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2014 IL App (4th) 130489-U

NO. 4-13-0489

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
July 1, 2014
Carla Bender
4th District Appellate
Court, IL

THE VILLAGE OF ELLIOTT, a Municipal Corporation; and TRACY MOTT,)	Appeal from
Plaintiffs and)	Circuit Court of
Counterdefendants-Appellees,)	Ford County
v.)	No. 100V21
DUANE WILSON,)	Honorable
Defendant and)	Mark A. Fellheimer,
Counterplaintiff-Appellant.)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, holding the trial court did not err in (1) dismissing plaintiff's counterclaim for failure to state a claim, (2) denying defendant's motion for mistrial, (3) allowing plaintiffs to present photographs depicting vehicles not described in the complaint, and (4) imposing a fine against defendant.

¶ 2 In April 2010, plaintiffs, the Village of Elliott (Village) and the Village's mayor, Tracy Mott, in his individual capacity, authorized the towing of several vehicles from two properties belonging to defendant, Duane Wilson, due to Wilson allegedly violating the Village's ordinance prohibiting abandoned or inoperable vehicles (Ordinance) (Elliott, Ill., Ordinance 4-1-1 (Aug. 8, 1995)). Wilson filed a counterclaim, alleging the Village and Mott violated state law and his federal constitutional rights, which the trial court later dismissed after finding the Village and Mott were immune from liability and that Wilson failed to exhaust state remedies.

Following a January 2013 jury trial, the jury found Wilson violated the Ordinance.

¶ 3 On appeal, Wilson asserts the trial court erred by (1) dismissing his counterclaims, (2) denying his motions for mistrial, (3) allowing the Village to present photographs depicting vehicles not described in the complaint, and (4) imposing a fine on Wilson when the complaint's prayer for relief did not request a fine. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 In April 2010, the Village and Mott authorized the towing of several vehicles from two properties belonging to Wilson due to Wilson allegedly violating the Ordinance by keeping inoperable vehicles on his properties. Specifically, from Wilson's property located on Market Street, the Village and Mott authorized the towing of a black and gold Chevrolet pickup truck (Chevy) as well as a Camaro, which ultimately was not towed. From Wilson's property on Main Street, the Village and Mott authorized the towing of three vehicles: (1) a large vehicle trailer, (2) a small trailer used for storage, and (3) a red Mitsubishi.

¶ 6 In June 2010, the Village filed a complaint alleging Wilson violated the Ordinance, which prohibited "the keeping of, or abandonment of, inoperable motor vehicles on public and private property." Elliott, Ill., Ordinance 4-1-1 (Aug. 8, 1995). The Ordinance required the offending party to "dispose of any inoperable motor vehicle under their control within seven (7) days of written notice" from the Village. Elliott, Ill., Ordinance 4-1-4 (Aug. 8, 1995). The complaint stated, in relevant part, (1) Wilson received written notices from the Village regarding the violation; (2) an inoperable Mitsubishi parked upon the large vehicle trailer blocked a sidewalk on Wilson's Main Street property; and (3) an inoperable Chevy was parked

on the Village's right-of-way on Market Street.

¶ 7 In August 2010, Wilson filed an answer denying wrongdoing and a counterclaim against numerous parties, including the Village and Mott. The counterclaim alleged Mott and the Village (1) deprived Wilson of his property without due process of law in violation of the Illinois and federal constitutions (count I); (2) conducted an unreasonable search and seizure of Wilson's vehicles in violation of the Illinois and federal constitutions (count II); (3) violated Wilson's right to equal protection under the Illinois and federal constitutions (count III); (4) trespassed on Wilson's property in violation of state law (count IV); (5) converted Wilson's property in violation of state law (count V); and (6) enforced an ordinance that was unconstitutional on its face in violation of state law and the federal constitution (count VI). Wilson's federal claims alleged the Village and Mott violated Wilson's civil rights pursuant to section 1983 of the Civil Rights Act of 1871 (Civil Rights Act) (42 U.S.C. § 1983 (1996)).

¶ 8 A. Pretrial Motions

¶ 9 In September 2010, the Village and Mott filed a motion to dismiss Wilson's counterclaim pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-615, 2-619 (West 2010)). In May 2012, the trial court granted the motion to dismiss the counterclaim pursuant to section 2-619, finding (1) the Village and Mott were immune from liability under the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/1-101 to 10-101 (West 2010)); (2) the Village and Mott possessed legislative immunity; (3) Mott possessed qualified immunity; and (4) Wilson failed to exhaust state remedies prior to filing a section 1983 action.

¶ 10 In November 2012, prior to the commencement of the trial, Wilson filed a motion

in limine requesting, in part, that the court prohibit the Village from introducing evidence regarding vehicles not subject to the trial. The court granted the motion.

¶ 11 B. The Jury Trial

¶ 12 1. *The Village's Evidence*

¶ 13 In January 2013, Wilson's jury trial commenced. John Huppert testified he was a resident of the Village and had been a Village board member for 12 years. Huppert resided on Maple Street, from which he could observe Wilson's Main Street property. Due to his tenure as a Village board member, Huppert stated he knew of the Ordinance.

¶ 14 In September 2009, Huppert testified he observed and photographed what he believed to be a violation of the Ordinance regarding multiple vehicles parked on Wilson's two properties. Wilson objected to the admission of the photographs, arguing that those photographs depicted vehicles not subject to trial, thus violating the motion *in limine*. The trial court overruled the objection and found the photographs did not run afoul of the motion *in limine* as long as the Village placed no "emphasis or innuendo or inference" that the other vehicles were abandoned or inoperable.

