

2014 IL App (1st) 123816-U

No. 1-12-3816

March 31, 2014

THIRD DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

CALVIN HOLLINS, JR., DWAIN KYLES,)	Appeal from the Circuit Court
and CALVIN HOLLINS, III,)	of Cook County.
)	
Plaintiffs-Appellants,)	
)	No. 08 L 2259
v.)	
)	The Honorable
CITY OF CHICAGO, a Municipal Corporation,)	Kathy M. Flanagan,
DEVINE (Officially and Individually),)	Judge presiding.
ASSISTANT STATE'S ATTORNEY)	
ROBERT EGAN, and DETECTIVE JOSEPH)	
BOTWINSKI, JR. # 20392,)	
)	
Defendants-Appellees.)	

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman concurred in the judgment.
Justice Pucinski specially concurred.

ORDER

¶ 1 *Held:* The Court of Claims has exclusive jurisdiction to hear claims against the State's Attorney and his assistant for filing false criminal charges and maliciously prosecuting those charges. The plaintiffs did not meet their burden of showing that the circuit court erred when

it held that the Tort Immunity Act (745 ILCS 10/1-101 *et seq.* (West 2006)) protected the City of Chicago and a police officer against claims against them for the state law tort of malicious prosecution. The plaintiffs did not show that the circuit court erred when it followed *Albright v. Oliver*, 510 U.S. 266 (1994), and dismissed the plaintiffs' § 1983 (42 U.S.C. § 1983 (2006)) claim for malicious prosecution.

¶ 2 This case involves the aftermath of a tragic accident that occurred in 2003 at a Chicago nightclub, where 21 persons died in a stampede to leave the nightclub. A grand jury indicted Dwain Kyles, Calvin Hollins, Jr., and Calvin Hollins III for involuntary manslaughter in connection with the incident. After the trial court found the Hollinses not guilty, and the State chose not to prosecute Kyles, the Hollinses and Kyles sued the City of Chicago, two prosecuting attorneys and a police officer for malicious prosecution. The Hollinses and Kyles charged the defendants both under state law and for infringement of their civil rights in violation of Title 42, section 1983 of the United States Code. 42 U.S.C. § 1983 (2006). The circuit court dismissed the counts against the prosecutors for lack of jurisdiction. The court dismissed the state law malicious prosecution claims against the City and the officer, and the court later granted the City's and the officer's motion for summary judgment on the federal claim for malicious prosecution.

¶ 3 On the plaintiffs' appeal, we hold (1) the Court of Claims has exclusive jurisdiction over the counts against the prosecutors; (2) the plaintiffs have not shown that the circuit court erred by finding that the Tort Immunity Act (745 ILCS 10/1-101 *et seq.* (West 2006)) protected the City and the officer from the state law malicious prosecution claims; and (3) the plaintiffs have not shown that the circuit court erred by following precedent from the United States Court of Appeals for the Seventh Circuit that holds that Illinois plaintiffs cannot state a

section 1983 claim for malicious prosecution because Illinois provides a tort remedy for malicious prosecution. Accordingly, we affirm the trial court's judgment.

¶ 4

BACKGROUND

¶ 5

Kyles owned LaMirage All Nite Studio, Ltd., which operated the E2 nightclub on South Michigan Avenue near Cermak Road, a few blocks from McCormick Place. LaMirage employed Calvin Hollins, Jr., as a consultant, and Calvin Hollins III as a floor manager.

¶ 6

Envy Entertainment rented the E2 nightclub for February 16, 2003, and arranged for a disc jockey to play music at the club. Envy Entertainment promoted the event, for which it provided its own security. More than 1,000 persons came to the nightclub that evening. After midnight, early on February 17, 2003, a fight broke out between two patrons on the dance floor. The disc jockey alerted security. The guards used mace on the fighters. Some patrons yelled, "Poison gas" and "Terrorist attack." Many of the persons in the club raced to the stairs to leave the club. The patrons pressed together in the stairwell with such force that 21 persons suffocated. Detective Joseph Botwinski conducted a preliminary investigation of the scene.

