Bargaining Ass'n v. Will County Carpenters Dist. Council*, 675 F.2d 881, 883 (7th Cir. 1982). The accepted standard for determining the sufficiency of the complaint does not permit dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. This is a technical determination not based upon the veracity of the facts alleged. The court cannot dismiss a complaint merely because it doubts that the plaintiff can prove the facts it alleges. *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). Thus, a defendant's motion to dismiss can only be granted if the plaintiff has failed to allege sufficient facts to entitle the plaintiff to relief if the facts alleged are taken as true. "[I]f the plaintiff . . . pleads facts, and the facts show that he is entitled to no relief, the complaint should be dismissed. There would be no point in allowing such a lawsuit to go any further; its doom is foretold." *Am. Nurses' Ass'n v. Illinois*, 783 F.2d 716, 727 (7th Cir. 1986). With these general principles in mind, the court now looks at the counts of the complaint that the Defendants contend are defective.

III. Claims Against the Marion County Sheriff's Department and the Bartholomew County Sheriff's Department

Defendants first contend that they are not legal entities subject to lawsuits. Indiana Code section 36-1-4-3 provides that a "unit" of local government may sue or be sued. Section 36-1-2-23 provides that a unit is a "county, municipality, or township." The Marion County Sheriff's Department and Bartholomew County Sheriff's Department are none of these. The Sheriff's Departments have no separate corporate existence and are "merely a vehicle through which the [county] government fulfills its policy functions." *Jones v. Bowman*, 694 F. Supp. 538, 544 (N.D. Ind. 1988). Because the Sheriff's Departments are not proper parties to sue, the counts against them must be dismissed.

Even if Plaintiffs had properly named the Defendants (meaning Marion and Bartholomew Counties), Defendants claim that Plaintiffs have failed to plead that their injuries were the result of an unconstitutional policy, custom, or practice. Municipalities are liable under § 1983 only when the municipality, in executing an official policy or practice, has caused a constitutional violation. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694 (1978). Liability attaches only when the governmental entity causes the violation; merely showing that an agent or employee afflicted an injury is not enough. The government cannot be held liable under a respondeat superior theory. *Id*. at 692-94.

In this case, the complaint appears to at least plead facts that if true would establish the municipalities' liability. For example, in paragraph eight of the complaint, Plaintiffs claim that "Deputy White and Deputy Pattinghill were at all times relevant to this complaint duly appointed and acting police officers of Bartholomew Co. Sheriff's Dept. and were

acting under color of the statutes, ordinances, regulations, policies, customs, and usages of the State of Indiana and Bartholomew County." There is similar language in paragraph six discussing Deputy Barrett and Deputy Davidson and the Marion County Sheriff's Department. However, other language in the complaint appears to plead a respondent superior theory. (Comp. ¶ 2 ("against the Marion County Sheriff's Department . . . as employer of [Barrett and Davidson], . . . against Bartholomew County Sheriff's Department . . . as employer of [White and Pattingill]").) Also, the Plaintiffs specifically disavow any § 1983 claim against the Sheriff's Departments. (Pl.'s Mem. of Law Supporting Their Resp. to the Marion County Defendants' Mot. to Dismiss Pl.'s Compl. at 1.) Although this court is mindful of the Seventh Circuit's proclamation in *McCormick v. City of Chicago,* 230 F.3d 319, 325 (7th Cir. 2000), that the plaintiff must merely "allege facts that would give the City notice of his municipal liability claim," it is not clear that the Plaintiff in this case has done even that. However, because these claims are being dismissed for other reasons, this court need not address the ambiguity in the Plaintiff's Complaint. If Plaintiffs choose to refile this claim, they should make clear whether they are alleging § 1983 claims against Marion and Bartholomew Counties, and they should be mindful that no viable claim can be made against a unit of government without an allegation that a federal constitutional violation was the result of an unconstitutional policy, custom, or practice.

IV. Claims Against Individual Defendants

A. *State Law Claims*

Defendants next claim that the state law claims against Barrett, Davidson, White, and Pattingill ("the Individual Defendants") must be dismissed because the Defendants were acting within the scope of their employment. Indiana Code section 34-13-3-5(b) provides that "[a] lawsuit alleging that an employee acted within the scope of the employee's employment must be exclusive to the complaint and bars an action by the claimant against the employee personally." Subsection (c) provides that "[a] lawsuit filed against an employee personally must **allege** that an act or omission of the employee that causes a loss is: criminal; clearly outside the scope of the employee's employment; malicious; willful and wanton; or calculated to benefit the employee personally." (emphasis added and numbering omitted).