¶ 15 Huppert testified he photographed the Chevy, which lacked taillights and appeared to be sunk into the dirt on Wilson's Market Street property. He also photographed a Camaro, which he believed to be inoperable. At Wilson's Main Street property, Huppert photographed a Mitsubishi and two trailers that lacked current registration. He indicated the large car trailer was parked on the sidewalk. Though acknowledging he did not watch Wilson's properties 24 hours a day, Huppert stated he never observed Wilson move any of the five vehicles from September 2009 through December 2009. Prior to the Village towing Wilson's

vehicles in April 2010, Huppert observed Wilson had moved the Mitsubishi onto the large car trailer, which was located on the Village sidewalk.

¶ 16 Tracy Mott testified from 2009 to 2010, he was the mayor of the Village, a town of approximately 370 people. Mott stated he was aware of the Ordinance prohibiting abandoned or inoperable vehicles. Though Mott knew Wilson by sight, he had never spoken with him. Wilson owned two properties in the Village, one on Market Street and one on Main Street. According to Mott, Wilson was not using either property as a residence, as both lacked running water. Neither location contained signage indicating Wilson operated a business for wrecking or junking vehicles, nor did Wilson advertise he ran such a business.

¶ 17 In 2009, Mott learned Wilson was allegedly violating the Ordinance by keeping inoperable vehicles on his property. The Village board discussed Wilson's alleged violations and, in December 2009, Mott asked the Village attorney, Ellen Lee, to send notice to Wilson of the alleged violations. The letter indicated Wilson had several vehicles in violation of the Ordinance and stated "you may attend the January 12 board meeting (7:00 p.m.) to present your plan to correct the situation." The letter did not specifically identify which vehicles were allegedly in violation of the Ordinance but did identify both the Market Street and Main Street properties. Wilson did not attend the January 2010 meeting, nor did he attend any subsequent meetings. Mott stated Wilson did not contact or communicate with Mott or any members of the Village board.

¶ 18 From September 2009 until March 2010, Mott did not observe Wilson moving or working on any of the five vehicles. In March 2010, Mott went to Wilson's properties with a Ford County sheriff's deputy. At that time, Mott asked the deputy to place towing stickers on the

Chevy, the Camaro, the Mitsubishi, and the small trailer in order to provide seven days' notice prior to towing. Mott believed the towing stickers specifically identified each vehicle subject to towing. While the deputy placed stickers on the vehicles, Mott took photographs. Mott said the Chevy was in a state of disrepair, with parts missing, the tires not holding air, and the tire rims touching the ground. Mott also noted the Chevy was located on the grass between the sidewalk and street, an area that constituted the Village's right-of-way. He could not definitively say whether the Chevy was inoperable.

¶ 19 According to Mott, the Camaro also appeared to be in a state of disrepair, with the tires not holding air and the tire rims touching the ground. Though he stated the Camaro was in "rough-looking condition" and appeared "not safe to drive," Mott did not necessarily know whether the vehicle was inoperable. Further, Mott testified the Mitsubishi and the small trailer located at Wilson's Main Street property lacked current registration. Mott said he did not ask the deputy to place a towing sticker on the large car trailer because the vehicle on the trailer at the time had current registration.

¶ 20 After Mott and the deputy placed towing stickers on Wilson's vehicles, Mott authorized Ellen Lee to send another notice to Wilson indicating the vehicles affixed with towing stickers would be towed in seven days if not brought into compliance. The only change Mott observed after placing towing stickers on the vehicles consisted of Wilson removing the vehicle from the larger trailer and replacing it with the Mitsubishi. In April 2010, the Village board hired Ken Wyatt to tow the Mitsubishi, the Chevy, and the two trailers. To tow the Chevy, Wyatt had to drag the Chevy onto the street with cabling prior to loading the Chevy onto the truck. Mott decided not to have the Camaro towed because it was not located on the Village's

right-of-way, though he still believed the vehicle to be in violation of the ordinance. Mott admitted he never attempted to contact Wilson to discuss whether the vehicles were in operable condition prior to towing them. Mott testified, for a vehicle with a towing sticker to avoid towing, the vehicle would need to be both in operable condition and have current registration.

¶ 21 Officer Curtis Miller, a lieutenant with the Ford County sheriff's office, testified in April 2010, he was dispatched to Wilson's properties to observe the towing of Wilson's vehicles. He noticed the Chevy was parked on Village property with the wheels sunk into the ground and the taillights missing. The Chevy had to be dragged to the street before it could be lifted onto the truck due to the tires being sunk into the ground. Miller denied looking closely at the Camaro since the Village chose not to tow it. Additionally, Miller observed the Mitsubishi and the two trailers were located on Village property. He did not personally know whether any of the vehicles were operable.

¶ 22 Ken Wyatt testified in April 2010, he towed four vehicles from Wilson's properties. At the Market Street property, Wyatt observed the Chevy on "the easement side" of the sidewalk and noticed one of the Chevy's wheels had sunk into the ground. Wyatt explained he had to slide the Chevy to the tow truck because the rear wheels had locked and would not turn. Wyatt did not have keys to the vehicle and the doors were locked, so he could not place the car in neutral. He later discovered the Chevy had a "problem with the rear end." According to Wyatt, the vehicle was inoperable. On the Main Street property, Wyatt observed a larger car trailer with a Mitsubishi on top parked just off the side of the road. Wyatt said the Mitsubishi did not have current license plates. Additionally, Wyatt testified he had never previously towed a vehicle to Wilson's properties to have work done, nor had he ever seen any advertising that

Wilson operated a junking or wrecking business.

¶ 23 Wilson did not make a motion for a directed verdict at the close of the Village's evidence. However, the trial court entered a directed verdict with regard to the larger car trailer because Wilson did not have adequate notice prior to the Village and Mott towing it. Wilson then presented his evidence.