¶ 7

The State's Attorney's Office presented evidence about the incident to a grand jury. In September 2003, the grand jury indicted Kyles and the Hollinses on 63 counts of involuntary manslaughter, charging that Kyles and the Hollinses recklessly operated the business in an unsafe manner and recklessly failed to maintain the premises in a safe condition.

¶ 8

At the bench trial of the Hollinses, held in 2007, the prosecutor tried to persuade the court that the Hollinses allowed the number of patrons in E2 to exceed the safe capacity of the club, failed to maintain adequate exits, and failed to hire and train sufficient security

personnel. At the close of the prosecution's case, the Hollinses moved for a finding of not guilty. The trial court found no evidence that either of the Hollinses admitted patrons to the club. The State's evidence, considered in the light most favorable to the prosecution, showed that the club held only 1,150 persons when the fight broke out. The prosecution's own experts said that the club could accommodate more than 1,000 persons. The court found that the Hollinses' failure to notice the excess, or the inadequacy of the exits, could only amount to negligence and not recklessness. The prosecution also failed to prove that the Hollinses acted recklessly by failing to supply and train security in addition to the security that Envy Entertainment supplied. Because the prosecution completely failed to prove that the Hollinses acted recklessly, the court acquitted them on all counts of involuntary manslaughter. The State elected not to try Kyles on the charges against him.

¶ 9 On February 28, 2008, the Hollinses sued the City, State's Attorney Richard Devine, assistant State's Attorney Robert Egan, and Detective Botwinski. After several amendments and the addition of Kyles as a plaintiff, the Hollinses and Kyles filed an amended complaint in six counts. The first three counts charged all of the defendants with the state law tort of malicious prosecution of Hollins III, Hollins Jr. and Kyles, respectively. The fourth count charged the defendants with conspiring against the three plaintiffs, and the fifth count charged the City and Botwinski (the City defendants) with theft of liquor and cash from the club. In the final count, the plaintiffs claimed that all of the defendants maliciously prosecuted the plaintiffs, in violation of section 1983.

¶ 10 The plaintiffs alleged that the City sought to close the E2 nightclub to further its plan for developing the area around McCormick Place. Before the incident in February 2003, the

City repeatedly brought unfounded complaints charging La Mirage with violating its liquor license, and the City conducted numerous unjustified inspections of the club. The City also towed cars parked near E2 at night for minor infractions, like being parked more than 6 inches from the curb, or having a small crack in the windshield. The City sent the cars to an impound lot far from the club, greatly inconveniencing the club's patrons. After the incident on February 17, 2003, according to the complaint, all of the defendants conspired to drive La Mirage out of the area by prosecuting the plaintiffs, even though the defendants knew they had insufficient grounds for the prosecution.

¶ 11 All defendants moved to dismiss the complaint under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)). The circuit court dismissed all counts against Devine and Egan because the court found that the Court of Claims had exclusive jurisdiction over the claims against the prosecutors. See 705 ILCS 505/8(d) (West 2002). For the state law claims against the City Defendants for malicious prosecution and conspiracy, the court said:

"[T]he only basis for any claim against the City Defendants with regard to malicious prosecution is the provision of the information regarding the crime to the prosecutor. To that end, the City Defendants are immune from liability pursuant to [section] 2-107 of the Tort Immunity Act. [745 ILCS 10/2-107 (West 2006).] With regard to the conspiracy claim against the City, it is alleged that the City started a campaign to defame, slander and falsely bring criminal charges against the Plaintiffs and provided false information to the State's Attorney regarding criminal acts of the Plaintiffs,

resulting in the prosecution of the Plaintiffs for manslaughter. Again, the acts alleged against the City would be afforded the immunity under 2-107. Furthermore, all the acts by the City as alleged in counts I through IV are discretionary ones. Thus, the City would also be immune from liability pursuant to [sections] 2-201 and 2-109 of the Act [745 ILCS 10/2-109, 2-201 (West 2006)]. Thus, the City is entitled to dismissal of counts I, II, III and IV."

