IN THE COURT OF COMMON PLEAS,
ADAMS COUNTY, OHIO
GENERAL DIVISION

SHAWN D. COOLEY, et al.,	:	Case No. 2023-0069
Plaintiffs,	:	
v.	:	Judge Jerry McBride
	:	
JOSEPH EDGAR FOREMAN, A/K/A AFROMAN, et al.	:	
	:	
Defendants.		

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS AS TO DEFENDANTS' COUNTERCLAIMS

The face of Defendants' Counterclaims as well as Defendants Opposition makes clear that judgment on the pleadings is warranted in favor of Plaintiffs. Defendants do not dispute that Plaintiffs' are entitled to qualified, absolute, and quasi-judicial immunity, waiving any argument to the contrary. Defendants put forth no legal arguments against Plaintiffs statutory immunity, aside from referencing an irrelevant and inapplicable statute. What is more, Defendants concede that Plaintiffs were not named in their official capacities and have not mitigated this issue. Defendants cannot overcome these shortcomings, but even if they somehow could, there is still no legal or factual basis for the remaining Counterclaims. Accordingly, judgment on the pleadings in favor of Plaintiffs is appropriate.

A. Defendants Do Not Dispute Plaintiffs' Entitlement to Qualified, Absolute, and Quasi-Judicial Immunity.

It is well established that a party's failure to address an argument raised by another in a dispositive motion in their opposition constitutes a waiver of any argument to the contrary. Here, Plaintiffs argued that had they been properly named, they would be entitled to qualified, absolute,

and quasi-judicial immunity. Defendants argue that Plaintiffs were properly named and have a general argument pertaining to immunity under R.C. 9.89 and Chapter 2744. However, Defendants put forth no express arguments against Plaintiffs claims to qualified, absolute, and quasi-judicial immunity, which are separate and apart from the immunity defenses provided in the above-referenced statutes. Defendants' failure to address these arguments constitutes waiver of any argument to the contrary. *See e.g., Hope Acad., Broadway Campus v. White Hat Mgmt., LLC*, 2022-Ohio-178, ¶ 36 (Ct. App.) (where a party fails to address an argument in response to a dispositive motion, they have abandoned any argument to the contrary.). Accordingly, judgment on the pleadings in favor of Plaintiffs as to qualified, absolute, and quasi-judicial immunity is warranted.

B. Plaintiffs Are Entitled to Statutory Immunity Pursuant to Chapter 2744.

Plaintiffs Motion for Judgment on the Pleadings shows Plaintiffs are entitled to statutory relief under Chapter 2744. Defendants do oppose Plaintiffs' statutory immunity but instead of addressing such arguments under Chapter 2744, as raised by Plaintiffs, they do so under R.C. 9.86.[1] This provision of the statute, and the immunity it provides, was not raised by Plaintiffs in their Motion for Judgment on the Pleadings. This is because the immunity provided under R.C. 9.86 would not apply to Plaintiffs who are officers for a political subdivision rather than state officers. (*See* R.C. 9.86; and see R.C. 9.85 (citing R.C. 109.36 defining "officer or employee" as used in R.C. 9.86 to exclude "any person elected, appointed, or employed by any political subdivision of the state"). Accordingly, Defendants arguments regarding the application of R.C. 9.86 are inconsequential and irrelevant to Plaintiffs' Motion for Judgment on the Pleadings.

[1] While Defendants cited R.C. 9.89, the provision they quoted is from R.C. 9.86.

What is relevant is Plaintiffs' entitlement to immunity under Chapter 2744. Defendants only argument to the contrary is that there are exceptions to the general grant of immunity provided under this chapter. (Def. Opp., 7). Defendants argue that to prevail, they only need to show one of the exceptions apply. (Id.). Defendants' do not argue that any exceptions apply generally, nor do they identify any exceptions which could possibly apply. (Id.).

Defendants' sole opposition to Plaintiffs' statutory immunity is only with respect to Defendants counterclaims 1 and 2, which deal with the alleged destruction of property of the door, door frames, and closet. These actions were permitted under Ohio law as explained below, but Plaintiffs are also entitled to statutory immunity for these claims. Defendants allege that "the exception to the immunity granted by O.R.C. Section 2744.02(B)(2) [would apply] by showing that the Deputies acted in a negligent manner in the execution of the search warrant." (Def. Opp., pg. 11). Defendants' immunity analysis stops there, but in reality if an exception to immunity applied, which it does not, such immunity may be restored in the third step of the analysis under R.C. 2744.03. Under R.C. 2744.03, any immunity would be restored as Plaintiffs actions in gaining access to Mr. Foreman's residence and closet were not manifestly outside the scope of the employee's employment or official responsibilities, in accordance with the applicable law, and permitted by the judicially authorized search warrant.