Defendants correctly note that the Plaintiffs' complaint alleges that the acts or omissions of the Individual Defendants occurred "while they were acting in their official capacity as duly appointed officers of the Marion County Sheriff's Department" and that the Defendants "acted in the course and scope of employment and the regular course of their duties." Plaintiffs respond that the complaint alleges merely that the officers were duly appointed and acting police officers and that the acts were committed in the course of employment, which is different than the scope of employment. Although a recent Indiana Court of Appeals case has made clear that there is a difference between scope of employment and in the course of employment, Plaintiffs' allegations appear to include both. *Bushong v. Williamson,* 760 N.E.2d 1090, 1096 (Ind. Ct. App. 2001). The concept of "in the course of employment" refers to the time, place, and circumstances during which

the act took place. The concept of "in the scope of employment" deals with the relationship between the act and the nature and duties of the employment. In paragraph six of the complaint, Plaintiff claims that "Deputy Barrett and Deputy Davidson were at all times relevant to this complaint duly appointed and acting police officers of Marion Co. Sheriff's Dept. and were acting under color of statutes, ordinances, regulations, policies, customs and usages of the State of Indiana and Marion County." Paragraph eight contains similar language for the Bartholomew County police officers. These paragraphs clearly refer to the course of employment, but also appear to allege that Defendants' actions were authorized by their employers.

Furthermore, Plaintiffs have not clearly satisfied subsection (c) of Indiana Code section 34-13-3-5, requiring suits against individual employees to clearly allege that the acts are outside the scope of employment or otherwise subject a municipal employee to personal liability. Because the complaint makes no claim that Defendants were acting outside the scope of employment, but rather implies that they were acting within the scope of employment, the state law claims against the individual Defendants are dismissed.

B. *§ 1983*

Defendants contend that the Individual Defendants are entitled to qualified immunity, quasi-judicial immunity, and judicial immunity/Indiana Torts Claim Act immunity. Police officers are entitled to qualified immunity so long as their conduct did "not violate clearly established statutory or constitutional rights of which a reasonable person would

have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Frazell v. Flanigan*, 102 F.3d 877, 886 (7th Cir. 1996). In deciding qualified immunity, the court focuses on the objective reasonableness of the defendant's actions: whether a reasonable police officer could have believed that his conduct was constitutional "in light of the clearly established law and the information he possessed at the time." *Frazell*, 102 F.3d at 886 (quotations and citations omitted). This is a two-part inquiry: (1) whether the alleged conduct sets out a constitutional violation, and (2) whether the constitutional standards were clearly established at the time in question.

In this case, the alleged conduct does not set out a constitutional violation, so there is no need to address whether the Individual Defendants are entitled to qualified immunity. The Seventh Circuit has upheld district courts' grants of motions to dismiss in similar circumstances. *See Patton v. Przybylski*, 822 F.2d 697 (7th Cir. 1987); *Johnson v. Miller*, 680 F.2d 39 (7th Cir. 1982). In *Patton*, a police officer pulled over Patton in a routine traffic stop and found a warrant for a man with the same name, of the same race, with a similar (but not the same) birth date, but with a different residence. Patton proclaimed his innocence, that is, that he was not the person named in the warrant, but the police officer arrested him anyway. The court upheld the district court's grant of a motion to dismiss, holding that,

> In these confused and ominous circumstances no reasonable finder of facts could, we think, infer that Przybylski acted unreasonably in arresting Patton and transporting him to the Schaumburg police station. No more is necessary to exonerate Przybylski. The Fourth Amendment forbids only unreasonable seizures; the arrest of Patton was not unreasonable.

Id. at 700. The court relied on the reasoning of *Johnson*, in which the person arrested had the same name, but was of a different race than the actual person described in the warrant:

> If an officer executing an arrest warrant must do so at peril of damage liability under section 1983 if there is any discrepancy between the description in the warrant and the appearance of the person to be arrested, many a criminal will slip away while the officer anxiously compares the description in the warrant with the appearance of the person named in it and radios back any discrepancies to his headquarters for instructions.

Id. at 699 (quoting *Johnson*, 680 F.2d at 41).

In this case, the Individual Defendants arrested China based on a warrant with the same name and a similar birth date. Although China claimed not to be the China Long in the warrant, this is hardly enough to make the Individual Defendants' actions unreasonable. Given these facts, this court must follow Seventh Circuit precedent in holding that "no reasonable finder of fact" could infer that the Individual Defendants acted unreasonably. Because the facts pleaded by Long show that she is entitled to no relief, the complaint should be dismissed. The purposes behind the doctrine of qualified immunity dictate that the dismissal of these federal claims against the Individual Defendants should be with prejudice. They should not have to defend a second version of these futile claims.