The court denied the motion to dismiss the theft count and the section 1983 count.

¶ 12 The plaintiffs deposed Botwinski and Egan. Botwinski said he had no involvement with the case after the initial investigation. He did not see evidence of criminal intent, and in his written report he did not recommend bringing criminal charges against Kyles or the Hollinses. Egan testified that he first participated in the case in September 2003, near the end of the presentation of evidence to the grand jury. Egan had no role in the decision to present evidence to the grand jury about the incident, and he did not know why the State's Attorney decided to present the case to the grand jury. Egan did not know whether City employees contacted the State's Attorney's Office about the case or sought to pressure the State's Attorney into presenting evidence to the grand jury. But Egan swore that no City employee participated in the decision of the State's Attorney's Office, at the conclusion of grand jury testimony, to ask for indictments against the plaintiffs for involuntary manslaughter. Egan identified Darren O'Brien as an assistant State's Attorney involved with the investigation of the incident at E2 from the beginning.

¶ 13 The plaintiffs sought to depose O'Brien and several police officers who took part in the investigation. The City Defendants moved for summary judgment on the remaining counts and asked the court to decide their motions without any further depositions. The City defendants presented in support affidavits by Egan and Botwinski. The plaintiffs moved to strike the affidavits as inconsistent with the witnesses' depositions. The circuit court denied the motion to strike the affidavits, and directed the plaintiffs to answer the summary judgment motion without any further depositions. The parties briefed the motion and the plaintiffs' attorney submitted an affidavit explaining his need for the additional depositions. The circuit court agreed with the City defendants that the statute of limitations barred the action for theft. The court also accepted *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001), as authority establishing that the plaintiffs could not successfully sue under section 1983 for malicious prosecution, because Illinois permits claims for malicious prosecution under state law. Accordingly, the court granted the City defendants summary judgment on the remaining counts.

¶ 14 The plaintiffs moved for reconsideration of the order granting summary judgment, and, in the alternative, the plaintiffs sought leave to file another amended complaint, so that they could renew their efforts to state a claim against the City for the state law tort of malicious prosecution. The court denied the motion for reconsideration and denied the plaintiffs leave to further amend the complaint. The plaintiffs now appeal.

¶ 15 ANALYSIS

¶ 16 We review *de novo* the order dismissing all claims against Devine and Egan, and counts I through IV against the City Defendants, because the circuit court dismissed those counts

under section 2-619 of the Code of Civil Procedure. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). We also review *de novo* the order granting summary judgment in favor of the City defendants on the theft and section 1983 counts. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). The plaintiffs do not challenge the dismissal of count IV, the conspiracy count, and count V, the theft count. They argue that the circuit court erred by dismissing the three state law malicious prosecution counts and the section 1983 count, and the court erred by denying the plaintiffs leave to depose more witnesses and file a fifth amended complaint.

¶ 17 As a preliminary matter, the plaintiffs contend that the circuit court should have stricken the affidavits of Egan and Botwinski. Because we find that the affidavits make no difference to the outcome of the case, we will treat the record, on *de novo* review, as though the circuit court had stricken those affidavits.

¶ 18 Devine and Egan

¶ 19 The plaintiffs argue first that the Court of Claims did not have exclusive jurisdiction over the counts against Devine and Egan. The Court of Claims Act provides that the Court of Claims "shall have exclusive jurisdiction to hear and determine *** [a]ll claims against the State for damages in cases sounding in tort." 705 ILCS 505/8(d) (West 2002). State's Attorneys and their assistants are state officials (*Ingemunson v. Hedges*, 133 Ill. 2d 364, 369 (1990); see also *Office of State's Attorney v. Illinois Local Labor Relations Board*, 166 Ill. 2d 296, 303 (1995)), so all claims for damages against them must be brought in the Court of Claims. The parties agree that a plaintiff may sue a state official in state court, if the

official's alleged actions fall outside the scope of his authority or involve matters not within the official's normal functions. See *Healy v. Vaupel*, 133 Ill. 2d 295, 308 (1990).

