

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ESTATE OF ROBERT SMITH, et al,	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	NO. 00-5485
	:	
TROOPER MARASCO, et al,	:	
Defendants.	:	

MEMORANDUM

STENGEL, J.

July 12, 2005

Following a second remand from the Third Circuit, plaintiffs' claims for excessive force, unreasonable search, and various state law claims remain in this civil rights case. Currently before the court is the remaining defendants' motion for summary judgment on the plaintiffs' intentional infliction of emotional distress claim. For the reasons set forth below, I will deny the motion.

I. BACKGROUND

The facts and procedural history of this case, as stated by the Third Circuit in Estate of Smith v. Marasco, 430 F.3d 140 (3d Cir. 2005), are as follows:

Plaintiffs' decedent, Robert Smith, was a Vietnam veteran who suffered from a variety of mental and physical ailments, including Post-Traumatic Stress Disorder (PTSD), flashbacks to Vietnam, and serious heart problems. Prior to his death, Smith had had several encounters with members of the state police, Troop L Reading. The encounters stemmed primarily from an ongoing feud between Smith and one of his neighbors, Robert Shafer. On a previous occasion, Shafer had accused Smith of shooting out a light Shafer installed on his property. The state police investigated the incident, but they did not charge Smith, although many of the troopers believed

that he was responsible for the shooting. As a result of their interaction, some of the troopers had at least limited knowledge of Smith's medical problems, although the extent of their knowledge is disputed by the parties.

On the afternoon of July 10, 1999, the state police received a complaint from Shafer alleging that Smith was shining a bright light into his backyard. Troopers James Marasco and Nicholas Scianna responded to the call and proceeded to Smith's residence several hours later. After not receiving a response at the front door, the troopers went around the house to see if they could locate Smith in his closed-in back porch.

After they were unable to find Smith behind his house, the troopers returned to their car and called their barracks for further instructions. They spoke with Corporal Mervin Rodriguez, who instructed them to attempt to contact Smith by phone, but, in the event they were unable to reach him, to leave a citation on the property and return to the barracks. After their own efforts to contact Smith over the phone were unsuccessful, the two troopers asked the barracks Personal Communication Officer (PCO) to attempt to reach Smith.

While they were waiting for the PCO to respond, the troopers returned to Smith's backyard. During this time, Trooper Scianna observed a red light in one of the windows of the house, which he first assumed to be a light from a video camera. He then noticed a red dot on Trooper Marasco's clothing, and at that point assumed that the light was a laser sight from a firearm. Fearing for their safety, the troopers retreated to their vehicle and called the barracks for assistance.

The two officers again spoke with Corporal Rodriguez, who instructed them to secure the area. Rodriguez requested backup from local police officials and proceeded to Smith's house himself, arriving there around 11 p.m. By this point, additional officers, including Trooper Thomas Rodriguez, had arrived at the scene and formed a perimeter around Smith's house.

Shortly after arriving and joining the perimeter, Trooper Rodriguez observed a figure leave the house through the back door, cross the yard, and enter a nearby tool shed. He later testified that the individual appeared to be carrying something under his arm. Rodriguez observed the figure return to the house, only to leave again a few minutes later. At this point, he called out to the individual but received no response. Acting at Trooper Rodriguez's suggestion, Corporal Rodriguez then ordered the officers to tighten the perimeter around the yard in order to cut off access to the house.

At around 11:30 p.m., Corporal Rodriguez contacted Lieutenant Frank Fetterolf, requesting that Fetterolf activate the Special Emergency Response Team (SERT), a state police unit trained to deal with high-risk, volatile situations. Fetterolf relayed the request to the SERT coordinator, Corporal Gregory Hall, who contacted the members of SERT and instructed them to proceed to Smith's residence.

At about 1:30 a.m., the SERT team began to arrive. Some thirty members of SERT, "wearing riot gear and camouflage and armed with various weapons," responded. Smith I, 318 F.3d at 503. Sometime after SERT began to assemble, Fetterolf asked Lieutenant Frank Weaver to investigate the incident involving the apparent laser sight and, if necessary, obtain a warrant. Weaver did so and obtained an arrest warrant for Smith, charging him with aggravated assault, simple assault, and reckless endangerment. n1 At around the same time, Trooper Andrew Wenger also obtained a search warrant for the residence. In addition, at some point during the evening, Fetterolf spoke with Captain Michael Marcantino, Troop Commander for Troop L, who was camping on the night of the 10th, to update him on SERT's activities.

n1 The arrest warrant was withdrawn on July 12, 1999. See Smith I, 318 F.3d at 504.

After arriving, Fetterolf and Hall established a command post from which they directed SERT's activities for the remainder

of the night. They tried to contact Smith using the telephone and a public address system, but were unsuccessful. At around 5 a.m., they ordered SERT members to break several of Smith's windows with rocks in an effort to induce him to communicate with them. One hour later, SERT members entered Smith's shed using tear gas. Finally, at 6:43 a.m., members the SERT team stormed Smith's house using "flash-bang distraction devices," small explosives designed to briefly disorient and stun anyone in the immediate vicinity.