¶ 24 *2. Wilson's Evidence*

¶ 25 Judy Wilson, Wilson's mother, testified the Mitsubishi belonged to her. She said the Mitsubishi was inoperable and that Wilson had the vehicle at his mechanic's shop on Main Street while he was looking for a transmission for the vehicle. She testified Wilson had been in the business of junking cars for years. If Wilson was unable to find a transmission, she planned to allow Wilson the opportunity to buy the vehicle in order sell or retain the scrap parts. It took over six months for Wilson to repair the vehicle. Coincidentally, on the day the Village towed the Mitsubishi, Judy drove to the Village from her home in Harrisburg, Illinois, to check on the status of the vehicle. According to Judy, Wilson completed the repairs to the Mitsubishi after reclaiming it from the tow yard. Judy acknowledged the Mitsubishi's registration had lapsed.

¶ 26 Robert Noble testified from 2009 to 2010, he owned the property next door to Wilson's Market Street property, which he stated was located in an industrial-zoned area. Noble said he knew Wilson owned a car repair business and operated from both the Market Street and Main Street addresses. According to Noble, he knew of several individuals who brought vehicles to Wilson to fix. Additionally, Noble testified he observed Wilson driving the Chevy in 2009 and/or 2010. He also saw Wilson driving his Camaro in 2009 or 2010, prior to the convertible top being slashed, which prompted Wilson to place a tarp over the convertible.

Noble did not have any information regarding the Mitsubishi.

¶ 27 Wilson testified he owned two properties in the Village, one on Main Street and one on Market Street, both of which were zoned for industrial or business use. Wilson was in the process of building a home on the Market Street property. The structure was made of concrete, completely enclosed, and had drywall and plumbing installed. Wilson had not yet placed bricks on the outside of the home, provided flooring, or completed the kitchen.

¶ 28 From 2009 to 2010, Wilson worked in Chicago and split his time between Chicago and the Village. While in the Village, Wilson repaired vehicles at the Main Street property, but he eventually shifted his work to the Market Street address because it had poured concrete, power, and safely housed his equipment. However, he continued to use the Main Street property to work on several vehicles because he stored spare parts at the property. Wilson also "junked" vehicles and kept the reusable parts for use on other vehicles. He possessed current registration in Illinois as a "parts resaler" under the name Quick Rods. Wilson described his business as 80% "junking" or "wrecking."

¶ 29 In March 2010, Wilson discovered several of his vehicles had towing stickers affixed to them. He testified he took photographs of those vehicles, then attempted to remove the stickers from the vehicles he believed were in compliance with the Ordinance. The small trailer had a towing sticker affixed, but Wilson noted that trailer had been on the property since 1996 and was used as storage for "junk" parts. Though the registration was not current, Wilson had no intention of using the small trailer for anything but storage.

¶ 30 Wilson conceded the Mitsubishi was inoperable at the time the Village affixed the towing sticker because Wilson was searching for a rare transmission that was no longer being

produced. The sticker included the Mitsubishi's license number. However, Wilson claimed that, prior to the Village towing the Mitsubishi, he replaced the transmission and drove it onto the large trailer, which was parked on a concrete pad. According to Wilson, a previous Village mayor permitted Wilson to place the concrete pad over the remains of an old sidewalk.

¶ 31 When Wilson arrived at his Market Street property, he discovered a towing sticker affixed to the Chevy; however, the sticker indicated it was for a Grand Am and the vehicle identification number (VIN) number did not match the Chevy's VIN number. Wilson testified the Chevy was operational. He admitted the Chevy was missing the taillight assembly, but noted the vehicle could still be driven if he employed hand signals. He also explained the tires appeared to be sunk into the ground because the tires had previously gotten stuck and he attempted, unsuccessfully, to "peel out" and free the Chevy. Wilson noted the Chevy had expired registration, so he renewed the registration, affixed new temporary plates to the vehicle, and placed documentation in the windshield. Though the Chevy was in operable condition, Wilson explained he removed the battery to preserve the battery for later use. According to Wilson, the Camaro did not have a towing sticker affixed to it and was in operable condition. He denied the Camaro's wheel rims were on the ground, stating the wheels were low-profile, which meant, by design, the rims should be near the ground.

¶ 32 Wilson admitted receiving both letters from the Village attorney. He did not attend the January 2010 Village meeting or contact any Village board members because (1) he had to work that day, (2) he felt uncomfortable because people in town gossiped about him, and (3) he did not believe he had violated the Ordinance. He also stated the Chevy was the only vehicle with the sticker placed on the back window, whereas the other vehicles had the sticker

placed on a passenger window.

¶ 33 On numerous occasions throughout the trial, the Village's attorney referred to exhibits as "People's exhibit," to which Wilson objected and subsequently requested mistrials. The court denied Wilson's requests for mistrials. The jury returned a verdict finding Wilson violated the Ordinance with regard to (1) the Mitsubishi, (2) the Chevy, (3) the Camaro, and (4) the small trailer.

¶ 34 C. Posttrial Proceedings

¶ 35 In February 2013, Wilson filed a posttrial motion asserting, in relevant part, (1) the Village's repeated references to exhibits as "People's exhibit" was prejudicial and warranted a mistrial; (2) the Village fabricated evidence, which warranted a new trial; (3) the Village presented insufficient evidence to convict Wilson; and (4) the trial court erred in allowing the Village to present photographs depicting other vehicles, which was in violation of the motion *in limine*. Following an April 2013 hearing, the court set aside the verdict with regard the small trailer, finding the Ordinance did not apply to trailers. The court denied the remainder of Wilson's posttrial motion.