Defendants' failure to put forth any argument against Plaintiffs statutory immunity for the remaining counterclaims is futile. First and foremost, Defendants' failure to substantively dispute Plaintiffs entitlement to statutory immunity constitutes abandonment of any arguments to the contrary. *See e.g., Hope Acad., Broadway Campus v. White Hat Mgmt., LLC*, 2022-Ohio-178, ¶ 36 (Ct. App.). Moreover, immunity is a threshold issue which is appropriate to determine at this stage. *Battle v. Favreau*, 2015-Ohio-5106, ¶ 17 (5th Dist.) (citing *Harlow v. Fitzgerald*, 457 U.S.

800, 818 (1982)); *see also Gettings v. Bldg. Laborers Local 310 Fringe Bens. Fund*, 349 F.3d 300, 304 (6th Cir. 2003). As Defendants have not provided any substantive argument against Plaintiffs entitlement to immunity under Chapter 2744, nor could they, such immunity warrants judgment on the pleadings in favor of Plaintiffs.

C. There is No Dispute that Plaintiffs Were Not Properly Named in Their Official Capacities.

Plaintiffs Motion for Judgment on the Pleadings demonstrates that when this case was initially filed by Plaintiffs Shawn D. Cooley, Justin Cooley, Michael D. Estep, Shawn S. Grooms, Brian Newland, Lisa Phillips, and Randolph L. Walters, Jr, all the claims were brought by these individuals in their personal, individual capacities. Nothing in Plaintiffs' Complaint claims any of their claims are pursued against Defendants in Plaintiffs' official capacities. What is more telling is that the Sheriff's Office has no involvement in the matter, further demonstrating Plaintiffs are not pursuing their claims in their official capacities. Plaintiffs have argued that Defendants' claims may be bared by a lack of capacity in Plaintiffs Answer to Defendants Counterclaims. (Pl. Answer, ¶179).

Defendants' only argument in opposition is that Plaintiffs' Complaint states that the Plaintiffs are employed with the Sheriff's Office and that they did not provide their residential addresses. This is not enough to render Plaintiffs' Complaint to be levied in their official capacity. Defendants provide no support that a single allegation of what Plaintiffs do for work is sufficient to transform this into an official capacity suit. Further, the addresses provided in Plaintiffs Complaint are for their personal counsel, not the Sheriff's Office or any other address associated with the County. (*See* Pl. Compl.). Plaintiffs' decision not to provide their actual addresses does not transform this case into an action in their official capacities either.

Defendants go on to argue, without any legal support, that "If the Deputies have sued under their official capacity they are then waiving their immunity by bringing the suit in their official capacity." (Def. Opp., 5). However, this argument misunderstands the application of immunity with respect to Plaintiffs. When Plaintiffs are pursuing claims against Defendants, they are not requesting immunity. This is because immunity is an affirmative defense, not a claim for relief. Plaintiffs are only seeking immunity now that Defendants have brought claims against them for actions taken during their employment with the Sheriff's Office. Thus, it is not accurate to state that because Plaintiffs initiated this suit in their personal capacities that they have somehow waived immunity for Defendants subsequent claims which targets their official capacities. Again, Defendants do not provide a single shred of legal support for this position aside from their own personal opinions. In all, Defendants have not brought any official capacity claims against Plaintiffs, but even if they had, at this stage Plaintiffs are entitled to statutory, absolute, qualified, and quasi-judicial immunity for Defendants' claims relating to the execution of the search warrant.

D. Defendants' Opposition Does Not Mitigate the Factual and Legal Shortcomings in their Counterclaims, Warranting Judgment on the Pleadings.

It is clear on the face of Defendants' counterclaims and Defendants Opposition filing that there is no legal or factual basis for relief against Plaintiffs, further warranting judgment on the pleadings with respect to Defendants' counterclaims.

i. Defendants Voluntarily Dismissed Counts 9, 10, and 11.

