Supreme Court Case No. 65143

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUDY PALMIERI,

Appellant,

vs.

CLARK COUNTY, a political subdivision of the STATE OF NEVADA; DAWN STOCKMAN, CE096, individually,

Respondents.

Appeal from the Eighth Judicial District Court for the District of Nevada
Order Granting Motions for Summary Judgment

Case No. A-11-640631-C

APPELLANT'S PETITION FOR REVIEW

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I.

INTRODUCTION

The Nevada Supreme Court must reverse the Court of Appeals opinion because the intermediate Court exceeded its jurisdiction when it misapprehended the facts of the case, by stating at page 23 at footnote 14 of its opinion, that the County failed to raise the administrative warrant standard in its opening and reply briefs.[1]

The Court of Appeals then held that the District Court failed to apply the proper standard because it applied a criminal standard for probable cause instead of a lesser standard of probable cause for an administrative search. The Court of Appeals then erroneously reviewed the case under the lesser administrative probable cause standard after the District Attorney had already acknowledged that the proper standard was a criminal standard by the arguments and moving papers in the District Court and in its Respondent's Brief in the Court of Appeals.

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[1]The County was not the appellant it acknowledged that the warrant was a criminal warrant. Likewise, the Court of Appeals further misapprehended that the Plaintiff/Appellant Judy Palmieri was not the owner of the Meadows Pet Store, or the Bark Avenue Pet Shop. The said stores were owned by Pacific Consolidated Corporation yet the County had previously charged Mrs. Palmieri for the acts of the corporation's employees.

The Court of Appeals does not have the jurisdiction to change the County's concession that the search was criminal rather than administrative. Indeed the Court of Appeals never asked for briefing on the issue, never advised the parties prior to oral argument that it was entertaining an administrative standard for probable cause and therefore denied Judy Palmieri the process that she was due on direct appeal pursuant to the state and federal provisions of the due process clause.

II.

STATEMENT OF FACTS

Mrs. Palmieri was not the legal owner of the Meadow Pets store in the city. Nor was she the owner of Bark Avenue pet store in the County. The pet stores were owned by Pacific Consolidated Corporation. (APP vol. I, 000064). The corporation is owned by her husband Fred Palmieri and Judy Palmieri owns less that 25% (APP vol. I, 000065.) Stockman clearly had the licensing information available to her from both City of Las Vegas and County of Clark business licensing. The Appellate Court's opinion erroneously concludes that the probable cause requirements for administrative inspections and searches of residential and commercial premises is the same.

Both Clark County and the City of Las Vegas have long standing grudges against Mrs. Palmieri. Each entity has subjected Mrs. Palmieri to a pattern of

continued harassment and excessive scrutiny. In a prior criminal case, on April 29, 2007, Clark County Animal Control Officer, Danielle Harney, filed a declaration in support of a warrant and summons for alleged violations which were attributed against Mrs. Palmieri, individually, but should have only been brought against her husband's corporation. Mrs. Palmieri was not even present when the violations were alleged to have occurred. Harney's 2007 declaration was based upon alleged lack of care and treatment of the animals under the care of the corporation.

Ultimately, Clark County Animal Control, by and through Danielle Harney, caused two criminal complaints to be filed against Mrs. Palmieri. These complaints were dismissed against Mrs. Palmieri. The first criminal charges were brought on March 28, 2008 before the Honorable J. Bonaventure. When Mrs. Palmieri refused to plead guilty in that case, Clark County Animal Control filed additional charges against Mrs. Palmieri with the specific purpose of finding criminal activity at the Bark Avenue pet store. These charges took place during an unannounced inspection and were brought against her for twenty-one alleged violations. The second prosecution was initially brought before the Honorable W. Jansen on July 21, 2008. Subsequently, the two matters were consolidated before the Honorable J. Bonaventure. The March 28, 2008 and July 21, 2008 charges

against Plaintiff were ultimately dismissed on May 20, 2009 because the State conceded that the corporation should have been the corporation, not Mrs. Palmieri.

In addition, Mrs. Palmieri was not subject to a consensual inspection when the warrant was executed on her home.[2] There were no exigent circumstances attendant to the warrant and the Animal Control Officer failed to contact Judy Palmieri prior to seeking the warrant as required by Nevada case law.

III.

ARGUMENT

The Court of Appeals chose to become an advocate for the County of Clark and Dawn Stockman by raising for the first time that an administrative probable cause has a lesser standard. The County was represented by competent counsel in the District Court and on appeal who both treated the matter as a criminal search warrant.[3] Likewise, the District Court reviewed the matter as a criminal matter.