V. Claims Against Columbus and Its Police Officers

The City of Columbus filed a separate Motion to Dismiss, contending that the claims against it should be dismissed for two reasons. First, Columbus claims that no § 1983 claim may be made against it because the Plaintiff has not alleged a pattern, custom, or policy as is required by *Monell v. New York City Dep't of Social Servs.,* 436

U.S. 658, 694 (1978). As discussed in Part III, above, in order for a municipality to be liable under § 1983, a custom, practice, or policy of the municipality must have caused the plaintiff's loss. In this case, in paragraph ten of the complaint, the Plaintiffs allege that "Unnamed Police Officer was at all times relevant to this complaint a duly appointed and acting police officer of the City of Columbus and was acting under color of the statutes, ordinances, regulations, policies, customs, and usages of the State of Indiana and the City of Columbus." This is sufficient under the liberal notice pleading standard to make out a claim that a custom, practice, or policy of Columbus caused Plaintiffs' losses. *McCormick v. City of Chicago*, 230 F.3d 319 (7th Cir. 2000). However, as in Part III, above, it does not appear that Plaintiffs have filed a claim against Columbus alleging violations of § 1983. The only count which names Columbus is Count IV for Negligence. The § 1983 claims are asserted in counts which do not list the City of Columbus as a party. Paragraph two of the complaint specifically lists the City of Columbus as a Defendant "as the employer of Unnamed Police Officer." Given these statements, any § 1983 claim against Columbus is dismissed without prejudice. If Plaintiffs choose to file such a claim in an amended complaint, they should make clear that they are alleging a § 1983 claim against Columbus, and again, should be mindful of the pleading requirements for § 1983 claims against a municipality.

As to the negligence claim, Columbus claims that it is immune pursuant to Indiana Code section 34-13-3-3(5),[4] providing that a governmental entity is not liable for a loss caused by the "initiation of a judicial or administrative proceeding." Plaintiffs claim that the City of Columbus "negligently and carelessly altered the warrant for the arrest of a criminal named China R. Long, which mistake transformed the innocent China Ann Long into a fleeing felon." Assuming the Plaintiffs' allegations are true (as this court must at this stage of the proceedings), the question becomes whether the negligent altering of a warrant is the initiation of a judicial proceeding. Most cases discussing this section of the ITCA involve malicious prosecution claims. *See e.g., Clifford v. Marion County Prosecuting Attorney*, 654 N.E.2d 805, 808 (Ind. Ct. App. 1995). Although Plaintiffs' claims against Columbus do not involve malicious prosecution, her alleged loss certainly occurred as a result of the State's initiation of the judicial proceeding against her culminating in her arrest and detainment. The negligence claim against Columbus is therefore dismissed.

As a final matter, although not raised, this court addresses the viability of the claim against the Unnamed Police Officer working for the City of Columbus. As discussed in Part IV, above, the state law claims against the other Individual Defendants are being dismissed. The same action is not appropriate for the Unnamed Police Officer where the Plaintiffs claim that the Unnamed Police Officer intentionally altered the original warrant, was malicious, and intentionally tortious. These claims clearly satisfy Indiana Code section

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[4]Columbus actually cites to subsection (6). However, subsection (5) contains the language that is quoted in its brief.

35-13-3-5(c). The Unnamed Police Officer is also not entitled to dismissal on the § 1983 claim against him/her because of Plaintiffs' allegations of willful misconduct on his/her part. If accepted as true, which they must at this stage of the proceedings, those allegations could constitute a constitutional violation.

VI. Willie's Claims

Defendants also claim that Willie's claim of loss of consortium is derivative in nature, meaning it gets its viability from the claim of the injured spouse. *Nelson v. Denkins,* 598 N.E.2d 558, 563 (Ind. Ct. App. 1992). Because China has no valid claims against the Individual Defendants, Marion County Sheriff's Department, or the Bartholomew County Sheriff's Department, Willie's loss of consortium claims against them must be dismissed.

VII. Conclusion

For the foregoing reasons, the Defendants' Motion to Dismiss is **GRANTED** in part and **DENIED** in part. The state law claims against Barrett, Davidson, White, and Pattingill, and all of the claims against the Marion County Sheriff's Department and the Bartholomew County Sheriff's Department are **DISMISSED** without prejudice. All claims against the City of Columbus are also **DISMISSED** without prejudice. Prejudice will attach to these dismissals if an amended complaint, adequately pleading § 1983 and the state law claims discussed herein, is not filed within thirty days of this date.

The § 1983 claims against Barrett, Davidson, White, and Pattingill in their individual capacities will be **DISMISSED** with prejudice against refiling, but no final order or judgment pursuant to Federal Rule of Civil Procedure 54(b) or 58 will be entered until judgment is entered on all other claims in this cause of action. All of the claims are related and involve common facts so it would be inefficient to enter a partial judgment at this time.

ALL OF WHICH IS ORDERED this 26th day of February 2002.

John Daniel Tinder, Judge
United States District Court

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