¶ 20 In the parts of the complaint pertaining to Devine and Egan, the plaintiffs alleged:

"Richard Devine was the State's Attorney of Cook County, Illinois, in charge of criminal prosecutions in Cook County, Illinois.

* * *

*** Sixty[-]three counts of manslaughter were filed against [each of the plaintiffs].

* * *

*** The actions of the Defendants were intentional, willful and wanton.

*** There were no facts to support probable cause for the criminal charges brought against [the plaintiffs].

*** The Defendants initiated and continued with the criminal charges against [the plaintiffs], knowing that they were false.

*** The Defendants were aware that there was no probable cause for these charges.

* * *

*** The City of Chicago, through its officials and personnel, along with Richard Devine, *** undertook an intentional, coordinated plan to deflect attention from the (in)actions of the employees of the City of Chicago and its botched rescue efforts.

* * *

*** The City of Chicago and the State[']s Attorney's office alleged that there were too many people in the nightclub, and alleged that this ultimately caused the victims' tragic deaths.

*** The statements regarding overcrowding and the cause of the victims' deaths were false.

* * *

*** The City of Chicago, through its Police Department personnel, *** and Richard Devine, conspired during the months of February, March, and April of 2003 to continue[their] efforts to close the E2 Nightclub and started a campaign to defame, slander, and falsely bring criminal charges against the management of the E-2 Nightclub.

* * *

*** The above parties were aware that their smear campaign and falsely bringing criminal charges against the management of E-2 Nightclub would effectively operate to shut the club down permanently, considered to be critical to the City's McCormick Place redevelopment plans.

*** The City of Chicago was fully aware that there were insufficient facts to support criminal charges against these Plaintiffs. The State's Attorney's office was also aware of this fact. These entities decided that criminal charges would be placed anyway. ***

* * *

*** The Plaintiffs believe that discovery will show that officers of the police department and officials of the City of Chicago communicated and conspired with Richard Devine within days and weeks after this tragedy conspiring to fabricate false charges against the Plaintiffs.

* * *

*** The ulterior motive of the Defendants was to shut this 'Black Club' down."

¶ 21 We find that the complaint charges Devine and Egan only with filing false charges against the plaintiffs and prosecuting the criminal case against them in bad faith. We see no allegation of other acts, of a kind that prosecutors do not normally perform. In particular, we find no allegation that Devine or Egan acted as an investigator. See *Fields v. Wharrie*, No. 13-1195 (7th Cir. 2014), slip op. at 4-5.

¶ 22 In *White v. City of Chicago*, 369 Ill. App. 3d 765 (2006), the plaintiff charged that prosecuting attorneys deliberately elicited false testimony from witnesses against the plaintiff in a criminal case. The appellate court found that the alleged acts, of interviewing witnesses and eliciting false testimony from those witnesses, all occurred within the scope of the defendants' official duties as prosecuting attorneys, and therefore the Court of Claims had exclusive jurisdiction over the case. *White*, 369 Ill. App. 3d at 778-79.

¶ 23 Like the plaintiff in *White*, the plaintiffs here have failed to allege any acts outside the scope of Devine's and Egan's official duties. Allegations of corrupt motives for the officials' actions do not give the circuit court jurisdiction over the charges against the officials. See *White*, 369 Ill. App. 3d at 778. Because the circuit court lacked jurisdiction over the claims

against State's Attorney Devine and his assistant, Egan, we affirm the order dismissing the claims against those defendants.