¶ 36 The trial court then proceeded to the sentencing phase. The Village presented evidence that Wilson had violated the Ordinance on two previous occasions, making it a long-standing issue. The Village then asked the court to impose a fine of \$45,000 (3 vehicles x 30 days x \$500 per day). Wilson, in turn, presented photographs showing his attempts to comply with the Ordinance. Wilson argued against the court imposing a fine because the Village did not include a request for a fine in its prayer for relief. The court took the matter under advisement. In May 2013, the court entered a written order assessing a \$1,800 fine against Wilson (3 vehicles

x 30 days x \$20 per day).

¶ 37 This appeal followed.

¶ 38 II. ANALYSIS

¶ 39 On appeal, Wilson asserts the trial court erred by (1) dismissing Wilson's counterclaims, (2) denying Wilson's motions for a mistrial, (3) allowing the Village to present photographs depicting vehicles not described in the complaint, and (4) imposing a fine on Wilson when the complaint's prayer for relief did not request a fine. We address these assertions in turn.

¶ 40 A. Whether the Trial Court Erred by Dismissing Wilson's Counterclaims

¶ 41 Wilson argues the trial court erred in dismissing his counterclaims pursuant to section 2-619 of the Civil Code (735 ILCS 5/2-619 (West 2010)) because (1) Wilson did not fail to exhaust state remedies, (2) the Village and Mott were not immune from liability pursuant to the Tort Immunity Act (745 ILCS 10/1-101 to 10-101 (West 2010)), (3) the Village and Mott were not protected by legislative immunity, and (4) Mott was not protected by qualified immunity.

¶ 42 As a preliminary matter, we note Wilson's initial brief failed to challenge the trial court's findings as to count IV and V, though he attempts to revive those claims in his reply brief. Because Wilson failed to specifically raise these issues in his initial brief, we conclude Wilson forfeited review of counts IV and V. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief[.]"). We next must determine the appropriate standard of review for assessing Wilson's remaining claims.

¶ 43 We review *de novo* the trial court's decision to grant a motion to dismiss pursuant

to section 2-619. *Redwood v. Lierman*, 331 Ill. App. 3d 1073, 1077, 772 N.E.2d 803, 808 (2002). "On review, this court accepts all well-pleaded facts as true, draws all reasonable inferences in favor of the nonmoving party, and construes all pleadings and supporting documents in the light most favorable to the nonmoving party." *Lynch v. Department of Transportation*, 2012 IL App (4th) 111040, ¶ 19, 979 N.E.2d 113. With this standard in mind, we now turn to Wilson's arguments.

¶ 44

1. *Failure To Exhaust Remedies*

¶ 45 Wilson first asserts the trial court erred in dismissing his counterclaim, which alleged constitutional deprivations under section 1983 of the Civil Rights Act (42 U.S.C. § 1983 (1996)), for failure to exhaust state remedies. The counterclaim also alleged violations of corresponding rights under the state constitution. The court dismissed Wilson's counterclaim, in part, based on his failure to exhaust state remedies.

¶ 46

"The purpose of [section] 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). To establish a cause of action under section 1983, the plaintiff must demonstrate that a person acting under color of state law "deprived him of rights, privileges, or immunities secured by the constitution or the laws of the United States." *Bilski v. Walker*, 392 Ill. App. 3d 153, 157, 924 N.E.2d 1034, 1038 (2009). The availability of overlapping state remedies is generally irrelevant in determining whether a plaintiff has stated a cause of action under section 1983. *Zinermon v. Burch*, 494 U.S. 113, 124 (1990). Whether a party is required to exhaust state remedies depends on the nature of the claim. *Zinermon*, 494 U.S. at 125-26. Thus, we must determine as to each claim whether

Wilson's counterclaim alleges well-pleaded facts to support a cause of action under section 1983 and, if so, whether the cause of action requires Wilson to exhaust state remedies prior to filing suit under section 1983. We note this court may affirm on any basis in the record. See *Empress Casino Joliet Corp. v. Giannoulis*, 406 Ill. App. 3d 1040, 1043, 942 N.E.2d 783, 787 (2011).

¶ 47 a. Due Process (Count I)

¶ 48 First, Wilson asserts he did not fail to exhaust state remedies prior to bringing a section 1983 claim under the Civil Rights Act (42 U.S.C. § 1983 (1996)) for deprivation of due process as outlined in the fourteenth amendment because the State provided no adequate pre- or postdeprivation processes. Specifically, Wilson argues (1) the various forms of notice provided by the Village failed to alert Wilson to the vehicles allegedly violating the Ordinance and (2) the invitation for Wilson to attend a Village board meeting did not offer a meaningful opportunity for Wilson to be heard. Conversely, the Village and Mott contend Wilson's section 1983 claim is precluded because Wilson did not exhaust state remedies as required prior to filing his claim where (1) Wilson failed to take advantage of the process provided when he did not attend the Village board meeting and (2) Wilson's vehicles were properly tagged for towing, thus providing adequate notice for purposes of due process.

¶ 49 The purpose of the due-process clause is to ensure fair procedure for those deprived of their rights. *Zinermon*, 494 U.S. at 125. Thus, "to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate." *Zinermon*, 494 U.S. at 126. "[W]here the State can feasibly provide a pre-deprivation hearing before taking property, it generally must do so, despite the adequacy of a post-deprivation tort remedy to compensate for the taking." *Wehde v.*

Regional Transportation Authority, 284 Ill. App. 3d 297, 307, 672 N.E.2d 843, 851 (1996).