After SERT cleared Smith's residence, state troopers executed the search warrant. They were unable to find Smith inside his house, but they did locate his identification as well as heart medication that he was required to take in the wake of a recent operation. They also recovered several weapons, although they did not find one with a laser sight.

At some point after clearing the house, the troopers began to search the wooded area behind Smith's yard. During this time, Smith's two daughters and at least two other individuals contacted the state police in an effort to assist in locating Smith. The police generally rebuffed these efforts, citing safety concerns. However, they did permit one of Smith's neighbors, Christopher Zwicky, to join them in a helicopter search of the woods behind Smith's house. The police discovered Smith's cellular phone in the woods, but were unable to locate Smith. After approximately two hours, they abandoned the search.

About one week later, a friend of Smith's discovered his body in the same woods, not far from where his phone was found. Smith had died of heart failure brought on, according to the Smiths, by the stress of the evening.

Smith's estate and various family members ("the Smiths") then filed suit against numerous police officials, named and unnamed, who were involved in the events of the evening. The suit alleged violations of the First, Fourth, and Fourteenth Amendments as well as numerous violations of state law. After discovery, the District Court granted summary judgment

for all defendants on all claims, finding that plaintiffs could not show that any of Smith's constitutional rights were violated. The Smiths appealed, and, in Smith I, we affirmed in part and reversed in part. We held that defendants were not entitled to summary judgment on three claims: the Smiths' claim that Officers Marasco and Scianna conducted an unreasonable search in walking around to the back of Smith's house and in entering Smith's garage; the Smiths' claim that the officers responsible for activating and directing SERT used excessive force in doing so, in violation of the Fourth Amendment; and the Smiths' claim that the use of SERT and other actions by the officers amounted to a state-created danger in violation of Smith's substantive due process rights under the Fourteenth Amendment. We affirmed with regard to all other federal claims raised.

On remand, following additional discovery, the District Court again granted summary judgment with respect to all federal claims. It again held that plaintiffs could not establish that Troopers Marasco and Scianna conducted an unreasonable search in walking into Smith's backyard. With respect to the excessive force and state-created danger claims, the District Court concluded that all defendants were entitled to summary judgment, on the grounds that they either lacked sufficient personal involvement in the events leading to Smith's death or that they were entitled to qualified immunity. Qualified immunity was not at issue in the first appeal.

The Smiths then filed a second appeal to this Court. Insofar as the appeal challenges the District Court's determinations regarding the personal involvement of defendants Doman, Krawczel, Carbonell, Weaver, and Wenger, it may be summarily disposed of and we do so in the margin. . .

Estate of Smith, 430 F.3d at 144-47.

The Court went on to affirm the district court's grant of summary judgment to all defendants except plaintiffs' claims against Marcantino, Fetterolf and Hall for excessive

force and against Marasco and Scianna for conducting an unreasonable search. The remaining five defendants moved for summary judgment against plaintiffs' state law claim for intentional infliction of emotional distress arising from the alleged mishandling of Robert Smith's body.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). The moving party initially bears the burden of showing the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial Celotex burden can be met simply by demonstrating “to the district court that there is an absence of evidence to support the non-moving party's case.” Id. at 325. A fact is “material” only when it could affect the result of the lawsuit under the applicable law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and a genuine issue of material fact exists when “the evidence is such that a reasonable jury could return a verdict for the non[-]moving party.” Id. The moving party must establish that there is no triable issue of fact as to all of the elements of any issue on which the moving party bears the burden of proof at trial. See In re Bessman, 327 F.3d 229, 237-38 (3d Cir. 2003) (citations omitted).

Once the moving party has carried its burden, the non-moving party must come forward with specific facts demonstrating that there is a genuine issue for trial. Williams v. West Chester, 891 F.2d 458, 464 (3d Cir. 1989). A motion for summary judgment looks beyond the pleadings, and factual specificity is required of the party opposing the motion. Celotex, 477 U.S. at 322-23. In other words, the non-moving party may not merely restate allegations made in its pleadings or rely upon “self-serving conclusions, unsupported by specific facts in the record.” Id. Rather, the non-moving party must support each essential element of its claim with specific evidence from the record. See id.

A district court analyzing a motion for summary judgment “must view the facts in the light most favorable to the non-moving party” and make every reasonable inference in favor of that party. Hugh v. Butler County Family YMCA, 418 F.3d 265, 267 (3d Cir. 2005) (citations omitted). Summary judgment is therefore appropriate when the court determines that there is no genuine issue of material fact after viewing all reasonable inferences in favor of the non-moving party. See Celotex, 477 U.S. at 322.