¶ 24 State Law Malicious Prosecution

¶ 25 The plaintiffs contend that they sufficiently stated causes of action against the City defendants for the state law tort of malicious prosecution. The circuit court dismissed counts I through III, the state law malicious prosecution counts, because the Tort Immunity Act protected the City defendants against these claims. The plaintiffs do not argue that the circuit court erred by so holding. Instead, they argue that tort immunity "was not the basis for the court's ruling." They claim that the circuit court based its ruling on its incorrect finding that the plaintiffs alleged only that the City defendants provided information to the prosecutors, and not that they actively participated in the decision to charge the plaintiffs with crimes. The plaintiffs' construction of the circuit court's order ignores the language of that order. The court said, "all the acts by the City as alleged in counts I through IV are discretionary ones. Thus, the City would also be immune from liability pursuant to [sections] 2-201 and 2-109 of the Act." Because the plaintiffs have not presented any argument to show that the Tort Immunity Act does not protect the City defendants against their claims, we affirm the dismissal of the state law malicious prosecution counts.

¶ 26 Section 1983

¶ 27 Next, the plaintiffs contend that the circuit court erred when it followed *Newsome* and found that the plaintiffs could not pursue a section 1983 claim for malicious prosecution. The *Newsome* court based its holding on its interpretation of *Albright v. Oliver*, 510 U.S. 266 (1994). In *Albright*, Illinois authorities issued an arrest warrant for Albright based on a

statement by Detective Oliver, who said Albright sold a substance that looked like narcotics. When Albright heard about the warrant, he surrendered to police, but denied his guilt of the crime charged. Police released him from custody when he posted bond. The trial court dismissed the criminal charge. Albright then filed suit against Oliver under section 1983, alleging that Oliver lied in the statement that led to Albright's arrest, thereby violating Albright's civil right "to be free from criminal prosecution except upon probable cause." *Albright*, 510 U.S. at 269. According to the *Newsome* court, a plurality of four justices held that Albright failed to state a viable claim for relief under section 1983 because Albright had not alleged a violation of his rights under the fourth amendment. *Albright*, 510 U.S. at 268-75; see *Newsome*, 256 F.3d at 750. Two other justices concurred, finding that Albright failed to state a section 1983 claim because Illinois protected Albright's civil rights by providing an adequate remedy for malicious prosecution. *Albright*, 510 U.S. at 284-86 (Kennedy, J., concurring); see *Newsome*, 256 F.3d at 750-51. The fact that Albright could not pursue such a claim, due to the statute of limitations, did not affect their conclusion.

¶ 28 The plaintiffs contend that the *Newsome* court misconstrued *Albright*. The plaintiffs explain that the plurality of four justices held that Albright failed to state a claim for relief because he attempted to state a claim for violation of his substantive due process rights without further specification of the rights protected, and section 1983 protects citizens only against violations of the rights specified in the constitution. Because Albright failed to identify the constitutional provision Oliver violated, Albright had not stated a viable section 1983 claim.

¶ 29 The plaintiffs here, like *Albright*, alleged that City officials had denied them the right not to be prosecuted without probable cause. Like *Albright*, they do not specify what constitutional provision the alleged acts violate. Like *Albright*, the plaintiffs have not stated a claim for violation of their rights under the fourth amendment. Although the plaintiffs state in their complaint that they "allege violations of their civil rights including false arrest and imprisonment," the complaint includes no allegation that the defendants arrested or imprisoned the plaintiffs. Thus, we see nothing in the complaint before this court to distinguish the complaint here from the complaint in *Albright*, and under the reasoning of the *Albright* plurality, the plaintiffs have failed to state a claim for relief under section 1983.

¶ 30 The two justices who concurred on the basis that Illinois recognizes a tort of malicious prosecution would also find the complaint here insufficient. Thus, under the reasoning of six of the justices who decided *Albright*, the plaintiffs here, like *Albright*, failed to state a claim for relief under section 1983.