After Plaintiffs' Motion for Judgment on the Pleadings, Defendants agreed to voluntarily dismiss Counterclaims 9, 10, and 11 on June 25, 2024. This includes Defendants claims for First Amendment Retaliation, Abuse of Process, and Tortious Inference with a Business Contract or Relationship. As Defendants have voluntarily dismissed these claims, Plaintiffs will not address them further.

ii. Defendants Cannot Sustain a Fourth Amendment Claim on this Record.

Defendants' failure to name Plaintiffs in their official capacity and Plaintiffs' entitlement to immunity both require judgment on the pleadings in favor of Plaintiffs. These legal barriers to relief aside, Defendants Fourth Amendment claim is still factually and legally deficient despite their Opposition filing. Defendants' grand, yet entirely unsupported, accusations of a "defective search warrant" are not enough to maintain their Fourth Amendment claims against any Plaintiff, but especially against Plaintiffs Shawn D. Cooley, Justin Cooley, Michael D. Estep, Shawn S. Grooms, Lisa Phillips, and Randolph L. Walters, Jr, who only executed the search warrant at issue. Accordingly, Defendants cannot maintain any claims against these Plaintiffs arising from their procurement of the search warrant.

Defendants have doubled down in their Opposition on the misplaced argument that the search warrant is only allegedly invalid because it was based on lies from a confidential informant to Plaintiff Newland. (Def. Opp., pp. 2-3). However, officers are permitted to rely on information from a confidential informant. *See United States v. Moore*, 999 F.3d 993, 997 (6th Cir. 2021); *United States v. Smith*, 510 F.3d 641, 652 (6th Cir. 2007) ("An officer may rely upon information obtained from a confidential informant so long as the issuing judicial officer is reasonably assured that the informant was credible and the information reliable."). There are no allegations or factual information to support the motion that, at the time Plaintiff Newland obtained the search warrant, any information provided by the confidential informant was false.

Defendants only push back with the question, "exactly how the purchase of marijuana at a [out of state] dispensary was illegal?" (Def. Opp., pp.2-3). But during the August 2022 time period in question, it was not legal to purchase recreational marijuana in Ohio, marijuana could not be brought in from other states, and the amount of marijuana Defendant Foreman allegedly

had was far above the minimum threshold. *See e.g., State v. Donoho*, 2018-Ohio-4950, ¶ 16 (Ct. App.) (Ohio law does not permit out of state marijuana and does not permit recreational sale or use); *Stadefendants 'n*, 2022-Ohio-1419, ¶ 14, 188 N.E.3d 688, 692 (Ct. App.) (Ohio law did not permit recreational marijuana during the time period in question, thus defendants possession of marijuana supported their indictment for the same); *State v. Bland*, No. 11-90-21, 1991 Ohio App. LEXIS 4644, at *7 (Ct. App. Sep. 30, 1991) (citing R.C. 2925.03(F) for the rebuttable presumption of drug trafficking for marijuana amounts over 1,000 grams). Thus, the information provided by the confidential informant supported the search warrant for Defendant Foreman's residence, and there was no information to the contrary which would negate probable cause for said search warrant. In all, these factual assertions do not invalidate the search warrant, as it does not alleviate the fact that the information provided by the confidential informant supported probable cause of several crimes by Defendant Foreman.

These unsupported arguments aside, a search warrant is valid when supported by probable cause. *Humes v. City of Blue Ash*, No. 1:12-cv-960, 2013 U.S. Dist. LEXIS 74573, at *11 (S.D. Ohio May 28, 2013). Officers such as Plaintiff Newland are permitted to rely on information from a confidential informant when assessing probable cause. *See United States v. Moore*, 999 F.3d 993, 997 (6th Cir. 2021) ("Officers rely on confidential informants with some frequency to procure information to support a request for a search warrant."). Nothing in this record demonstrates any of the information provided to Plaintiff Newland at the time it was provided indicated said information would be unreliable. *See Marriott v. Persing*, No. 23-3620, 2024 U.S. App. LEXIS 5964, at *6 (6th Cir. Mar. 11, 2024) (explaining officers do not need to conduct quasi-trials to assess for probable cause); *Grant v. Wilson*, Nos. 21-5642, 21-5750, 2022 U.S. App. LEXIS 23207, at *20 (6th Cir. Aug. 18, 2022). (courts only look at the information known to the officer

at the time the warrant was obtained). Defendants' arguments that the confidential informant provided faulty information is further shot down by the fact that officers did locate evidence of drugs and drug trafficking in the home upon the execution of the search warrant. (*See* Def. Opp., pg. 4).