III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS STANDARD

Pennsylvania has adopted § 868 of the Restatement of Torts. It provides: “a person who wantonly mistreats the body of a dead person or who without privilege intentionally removes, withholds or operates upon the dead body is liable to the member of the family of such person who is entitled to the disposition of the body.” Papieves v. Kelly, 437 Pa. 373, 376, 263 A.2d 118, 119-20 (1970). In Papieves, the parents of a 14

year old boy brought suit against two minor defendants for intentional infliction of emotional distress after one defendant struck the 14 year old with his car, mortally injuring him, and then hid the 14 year old's body in his garage. The two defendants buried the 14 year old's body in a shallow grave in a field one week later. The Pennsylvania Supreme Court held that the lower court's dismissal of the suit was in error and explicitly adopted the Restatement approach.

IV. DISCUSSION

In this case, there is no evidence that the defendants ever manipulated, or even touched, Robert Smith's body. The plaintiffs contend that the defendants intentionally withheld the location of the body. According to the plaintiffs, the defendants knew the location of Smith's body when: (1) one of the state troopers cut away some of the brush within ten to fifteen yards of where Smith's corpse was ultimately found; (2) a trooper allegedly admitted that the defendants had found Smith's cellular phone, the location of which ended up being within ten yards of Smith's corpse; and (3) when a helicopter, seen by neighbors, hovered for a prolonged period of time over what later turned out to be the location of Smith's corpse.

A. Were the Defendants Acting Within the Scope of Their Employment?

Sovereign Immunity protects Commonwealth officials acting within the scope of their duties from civil liability.¹ Moore v. Commonwealth, 114 Pa. Commw. 56 (1988); 1 Pa.C.S. § 2310 (2005); see also Lafrankie v. Miklich, 152 Pa. Commw. 163, 169-72 (1992). However, conduct by an official that is “conscience-shocking,” or willful and wanton, is outside the scope of employment for purposes of Pennsylvania’s sovereign immunity statute. Schnupp v. Port Auth., 710 A.2d 1235, 1238-39 (Pa. Commw. 1998). Further, “willful misconduct in this context is synonymous with intentional tort.” Id. (citations omitted). Thus, in order to be liable under an intentional infliction of emotional distress claim for manipulating a corpse, and in order for the defendants to be acting outside the scope of their employment, the defendants’ actions must have risen to the level of willful and wanton misconduct.

B. Is There a Genuine Issue of Material Fact Regarding Whether the Defendants Committed Willful and Wanton Misconduct?

The willful and wanton standard in Pennsylvania is well established.

In Pennsylvania, willful misconduct requires “that the actor desired to bring about the result that followed or at least that he was aware that it was substantially certain to ensue.” . . . Wanton misconduct requires “that the actor has intentionally done an act of an unreasonable character, in disregard of a

¹It is uncontested that the defendants were state officials.

risk known to him or so obvious that he must be taken to have been aware of it.”

Carlson v. Arnot-Ogden Memorial Hosp., 918 F.2d 411, 417 (3d Cir. 1990) (quoting Evans v. Philadelphia Transp. Co., 418 Pa. 567, 573-74, 212 A.2d 440, 443 (1965)).

In this case, the plaintiffs have provided some evidence that the defendants either knew or should have known the location of Smith’s corpse prior to its discovery by the family friend. In particular, the plaintiff’s evidence demonstrates that Smith’s cellular phone was found by the defendants within ten yards of Smith’s corpse and after the corpse had begun to decompose. One of the officers even commented on the “dead animal” like smell. Additionally, a helicopter equipped with sophisticated heat sensors used to locate bodies hovered over the ultimate location of Smith’s corpse shortly after the apparent time of death. From this, the jury could infer that the defendants had actual knowledge of the location of the corpse prior to it being found by the family friend.

Furthermore, it is uncontested that the defendants knew the plaintiffs desired to find Mr. Smith-- or in the worst case scenario, his corpse-- as soon as possible. Drawing all factual inferences in the plaintiffs’ favor, a reasonable juror could possibly decide that the defendants intentionally withheld information about the location of Smith’s body. A reasonable juror, after finding the defendants wilfully withheld pertinent information

regarding Smith's location, could conceivably also find that conduct sufficiently outrageous to rule in plaintiffs' favor on this state law claim.²

V. CONCLUSION

Although the plaintiffs have a very tough standard to overcome at trial on this issue, I find that they have posed a genuine issue of material fact regarding whether the defendants had actual knowledge of Smith's corpse. Furthermore, if the defendants intentionally withheld that information from the plaintiffs, then a reasonable juror could find that conduct sufficiently outrageous to establish liability in accordance with Papieves. An appropriate order denying the defendants' motion follows.

²Although the defendants did not owe a duty to look for Smith's body if they were acting beyond the scope of their employment, a reasonable juror could find that intentionally withholding information about the location of Smith's corpse is sufficiently outrageous to establish liability.

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ORDER

AND NOW, this 12th day of July, 2006, upon consideration of defendants' Motion for Summary Judgment (document # 78), and the plaintiffs' response thereto, it is hereby **ORDERED** that the motion is **DENIED**.

BY THE COURT:

s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.