¶ 31 The plaintiffs point to two decisions after *Albright* in which federal courts listed the elements of a cause of action under section 1983 for malicious prosecution. *Wood v. Kessler*, 323 F.3d 872, 882 (11th Cir. 2003); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068-70 (9th Cir. 2004). In both *Wood* and *Awabdy*, the plaintiffs pled causes of action for violations of their fourth amendment rights. *Wood*, 323 F.3d at 881; *Awabdy*, 368 F.3d at 1068-70. Neither case includes a discussion of whether the availability of a state law remedy for malicious prosecution forecloses relief under section 1983, and neither case helps distinguish the case for the plaintiffs here from *Albright*. The plaintiffs also rely on *Fabiano v. City of Palos Hills*, 336 Ill. App. 3d 635 (2002), in which the court considered a section 1983 claim

for malicious prosecution. However, that case helps little, as it includes no discussion of *Albright* or *Newsome*. Because plaintiffs have not presented sufficient grounds to distinguish this case from *Albright*, we hold that the plaintiffs have failed to state a claim for relief under section 1983.

¶ 32 Proposed Amended Complaint

¶ 33 The plaintiffs argue that the circuit court abused its discretion when it denied them leave to file a fifth amended complaint. The circuit court need not permit further amendment of the complaint when the proposed amendment fails to state a viable cause of action. See *Crinkley v. Dow Jones & Co.*, 67 Ill. App. 3d 869, 874-77 (1978). The plaintiffs' proposed amendment tracks earlier versions of the complaint. The amendment changes the complaint by adding a renewed effort to state a state law claim for malicious prosecution. The plaintiffs do not explain why the Tort Immunity Act does not foreclose the claim. Accordingly, we cannot say that the circuit court abused its discretion when, after allowing four amendments to the complaint, it denied the plaintiffs leave to amend the complaint a fifth time. See *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992).

¶ 34 Depositions

¶ 35 Finally, the plaintiffs contend that the circuit court erred when it denied their request to depose other witnesses before deciding the motion for summary judgment. The plaintiffs claim that with the depositions they could prove that the City participated in the decision to present evidence about the incident to the grand jury, and in that way the City maliciously prosecuted the plaintiffs. The plaintiffs have not explained how the testimony of those witnesses could help them avoid the effect of the Tort Immunity Act, *Albright*, and the

exclusive jurisdiction of the Court of Claims. The plaintiffs also claim that the deposition of O'Brien, who is not a party, might show that prosecutors, including O'Brien, acted as investigators and tried to fabricate evidence before filing charges against the plaintiffs. But the complaint before this court includes no allegations of such conduct by Devine or Egan, the defendants from the State's Attorney's office in this case. Because the plaintiffs have not shown any reason to believe the depositions would change the resolution of any of the issues in the case, we cannot say that the circuit court abused its discretion when it denied the plaintiffs leave to depose further witnesses. See *Reedy Industries v. Hartford Insurance Co.*, 306 Ill. App. 3d 989, 996-97 (1999); *Jiotis v. Burr Ridge Park District*, 2014 IL App (2d) 121293, ¶ 23. We note that the Court of Claims may permit plaintiffs to take discovery related to their claims against state officials. See *Kapner, Wolfberg & Assocs. v. State of Illinois*, 54 Ill. Ct. Cl. 330 (2002).

¶ 36

CONCLUSION

¶ 37

The Court of Claims has exclusive jurisdiction to consider the complaint against the prosecutors, because the complaint alleges only corrupt motives for actions prosecutors took within the scope of their official duties. The plaintiffs have not addressed the circuit court's holding that the Tort Immunity Act justified dismissal of the state law malicious prosecution claims against the City defendants. The plaintiffs also have not shown that the circuit court erred when it followed Seventh Circuit precedent concerning the availability of a section 1983 cause of action for malicious prosecution in Illinois. Accordingly, we affirm the circuit court's judgment.

¶ 38

Affirmed.

No. 1-12-3816

¶ 39 JUSTICE PUCINSKI, specially concurring.

¶ 40 I concur in the result.