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[2]At the time of the execution of the warrant Mr. Palmieri was in the shower at her home, She testified in deposition that she heard voices downstairs and found a LVMPD officer, Stockman and another animal control officer, Tory Olson in her kitchen.

[3]The Motion for Summary Judgment was filed by Chief Deputy District Attorney, by Michael J. Foley, on two occasions. Neither time did he argue for a lower standard for probable cause pursuant to an administrative search warrant. On appeal Matt Christian an experienced attorney and adjunct law professor did not argue a lesser standard of probable cause for a residential search of Mrs. Palmieri's home. Mrs. Palmieri testified in her deposition that Stockman's

The Court of Appeals did not allow Mrs. Palmieri to brief the issue because the Court erroneously states at page 23 of its opinion that the County of Clark did not raise the administrative probable cause and on appeal it did not raise the issue in its opening or reply briefs.

The Court of Appeals claims that it can raise a claim not raised by the Appellant if it deals with a constitutional question. The only case that the Court cites to Desert Chrysler-Plymouth v. Chrysler Corp., 95 Nev. 640, 643-644 (Nev. 1979), which it cites to support the proposition that a Court may address an issue not raised by the Appellant, *sua sponte*, is Mountain States Telephone & Telegraph Co. v. Animas Mosquito Control District, 152 Colo. 73, 380 P.2d 560 (1963).

However, Mountain States is not as broad as the Appellate Court purports. Specifically, Mountain States actually held:

> "generally it is not considered good practice for courts to resolve cases on grounds not urged by the parties or their counsel, yet in cases such as we have before us, when much of the argument revolves around which of two words and meanings the legislature intended, and which by either interpretation reveals legislation that is patently unconstitutional and void, and under which many persons are receiving unfair, discriminatory and unlawful

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supervisor did not like Mrs. Palmieri because she was a woman. (APP vol. I, 000105, lns. 15-16).

> treatment, it is the duty of the courts to resolve the question to the end that citizens may not be deprived of their constitutional rights." Id. at 77, 380 P.2d at 562

However, the facts of this case do not fall within the exceptions which may permit *sua sponte* consideration of constitutional questions. Here, The constitutionality of a statute is not inherently involved nor patently unconstitutional and void. Furthermore, the Court of Appeals here is not reviewing the constitutionality of a statute, but rather is impermissibly changing a material fact which the County already acknowledged before the District Court and in its Answering Brief before the Court of Appeals. That is, Ms. Palmieri was subjected to a *criminal search in her home, not an administrative search* and Mrs. Palmieri was prosecuted in a criminal court not in an administrative court.

A business owner's expectation of privacy in commercial property is less that the privacy interest afforded to a private homeowner and is particularly attenuated commercial property used in "closely regulated" industries *i.e.* airports, railroads, restaurants, and liquor establishments, where premises may be subject to regular administrative searches by state or federal agencies for the purpose of determining compliance with health or safety regulations. Therefore, the Court's reliance upon Camara v. Mun. Court, 387 U.S. 523 (1967) is misplaced because that reliance overlooks the significant liberty interest enjoyed by Mrs. Palmieri

when she is subjected to an invasive search, in her home, that gives rise to criminal charges.

In the case at hand, the purpose of the search was to charge Mrs. Palmieri with crimes and have her answer personally in criminal court. Indeed, Mrs. Palmieri testified that Dawn Stockman told her that the supervisor said words to the effect that animal control had been unable to "get Mrs. Palmieri until now." In the past, the charges against Mrs. Palmieri had been dismissed because they were improperly brought against Mrs. Palmieri rather than the corporation and that other charges in a criminal indictment had also been dismissed.

Additionally, the Court's reliance upon West Point-Perpperell, Inc. V. Donovan, 689 F.2d 950 (11th Cir. 1982), to support deference to the initial magistrates' issuance of the warrant is misplaced because, as the Ninth Circuit has instructed, in a civil rights cases that the existence of probable cause is generally a question of fact for a jury to determine. *See*, McKenzie v. Lamb, 738 F.2d 1005, 1008 (9th Cir. 1984).

Here, the concurring opinion correctly states that the majority opinion does not follow the requirements set forth in Owens v. City of North Las Vegas, 85 Nev. 105, 450 P.2d 784 (1969) and its requirement that the County seek consent . . .

before seeking an administrative warrant. The County's failure to follow Nevada law shows that the clear intent was to seek a criminal search warrant.