Defendants further take issue with the fact that the search warrant was issued and executed on the same day. However, Plaintiffs execution of the search warrant was done within the terms of the search warrant. Defendants do not dispute this. Moreover, Defendants do not provide any support or argument that such practice is not permitted or unusual, nor could they. Just because Plaintiffs could have waited longer to execute the search warrant does not mean they had to, nor does it make the execution of the search warrant a violation of Mr. Foreman's Fourth Amendment rights.

Defendants' Opposition demonstrates the only issues with Plaintiffs' execution of the search warrant at Mr. Foreman's residence are Mr. Foreman's personal grievances with the search warrant, rather than any supportable legal claims. Given this, and as Plaintiffs are not sued in their official capacities and are entitled to immunity, judgment on the pleadings in favor of Plaintiffs is warranted for Count 8.

i. Defendants' Counterclaims Pertaining to the Condition of his Door and Door Frames Do Not Support a Legal Claim.

Defendants purport that there was damage caused by Plaintiffs when executing the search warrant at Defendants residence. Plaintiffs correctly explained that there is no cause of action for damage to these features during the execution of the search warrant at Defendants home.

Yet, Defendants persist with this claim, stating that two doors were damaged during the search warrant. Defendants recognize that when officers arrived to execute the search warrant, they could not see if anyone was home, allowing them to gain access to the property by opening a

door. Defendants push back, without support, that because no one was home officers should have waited to execute the search warrant. However, Defendants provide no legal support, nor could they, that the officers' decision to execute a search warrant when no one was home was somehow improper. This argument ignores the language of R.C. 2935.12 and cases applying the same. *See State v. Wilson*, 41 Ohio App. 2d 240, 242, 325 N.E.2d 249, 251 (1974). This exact issue was addressed in *Wilson*, where the court held that the officers did not violate R.C. 2935.12 because "no one was at home to refuse them admittance" explaining that "[i]t was impossible to obtain consent when no one was present to give it." *Id.* Thus, there is no question that Plaintiffs actions where in compliance with R.C. 2935.12 and Plaintiffs did not need to be specifically denied entrance before making entry into Defendant Foreman's residence. To hold otherwise would create a loophole for criminals to simply not answer officers during a knock and announce to avoid the execution of a valid search warrant.

Similar to the door, the officers were permitted to cause some damage to the closet in order to execute the search warrant. *See e.g., Dunigan v. Thomas*, No. 22-cv-11038, 2023 U.S. Dist. LEXIS 31379, at *39 (E.D. Mich. Feb. 24, 2023) (citing *Dalia v. United States*, 441 U.S. 238, 258, 99 S. Ct. 1682, 60 L. Ed. 2d 177 (1979) ("officers executing search warrants on occasion must damage property in order to perform their duty[.]"); and *see Streater v. Cox*, 336 F. App'x 470, 477 (6th Cir. 2009) (finding that officers' conduct in breaking of a lock on plaintiff's briefcase during the execution of a search warrant was de minimis and did not constitute a constitutional violation). There are no allegations that the closet is no longer useable or otherwise unjustly taken by Plaintiffs, which would be necessary for Defendants' trespass to chattels and conversion claims. Accordingly, no further discovery on this issue is needed as both the facts alleged by Defendants

and the applicable law demonstrate Defendants have no basis to pursue Counts 1 and 2 against Plaintiffs.

ii. Defendants Have Not Set Forth a Viable Basis for Frivolous Conduct Under R.C. 2323.51, Nor Does this Statute Create a Private Cause of Action.

Plaintiffs' Motion for Judgment on the Pleadings correctly points out that there is no independent cause of action for alleged frivolous conduct, and even if there was, Defendants have not articulated any basis to pursue relief for frivolous conduct in this action.

Defendants do not dispute that Ohio law does not provide a private cause of action for alleged frivolous conduct under R.C. 2323.51, none exists. Instead, Defendants bizarrely ask this Court to transform their Opposition to Plaintiffs' Motion for Judgment on the Pleadings into a motion for sanctions against Plaintiffs. (Def. Opp., pg. 13-14). At the same time, Defendants reiterate that the only factual basis they have for requesting sanctions is due to Plaintiffs filing claims against Defendants, a majority of which survived an early dispositive motion. (Id.).