¶ 50 In this case, Wilson's counterclaim alleges the Village and Mott failed to provide constitutionally meaningful due process prior to towing Wilson's vehicles. We disagree. The Ordinance, on its face, does not contain any provisions regarding pre- or postdeprivation hearings or the manner in which notice must be given, other than stating such notice must be in writing. The parties do not dispute Wilson received a letter from the Village attorney stating, "You may attend the January 12 board meeting (7:00 p.m.) to present your plan to correct the situation"—a meeting Wilson chose not to attend. The question then becomes whether an invitation to appear at a Village board meeting and present a corrective plan constituted a "hearing" for purposes of satisfying due process and providing a state remedy. While far from ideal, we conclude the Village's letter meets minimal procedural due-process requirements. "[T]he fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 165 Ill. 2d 25, 45, 649 N.E.2d 384, 395 (1995). The Village's letter inviting Wilson to the January board meeting provided Wilson with an opportunity, predeprivation, to bring any questions or challenges before the Board. Wilson failed to take advantage of that opportunity and, thus, cannot assert the Village deprived him of the opportunity to be heard at a meaningful time and in a meaningful manner. We therefore conclude Wilson cannot sustain his deprivation-of-due-process claim under section 1983 because he failed to avail himself of the process that was afforded to him by the Village board. Thus, the trial court did not err in dismissing this count.

¶ 51 b. Search and Seizure (Count II)

¶ 52 Wilson next asserts the trial court erred in finding Wilson failed to exhaust state remedies before filing his section 1983 claim regarding unlawful search and seizure under the fourth amendment. Because we conclude Wilson failed to state a cause of action under section 1983, we uphold the trial court's dismissal of count II.

¶ 53 In support of his argument that the Village violated his fourth amendment rights by failing to obtain a warrant prior to towing his vehicles, Wilson relies on *Redwood*, which held that, except under special circumstances, town officials are required to obtain a warrant prior to towing a vehicle located on the curtilage of a private residence. *Redwood*, 331 Ill. App. 3d at 1083, 772 N.E.2d at 813. However, the distinguishing factor between *Redwood* and the case at bar is that, in *Redwood*, town officials towed a car from the curtilage of a private residence, whereas in the present case, the Village towed Wilson's vehicles from outside his purported place of business. We find Wilson's interpretation of *Redwood* as applying to all private property too broad, as the facts of *Redwood* were limited to a seizure of a vehicle from the curtilage of a private residence. Indeed, this court in *Redwood* emphasized as "crucial" the fact that the inoperable vehicle was located on the curtilage of residential property. *Redwood*, 331 Ill. App. 3d at 1083, 772 N.E.2d at 813.

¶ 54 As the Illinois Supreme Court has noted, "the privacy expectation in commercial premises is different from, and less than, the privacy interest in a private home." *People v. Janis*, 139 Ill. 2d 300, 317, 565 N.E.2d 633, 641 (1990). While the curtilage of a residential property carries with it a reasonable expectation of privacy, the same concept is inapplicable to the area immediately surrounding a business. *Janis*, 139 Ill. 2d at 313, 565 N.E.2d at 639. Thus, Wilson would be required to demonstrate a subjective expectation of privacy that society would be

willing to recognize as reasonable. *Janis*, 139 Ill. 2d at 313-14, 565 N.E.2d at 639. Wilson's counterclaim states he operated a business out of his Market Street and Main Street properties and that customers would bring vehicles to Wilson for repairs. This implies customers had ready access to the property. Moreover, the counterclaim and record fail to reflect Wilson took any steps to demonstrate a subjective expectation of privacy, such as, for example, placing "no trespass" signs or enclosing the property with a fence. Thus, Wilson's counterclaim fails to demonstrate a legitimate expectation of privacy in the outdoor area surrounding his business.

¶ 55 Due to the dearth of Illinois case law regarding a municipality's authority to tow inoperable vehicles from private property, we also find guidance from other jurisdictions. In *Bezayiff v. City of St. Louis*, 963 S.W.2d 225 (Mo. Ct. App. 1997), which is cited in *Redwood*, the reviewing court determined the plaintiff's fourth-amendment rights had been violated when city officials entered the fenced-in backyard of plaintiff's residence to seize inoperable motor vehicles. *Bezayiff*, 963 S.W.2d at 234. However, in reaching its decision, the *Bezayiff* court stated, "[w]e do not mean to suggest that the warrant requirement extends to all entries onto private property for nuisance abatement purposes, such as removing inoperable motor vehicles. Rather, the requirement applies only to those entries which intrude upon constitutionally recognized expectations of privacy." *Bezayiff*, 963 S.W.2d at 234.

¶ 56 In *Santana v. City of Tulsa*, 359 F.3d 1241, 1245 (10th Cir. 2004), the Tenth Circuit adopted previous holdings from the Fifth and Eighth Circuits in concluding, "as long as procedural due process standards are met and no unreasonable municipal actions are shown, a nuisance abatement action does not violate the Fourth Amendment." See *Samuels v. Meriwether*, 94 F.3d 1163, 1168 (8th Cir. 1996); *Freeman v. City of Dallas*, 242 F.3d 642, 652-

53 (5th Cir. 2001).

¶ 57 As discussed above, the Village met procedural due-process standards in this case. Wilson received notice of the violation from the Village but declined the Village's invitation to attend the board meeting to address the Ordinance violation, thus choosing not to take advantage of any procedural safeguards implemented by the Village prior to towing his vehicles. Further, Wilson has failed to establish the Village's actions were unreasonable. Wilson does not have the same expectation of privacy in his purported business as he would in his private residence. His vehicles were located in plain view on nonresidential property and the Village deemed those vehicles to be inoperable and therefore in violation of the Ordinance. Under the circumstances, we conclude Wilson failed to establish a legitimate expectation of privacy such that a warrant was required prior to seizing his vehicles. Thus, we uphold the trial court's dismissal of count II because Wilson failed to state a cause of action sufficient to sustain an action under section 1983.