Moreover, pursuant to Franks v. Delaware, 438 U.S. 154 (1978) Stockman's affidavit demonstrated reckless disregard for the truth, by Stockman herself as the affiant. Specifically, **during her deposition in this matter, Defendant Dawn Stockman conceded that Clark Country Animal Control has a policy of failing to adequately investigate complaints and to personally confirm the identity of persons making complaints**. Stockman testified as follows:

> "Q. Did you make any efforts to identify the individual that you had talked to as being Kaitlyn Nichols?
>
> A. No.
>
> Q. And why is that?
>
> A. That's not our normal procedure. We get thousands of calls. We don't go out and investigate if the person reporting is that person.
>
> Q. Okay. So your actions were pursuant to policy and practice?
>
> A. Correct.
>
> Q. Of your department?

A. Correct.

(APP vol. I, 000164, p. 16, lns. 13-25)

Although Stockman swore to a judge that her affidavit was truthful, during her deposition, Stockman also conceded that her affidavit included several fallacies, inaccuracies, and misrepresentations. Stockman conceded that if the individual filing the complaint was not Kaitlyn Nichols then her report "would all be fictitious" (APP vol. I, 000168, p. 32, lns. 5-6). Likewise, Stockman conceded that she made no effort to determine whether Ms. Nichols was a former employee of Mrs. Palmieri. (Id., p. 32, ln. 7 through p. 33, ln. 18). Additionally, Stockman made no effort to investigate Kaitlyn Nichols' background to determine that Nichols and her roommate Ornealas had both been terminated for theft. (Id., p. 33, ln. 25 through p. 34, ln. 2)

Stockman made no effort whatsoever to corroborate the purported report. Stockman did not seek preliminary information, such as a description of the residence. (APP vol. I, 000169, p. 34, lns. 13-15). Incredibly, Stockman did not even ask the date of the alleged infractions which were the basis of the purported complaint. (Id., p. 36, ln. 1 through p. 37, ln. 13). Stockman likewise did not ever attempt to ascertain the number

of animals alleged to be at Mrs. Palmieri's house. (APP vol. I, 000170, p. 38, lns. 1-6).

Stockman also conceded that the prior contacts which she detailed in her affidavit concerned incidents which were not recent, but on the contrary, which had occurred approximately **two and half to four and years prior**. (APP vol. I, 00172, p. 46, lns. 6-11; p. 49, lns. 18-21). Lastly, Stockman never contacted Officer Jason Elff , whose prior report Stockman claimed necessitated obtaining a search warrant. (Id., p. 49, lns. 12-17). Stockman also dod not advise the Court that Mrs. Palmieri was not the owner of the Meadows Pet Store. Dawn Stockman did not advise the Court that the complainant, Ms. Nichols, had been terminated for theft.

Furthermore, the Appellate Court overlooked Plaintiff's state tort claims because the Court erroneously applied the wrong standard of probable casue.

1. Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress

The elements of an intentional infliction of emotional distress ("IIED") claim are "(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the

plaintiff's having suffered severe or extreme emotional distress and (3) actual or proximate causation." Star v. Rabello, 97 Nev. 124, 625 P.2d 90, 91-92 (Nev. 1981).

Here, the Defendant intentionally and negligently inflicted emotional distress upon Mrs. Palmieri by searching her residence based upon a warrant which was obtained without probable cause. During the search Mrs. Palmieri was forced to wait in her pajamas without underwear or shoes. Then the County seized Mrs. Palmieri's two elderly dogs and burned the skin of one of the dogs. The County had a duty to investigate complaints made to Animal Control and not execute warrants which were obtained without probable cause. Instead, the County engaged in a series of actions to vex, harass and annoy Mrs. Palmieri in an extended pattern of conduct. As a result, a reasonable jury could find that the County's conduct was outrageous and engaged in reckless disregard for causing Mrs. Palmieri's emotional distress. There exists a genuine issue of material fact as to whether Stockman's statement while executing the warrant, that "Animal Control has never been able to get anything on you until now" demonstrates the County acted with malice, or reckless disregard for, Mrs. Palmieri's

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emotional well-being. Therefore, the Court failed to view the evidence in the light most favorable to Mrs. Palmieri.

2. Conspiracy

To state a claim for conspiracy, Plaintiffs must demonstrate a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and that damage has resulted from said act or acts. *See*, Hilton Hotels Corp. v. Butch Lewis Prods., Inc., 109 Nev. 1043, 862 P.2d 1207, 1210 (Nev. 1993).