Defendants do not provide a single piece of legal support for this absurd request for sanctions. (Id.). At best, Defendants argue that because there was "no basis in existing law" for two of Plaintiffs claims, that this alone supports sanctions under R.C. 2323.51. (Id.). This theory of liability is not correct. Even the passage quoted in Defendants' Opposition states that frivolous conduct under R.C. 2323.51 requires not only that the claims have no basis in fact, but that the claims also cannot be supported by a good faith argument for extension, modification, or reversal, or cannot be supported by a good faith argument for the establishment of a new law. (Id.). Defendants only argue that the dismissed claims have no basis in fact, but that is not the standard set forth for frivolous conduct under R.C. 2323.51.

Moreover, as Defendants have dismissed claims from this action, under Defendants' own theory of R.C. 2323.51, Plaintiffs too would be entitled to sanctions against Defendants.

That being said, Ohio courts have consistently held that frivolous conduct captured under R.C. 2323.51 only includes conduct that (i) was obviously done to harass or maliciously injure another party, or for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation; (ii) not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law; (iii) lacking of any evidentiary support after a reasonable opportunity for further investigation or discovery; or (iv) denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief. R.C. 2323.51(A)(2)(a). Defendants allegations that a few of Plaintiffs claims were dismissed upon a motion to dismiss do not rise to the level of frivolous conduct captured under R.C. 2323.51(A)(2)(a).

Even if frivolous conduct was afoot, Defendants cannot simply request "sanctions" in an Opposition to Plaintiffs' Motion for Judgment on the Pleadings. As expressly explained in Plaintiffs Motion for Judgment on the Pleadings, an award for frivolous conduct can only occur after the court (1) holds a hearing regarding the alleged frivolous conduct, (b) gives notice of said hearing, and (3) determines that the conduct involved was frivolous and that a party was adversely affected by it, and then determines the amount of the award to be made. R.C. 2323.51(B)(2). No such hearings have been requested or held.

In all, Defendants have no legal basis to pursue an independent cause of action for frivolous conduct. Defendants also cannot transform their Opposition filing into a motion for sanctions, as this is not the proper avenue for doing so, there are no material allegations which would support a

finding of frivolous conduct, and Defendants have ignored the clear procedures for pursuing frivolous conduct. Furthermore, if Defendants are somehow entitled to sanctions under this theory, Plaintiffs would be too. But R.C. 2323.51 would not support a finding of frivolous conduct herein against Plaintiffs. Accordingly, Plaintiffs are entitled to judgment on the pleadings for this attempted claim.

E. Defendants Waive Any Claims by Hungry Hustlers Records by Not Defending the Same in Their Opposition.

Plaintiffs Motion for Judgment on the Pleadings demonstrates that Defendants' Counterclaims clearly allege no claims by Hungry Hustler Records against Plaintiffs. Plaintiffs' Motion for Judgment on the Pleadings further demonstrates that Hungry Hustler Records would not have any viable basis for any claims in this action, even if they attempted to pursue any claims. Defendants' Opposition to Plaintiffs' Motion for Judgment on the Pleadings does not dispute either of these positions. Accordingly, Defendants have waived any arguments to the contrary by failing to raise them in their Opposition. *See e.g., Hope Acad., Broadway Campus v. White Hat Mgmt., LLC*, 2022-Ohio-178, ¶ 36 (Ct. App.) (a party abandons an argument by failing to address it in their responsive brief); *Dage v. Time Warner Cable*, 395 F.Supp.2d 668, 679 (S.D. Ohio 2005) (plaintiff abandoned claim by failing to address it in his responsive brief). Thus, dismissal of any counterclaims by Hungry Hustler Records against Plaintiffs is appropriate.

II. Conclusion

For the foregoing reasons, and for the reasons captured in Plaintiffs' Motion for Judgment on the Pleadings, Plaintiffs respectfully seek judgment on the pleadings as to Defendants Foreman and Hungry Hustler Records' counterclaims arising from the execution of a valid search warrant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a true and accurate copy of the foregoing was served by email, this 8th day of July 2024, upon the following:

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