¶ 58 c. Equal Protection (Count III)

¶ 59 Wilson contends the trial court also erred by dismissing his equal-protection claim. However, because we conclude his counterclaim failed to state sufficient facts to support a cause of action under section 1983 of the Civil Rights Act (42 U.S.C. 1983 (2006)), we need not address whether defendant was required to exhaust state remedies.

¶ 60 To adequately plead a section 1983 constitutional violation on the grounds of equal protection of laws, the complainant must show more than different treatment from others; to be sufficient, a section 1983 claim based on equal protection must assert the government official singled out an identifiable group of individuals for disparate treatment with the purpose,

at least in part, of causing adverse effects on the group. *Dennis E. v. O'Malley*, 256 Ill. App. 3d 334, 348, 628 N.E.2d 362, 372 (1993). A defendant who raises an equal-protection claim must demonstrate that selective enforcement of a statute is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962). Wilson has the burden of pleading sufficient facts to demonstrate the Village engaged in discriminatory enforcement of the law. See *City of Champaign v. Sides*, 349 Ill. App. 3d 293, 301, 810 N.E.2d 287, 295 (2004). "To invoke the defense of selective prosecution, one must prove that the selection was based on an unjustified standard such as race, religion, or some other arbitrary classification." *City of Collinsville v. Seiber*, 82 Ill. App. 3d 719, 726, 403 N.E.2d 90, 95 (1980). "[M]ere conscious exercise of selectivity in enforcement is not in itself a constitutional violation." *Id.*

¶ 61 Here, Wilson's counterclaim fails to set forth well-pleaded facts to demonstrate the Village and Mott singled out Wilson for disparate treatment and chose to tow his vehicles in order to cause adverse affects against him. Rather, the counterclaim states, without any factual support, that the Village chose not to tow vehicles from similarly situated individuals and that the Village did so solely based on "vindictiveness and animus." Even if Wilson pleaded facts to demonstrate the Village towed his vehicles out of "vindictiveness and animus," the exercise of some selectivity in the enforcement of an otherwise valid law does not create a constitutional violation. *Id.* Because we conclude Wilson's counterclaim failed to state sufficient facts to support a cause of action under section 1983 and are of the opinion Wilson is unable to cure the defect, we find the trial court did not err in dismissing count III of Wilson's counterclaim with prejudice.

¶ 62 d. Unconstitutionality of the Ordinance (Count VI)

¶ 63 Wilson also argues the trial court erred in finding Wilson was required to exhaust state remedies before filing a section 1983 claim asserting the unconstitutionality of the Ordinance on its face. Section 11-40-3 of the Illinois Municipal Code (65 ILCS 5/11-40-3 (West 2008)) authorizes municipalities to institute ordinances declaring "all inoperable motor vehicles, whether on public or private property and in view of the general public, to be a nuisance." Because the statute authorizes the Village to pass such an ordinance, the Ordinance is presumed valid. See *Radcliff v. City of Berwyn*, 129 Ill. App. 3d 70, 72, 472 N.E.2d 98, 100 (1984). "To overcome this presumption, plaintiffs must show that the ordinance as applied to them was arbitrary, unreasonable and without substantial relation to the public health, welfare or safety and thus unconstitutional." *Gibson v. Village of Wilmette*, 97 Ill. App. 3d 1033, 1037-38, 425 N.E.2d 434, 437-38 (1981). "[T]he means chosen must be reasonably necessary for the accomplishment of the intended purpose and not unduly oppressive." *Aladdin's Castle, Inc. v. Village of North Riverside*, 66 Ill. App. 3d 542, 547, 383 N.E.2d 1316, 1319 (1978).

¶ 64 We have already determined Wilson failed to state a cause of action under section 1983 of the Civil Rights Act (42 U.S.C. 1983 (2006)) for violations of his fourteenth- and fourth-amendment rights, which diminishes his ability to overcome the presumption of the Ordinance's validity. Moreover, the relation of this type of ordinance to the public health, welfare, and safety is well documented. Inoperable motor vehicles constitute "a fire hazard; an attractive nuisance to children; a liability in encouraging tourist trade; and an eyesore." *Bezayiff*, 963 S.W.2d at 229 (citing *Price v. City of Junction, Texas*, 711 F.2d 582, 588 (5th Cir. 1983)). Thus, an ordinance prohibiting inoperable motor vehicles on private or public property reasonably serves to protect

the public health, welfare, and safety. The Village gave Wilson an opportunity to abate the nuisance, provided extensive notice beyond what was required by the Ordinance, and offered Wilson an opportunity to be heard before instituting towing procedures. After several months without communication from Wilson, the Village towed Wilson's vehicles without a warrant, an action that was reasonably necessary to accomplish the Ordinance's intended purpose of keeping the Village free from the public health, welfare, and safety issues presented by inoperable motor vehicles. Moreover, the Village's actions were not unduly oppressive.

¶ 65 Because Wilson has failed to overcome the presumption that the Ordinance is valid and has further failed to demonstrate the Ordinance was unconstitutionally applied as to him, we conclude the trial court did not err in dismissing count VI of Wilson's counterclaim.

¶ 66 As we would apply the same reasoning to Wilson's state-law claims in counts I, II, III, and VI that we have just applied to their corresponding federal constitutional claims, we further conclude the trial court did not err in dismissing the state-law claims contained within these counts.

¶ 67 *2. Tort Immunity Act, Qualified Immunity, and Legislative Immunity*

¶ 68 Because we have already concluded the trial court did not err in dismissing Wilson's counterclaim, we need not address whether the Village and Mott were protected by the Tort Immunity Act, qualified immunity, or legislative immunity.