It is unlikely that direct evidence of a conspiracy exists. Thus the question of whether an agreement exists should not be taken from the jury so long as there is a possibility that the jury can infer from the circumstances [that the alleged conspirators] reached an understanding to achieve the conspiracy's objectives. An express agreement among all the conspirators in not a necessary element of a civil conspiracy. Hampton v. Hanrahan, 600 F.2d 600, 620-624 (7th Cir. 1979). *cert. granted in part, judgment rev'd in part on other grounds*, 446 U.S. 754, 100 S. Ct. 1987 (1980); *See also*, Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598 (1970); Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988).

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Here, Stockman and Animal Control officers conspired to deprive Mrs. Palmieri's Fourth and Fourteen Amendment rights and Mrs. Palmieri suffered actual harm when Mrs. Palmieri's residence was unlawfully searched and she had false criminal charges filed against her. Therefore, a reasonable juror could infer that the alleged conspirators reached an understanding to achieve the objective of depriving Mrs. Palmieri of her Fourth and Fourteen Amendment rights. Additionally, Stockman's statement that "Animal Control has never been able to get anything on you until now" shows that Animal Control engaged in a pattern of behavior and conspiracy to vex, harass, and annoy Mrs. Palmieri by subjecting her to excessive scrutiny in hope to "get something on her." Consequently, the question of whether an agreement exists should be determined jury.

3. Malicious Prosecution

The elements of a malicious prosecution cause of action are: (1) Defendant initiated, procured the institution of, or actively participated in the continuation of a criminal proceeding against plaintiff; (2) Defendant lacked probable cause to commence that proceeding; (3) Defendant acted with malice; (4) The prior proceeding was terminated; and (5) Plaintiff sustained damages. LaMantia v. Redisi, 118 Nev. 27, 38 P.3d 877 (2002).

Want of probable cause is judged by an objective test. The Court is required to determine whether, on the facts known by the attorney, a reasonable attorney would have considered the prior action legally tenable. Jordan v. Bailey, 113 Nev. 1038, 944 P.2d 828 (1997).

Summary judgment was erroneously granted on Mrs. Palmieri's claim for Malicious Prosecution because there existed questions of fact concerning whether Stockman had probable cause to swear an affidavit for criminal activity when she conducted no investigation whatsoever. The bedrock principle of a malicious prosecution claim is that one who causes or triggers a charge to be filed may be sued for malicious prosecution. In Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L. Ed. 2d 561 (1976) the Court used the term of the "moving force" in the context of a malicious prosecution in a 42 U.S.C. 1983 action. That means that the fact that Stockman's affidavit was granted by a Judge does not insulate Stockman from liability. In Catrone v. 105 Casino Corp., 82 Nev. 166 414 P.2d 106 (1966), the Supreme Court approved the rule that a person who maliciously procures prosecution by a third person is as liable as if he had instituted the criminal proceeding himself.

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Moreover, there exists a question of fact as to whether Stockman acted with malice. In Countrywide Home Loans, Inc. v. Thitchener, 192 P.3d 243, 252 (Nev. 2008) the court defined malice and oppression when they held, "'[m]alice, express or implied' means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others." "'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person." The court went on to state that both definitions utilize conscious disregard of a person's rights as a common mental element, which in turn is defined as "the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences." (Id.). At the summary judgment stage the court was required to accept Plaintiff's contention that during the search Stockman said something to the effect that "we haven't been able to get anything on you until now." Accepting that statement as true and drawing reasonable inferences therefrom there can be no doubt that Stockman's statement corroborates Mrs. Palmieri's allegations that Animal Control had something against her and engaged in a pattern of behavior to "get her."

IV.

CONCLUSION

The Appellant respectfully requests an Order for full briefing in this matter; or that the case be reversed and remanded for trial.

DATED this 19th day of January, 2016.

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V.

CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 32(a)(8) and NRAP 40B(d), I certify that the Appellant's Petition for Review is proportionally spaced, has a font typeface of 14 points of Times New Roman type-style, and contains 3,172 words (petitions for review are limited to 4,667 words), and is 16 pages long.

Finally, I hereby certify that I have read this Petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the document regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found; NRAP 32(a)(4)-(6) regarding the limitations of this Rule, computed in compliance with Rule 32(a)(7)(C).

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19th day of January, 2016.

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VI.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to NRAP 25(1)(d) on the 20th day of January, 2016, I did serve at Las Vegas, Nevada a true and correct copy of **APPELLANT'S PETITION FOR REVIEW**, on all parties to this action by:

- ☐ Facsimile
- ☐ U.S. Mail
- ☐ Hand Delivery
- X Electronic Filing

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