¶ 69 We now turn to Wilson's contention that the trial court made several reversible errors during the trial on his ordinance violation.

¶ 70 B. Whether the Trial Court Erred in Denying Wilson's Motions for Mistrial

¶ 71 Wilson contends the trial court erred in denying his motions for mistrial based on

the Village repeatedly referring to several exhibits as "People's exhibit." "It is the court's duty to prevent prejudicial conduct at trial, and to grant a new trial where such conduct has occurred." *Bisset v. Village of Lemont*, 119 Ill. App. 3d 863, 865-66, 457 N.E.2d 138, 140 (1983). We will not overturn the court's decision to deny a motion for mistrial absent an abuse of discretion. *Jackson v. Reid*, 402 Ill. App. 3d 215, 229, 935 N.E.2d 978, 990 (2010). To warrant a mistrial, an error must be of such a character and magnitude that the complaining party has been deprived of its right to a fair trial, which requires the complaining party to demonstrate that actual prejudice resulted from the error. *Jackson*, 402 Ill. App. 3d at 229-30, 935 N.E.2d at 990-91.

¶ 72 Wilson outlines 11 occasions in which the Village referred to exhibits as "People's exhibit." The Village's attorney apologized to the jury and, on three of those occasions, corrected himself midsentence. Wilson objected on eight occasions and requested a mistrial twice during the trial. Wilson asserts this repeated behavior by the Village attorney was egregious enough to warrant a mistrial. We disagree. The record indicates the Village's attorney served as State's Attorney for 20 years and the record supports that the Village's attorney made these mistakes out of habit, not intentionally. Wilson cited no precedent to support the finding of a mistrial in this instance and offered the trial court no evidence to demonstrate the use of "People's exhibit" tainted the jury. Without a showing of actual prejudice and only the speculation of Wilson, we are not inclined to create such precedent here.

¶ 73 Wilson's chief concern was that the jury might have implied the trial to be of a criminal nature rather than civil. Regardless, Wilson failed to demonstrate how the use of "People's exhibit" implied the case was criminal in nature or how that caused "actual prejudice" to Wilson. Thus, we conclude the court did not abuse its discretion in denying Wilson's motion

for a mistrial.

¶ 74 Though the heading in Wilson's brief suggests this issue revolves around the Village's attorney repeatedly referring to several exhibits as "People's exhibit," he spends several pages asserting additional reasons why the court should have granted a mistrial, including (1) the Village's attorney "uttered a loud, exasperated sigh; leaned back in his chair; rolled his eyes" and (2) the Village "completely fabricated evidence." Wilson argues the Village's pervasive misconduct inevitably influenced the jury in an otherwise close case, and thus the court should have granted a mistrial. Even taken with Wilson's assertion that the Village attorney's repeated discussion of "People's exhibit" constituted a grievous error, we conclude the trial court did not abuse its discretion in denying Wilson's motion for mistrial. The Village's attorney's act of sighing with exasperation, even when combined with other alleged acts of misconduct, does not rise to the level which required the trial court to grant a mistrial.

¶ 75 As to the allegations that the Village "completely fabricated evidence," we conclude the Village argued reasonable inferences based on the evidence in the case. Wilson asserted his testimony that the vehicles were not properly affixed with towing stickers was uncontradicted by the evidence; however, it does not follow the jury must believe his testimony. *Village of Bull Valley v. Winterpacht*, 2012 IL App (2d) 101192, ¶ 12, 968 N.E.2d 160 (it is the role of the jury to determine the credibility of witnesses and the weight to be given to witness testimony). Moreover, contradictory testimony did exist. Mott testified he observed an officer from the Ford County sheriff's office tag all five vehicles. The Village's cross-examination then explored the reason for the discrepancy by asking Wilson if the stickers could be peeled from one vehicle and transferred to another. Wilson testified that would not be possible without

ruining the sticker.

¶ 76 On appeal, Wilson expresses outrage that the Village continued to "demand the same false testimony over and over, in a loud and accusatory voice, charging at [Wilson] in a demonstrative manner." The record supports no such assertion from Wilson. In fact, the record reflects the Village's attorney asked Wilson the question about whether the sticker could have been transferred to another vehicle, then, upon hearing Wilson testify it would have been impossible, he moved on to another topic. The record does not reflect the Village's attorney berated Wilson with the same question repeatedly. Moreover, Wilson raised no objection during this line of questioning, rendering that portion of the argument forfeited. See *Guski v. Raja*, 409 Ill. App. 3d 686, 695, 949 N.E.2d 695, 704 (2011) (failure to object at trial renders an argument forfeited).

¶ 77 Wilson also directs us to the Village's closing argument in support of his argument that the Village fabricated evidence by saying the Chevy was the only vehicle with a towing sticker placed on the back windshield, as other vehicles not named within the complaint had been tagged on the back window. The record does not include evidence regarding other vehicles on Wilson's property and where those vehicles were allegedly tagged, so we will not consider it now. See *O'Brien v. City of Chicago*, 285 Ill. App. 3d 864, 874, 674 N.E.2d 927, 936 (1996) (appellate court review is limited to the trial court record). In this instance, the Village attorney remarked the Chevy was the only vehicle with a sticker on the back, which he submitted demonstrated "some monkey business going on there." During closing argument, attorneys are allowed to draw reasonable inferences based on the evidence. *Rendleman v. A B A Building Maintenance, Inc.*, 222 Ill. App. 3d 367, 373, 583 N.E.2d 703, 707 (1991). The fact that

witnesses disagreed as to whether all five vehicles had been properly affixed with towing stickers gives rise to the inference that someone could have tampered with the stickers, which was an issue for the jury to decide. Even if the Village incorrectly stated the evidence, the jurors were instructed that opening and closing arguments are not evidence and that they should rely on their own notes and recollections even if they differ from others. We presume the jury followed the instructions presented by the trial court. *Aguirre v. City of Chicago*, 382 Ill. App. 3d 89, 100, 887 N.E.2d 656, 665 (2008). Moreover, for reasons previously stated, we find sufficient evidence existed to support the jury's finding. See *Morescki v. Leuschke*, 217 Ill. App. 3d 456, 459, 577 N.E.2d 547, 550 (1991) ("a jury verdict will not be overturned unless the verdict is palpably inadequate or against the manifest weight of the evidence"). Therefore, we conclude the trial court did not abuse its discretion in denying Wilson's motion for mistrial or, by extension, its motion for a new trial.

¶ 78 C. Whether the Trial Court Erred in Allowing the Village
To Present Photographs Depicting Vehicles Not Described in the Complaint

¶ 79 Wilson next asserts the trial court erred in allowing the Village to present photographs depicting vehicles not described in the complaint. Wilson argues this is particularly egregious because these photographs ran afoul of Wilson's motion *in limine*, which the court previously granted. We will not overturn the trial court's decision regarding the admission of evidence absent an abuse of discretion. *Clayton v. County of Cook*, 346 Ill. App. 3d 367, 377, 805 N.E.2d 222, 231 (2003).

¶ 80 Wilson cites one case in support of his position: *Jackson*, 402 Ill. App. 3d 215, 935 N.E.2d 978. In *Jackson*, the court held the defendant "injected an unfair inference into the trial which the court clearly directed the defense to avoid in order to insure a fair trial[.]"

Jackson, 402 Ill. App. 3d at 232, 935 N.E.2d at 992. Wilson asserts, in this case, by showing the photographs depicting other vehicles, the Village injected an unfair inference into the trial that Wilson possessed other vehicles that failed to comply with the Ordinance. We disagree.

¶ 81 Several witnesses took photographs of Wilson's properties memorializing the state of the properties between September 2009 and April 2010, including Huppert, Mott, and Wilson. Those photographs included the entirety of Wilson's properties, including the five vehicles at issue during trial and other vehicles not at issue. To preclude any and all photographs that depicted vehicles not at issue would leave the Village without meaningful evidence from which to try its case. The trial court cautioned the Village not to emphasize the presence of those additional vehicles or to suggest those vehicles were also in violation of the Ordinance, an order with which the Village complied throughout the trial. Thus, we conclude the court's decision to admit the photographs did not violate the motion *in limine* or constitute an abuse of discretion.

¶ 82 D. Whether the Trial Court Erred in Imposing a Fine

¶ 83 Wilson's final argument is the trial court erred in imposing a \$1,800 fine because the Village's complaint did not request the imposition of a fine in the prayer for relief. We review the court's imposition of a fine for an abuse of discretion. *Village of Barrington Hills v. Life Changers International Church*, 354 Ill. App. 3d 415, 420, 820 N.E.2d 1068, 1072 (2004).

¶ 84 In support of his contention, Wilson relies upon section 2-604 of the Civil Code (735 ILCS 5/2-604 (West 2010)), which states, in part, "[e]very count in every complaint and counterclaim shall contain specific prayers for the relief to which the pleader deems himself or herself entitled." The Village correctly notes the importance of the remainder of section 2-604, which reads, "[e]xcept in case of default, the prayer for relief does not limit the relief obtainable,

but where other relief is sought the court shall, by proper orders, and upon terms that may be just, protect the adverse party against prejudice by reason of surprise." 735 ILCS 5/2-604 (West 2010). While it is true the Village did not request a fine in the prayer for relief or attach a copy of the Ordinance to the complaint, Wilson cannot claim surprise. The initial letter Wilson received from the Village attorney included a copy of the Ordinance, which specifically stated, pursuant to section 4-1-10, each vehicle in violation of the Ordinance could be fined up to \$500 per day. Additionally, Wilson himself included a copy of the Ordinance as an attachment to his answer and counterclaim. Wilson also had to rely upon the language of the Ordinance in crafting jury instructions, as no pattern jury instruction was available for the Ordinance. Perhaps the best indicator that Wilson was not surprised by the fine was a rejected jury instruction Wilson submitted to the court that would allow the jury to determine what fine, if any, to impose.

¶ 85 Wilson asserts surprise is irrelevant because the real issue is whether the Village complied with the Civil Code. In support, Wilson cites to *P B M Stone, Inc. v. Palzer*, 251 Ill. App. 3d 390, 396, 622 N.E.2d 71, 76 (1993), for the proposition that "where there is no prayer for a money judgment in a plaintiff's complaint, it is improper to grant such relief." However, careful examination of *PBM Stone* reveals the holding centered on the fact that the complaint prayed only for *mandamus* relief to compel the defendant to issue a license and permit; therefore, the appellate court held the defendant was prejudiced by the lack of a prayer for damages because the defendant would have otherwise asserted applicable affirmative defenses. *P B M Stone*, 251 Ill. App. 3d at 397, 622 N.E.2d at 76. In other words, the appellate court clearly concluded the defendant in *PBM Stone* was surprised by the request for damages at the dispositional phase. That is not the situation in this case, as Wilson cannot demonstrate surprise

at the possibility of a fine.

¶ 86 Because Wilson cannot show surprise that the trial court imposed a fine against him and he has not demonstrated how his defense of the case was prejudiced by the Village's failure to include the imposition of a fine in its prayer for relief, we conclude the court did not err in imposing a \$1,800 fine against Wilson.

¶ 87

III. CONCLUSION

¶ 88 For the foregoing reasons, we affirm the trial court's judgment.

¶ 89 Affirmed.