

Appeal No. 10-6105

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VICKI KOCH aka VICKI BUTRICK
Plaintiff - Appellant

v.

CITY OF DEL CITY, a municipal
corporation, and JOHN BEECH,
an individual,
Defendants - Appellees

REPLY BRIEF OF APPELLANT VICKI KOCH aka VICKI BUTRICK

Appeal from the United States District Court For The Western District Of Oklahoma
The Honorable Timothy D. DeGiusti
Case Number CIV-07-371-D

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REPLY BRIEF OF APPELLANT VICKI KOCH a/k/a VICKI BUTRICK

COMES NOW Appellant Vicki Koch, and replies to the Response Brief Of Appellees City Of Del City And John Beech, Individually, filed November 4, 2010.

I. APPELLATE JURISDICTION.

This Court has jurisdiction to hear this appeal because the order of Judge DeGiusti entered March 29, 2010, disposed of all claims before the trial court and is therefore a final decision.

II. OBJECTION TO ISSUES PRESENTED FOR REVIEW.

In its Statement of the Issues Presented for Review, Defendant objects to Koch's claim of malicious prosecution against Officer Beech, arguing it was never previously asserted. The Petition filed by Koch alleges Beech swore out a complaint of assault and battery upon a police officer and a count of obstructing an officer in the performance of his official duties, which charges were later dismissed for want of prosecution on March 2, 2006. It accuses Beech of knowing he was without probable cause to arrest Koch when he did. It accuses Beech of an unlawful and malicious arrest without due process of law. Attorney Vincent's statements in the Petition are sufficient to support a malicious prosecution claim.

The trial court should exercise supplemental jurisdiction over Koch's state

law tort claims when Koch's federal claims are remanded back for trial.

III. OBJECTIONS TO APPELLEES' STATEMENT OF THE CASE.

Appellees make numerous slanderous statements against Koch in their statement of the case, based either on outright false statements or fantasized opinions without any evidence to support such facts.

Koch was in fact a good Samaritan who voluntarily chose to care for Gladys Lance for many years before Lance's niece Pat Loar became guardian. (Aplt. App. 131). Lance was forced to rely on friends like Koch, as Lance's own family showed little concern for her welfare. At the time Loar took guardianship, Lance was 101 years of age and it had become necessary for her to be placed in a nursing home, which Koch's father did and sold Lance's home to pay for her care. Mr. Butrick turned the proceeds from the sale of the home over to Loar shortly after she obtained guardianship. (Aplt. App. 120).

The emergency guardianship order obtained by Loar directed Koch or her family to "immediately tell DHS, Petitioner and Gladys Lance's family (relatives) the whereabouts of Gladys Lance and why she was removed from her home." This order was entered in violation of Koch's Due Process rights, as she was never given notice of the hearing, and furthermore did not know the exact whereabouts of Lance, nor had Koch removed Lance from her home. Prior to her arrest, Koch

believed DHS felt she had been doing a good job taking care of Lance, as that is what her attorney Joyce Good had been advised by a DHS worker. (Aplt. App. 115). Koch's father had been advised by his own attorney that DHS had suggested the Advantage Program for Lance, but otherwise no further action was expected by DHS. (Aplt. App. 177). Koch's attorney contacted Nancy Byers on August 15th and told her Koch's father was admitting Lance into a nursing home. (Aplt. App. 207).

Beech and Del City can point to no evidence which suggests Koch was aware APS and Loar were looking for Lance or that Koch refused to disclose Lance's location to Loar's attorney Julia Wilson. To the contrary, attorney Wilson failed to disclose to Koch the actions she had been taking for Loar to obtain possession of Lance.

Officer Beech was dispatched to Koch's home to check on the welfare of Lance. He was not investigating any possible crime. Koch was not under investigatory detention, and therefore had the right to tell him to leave her property and go into her residence. Beech was trespassing when he refused to leave her property. Beech had no probable cause to arrest. Beech became so angry with her that he threw her down on the ground causing her numerous injuries which she still struggles with today.

IV. APPELLEES' STATEMENT OF FACTS.

Koch and her parents did in fact care for her parents for many years without any concern from Lance's niece, Pat Loar. Loar was aware Koch had been caring for her aunt as early as 2003. (Aplt. App. 130). Lance was happy with the care she received from Koch and her parents. (Aplt. App. 131, 183, 184, 185, 212). Lance revoked power of attorney from Loar on January 5, 2004, because she no longer wanted her to have it. (Aplt. App. 189, 122). According to the record, Loar took no action on Lance's behalf until late 2005, when DHS began checking on the welfare of Lance. Koch's father had authority under the power of attorney to place Lance into a nursing home and sell her home. (Aplt. App. 121). Either way, Koch is not responsible for any actions taken by her parents.

An emergency order was entered granting Loar immediate guardianship over Lance, without any notice to Koch. The order directed Koch to disclose the location of Lance to DHS and to Loar. There is also generic language that Loar may obtain law enforcement assistance, but as to what it does not specify other than that she may file a missing persons report. Loar never did file a missing persons report. The Letters Of Special Guardianship also entered September 8, 2005, does not direct Koch to disclose the location of Lance. (Aplt. App. 244).

Koch admits that a paper was placed on her door a few days before her

incident with Beech, and called Loar's attorney Julia Wilson after she received it. (Aplt. App. 253). Whatever it was, she did not understand it and did not know what was going on because no one had been speaking directly with her. (Aplt. App. 251). Proper notice of the guardianship proceedings should have been by mail. Koch asked attorney Wilson what she wanted with Lance and Wilson refused to tell her. (Aplt. App. 260). Koch did not see the order directing her to disclose the whereabouts of Lance to DHS or Loar until later. (Aplt. App. 261). Lance had been with Koch's parents, and Koch did not know where they were. (Aplt. App. 195). On September 9th Koch learned her parents had admitted Lance to a nursing home, but cannot remember anything about it except that it was in Harrah or Choctaw. (Aplt App. 254-255).

Koch has never admitted she saw the Order Appointing Special Guardian on September 9th as stated by Appellees. Appellees have produced no evidence showing it was given to her by September 9th. Koch went to the courthouse with her attorney at a later date to pick up the papers. (Aplt. App. 121).

Beech says he was told there was a pick-up order in place. However, he has never seen such an order and admits he had no such order with him when he went to Koch's residence. He was told to go to Koch's residence to check on the welfare of Lance. (Aplt. App. 65). Beech never does give us any explanation of

what is meant by a pick up order. He admits the only information he had that evening is what was told to him by his shift supervisor. (Aplt. App. 68). Clearly, checking on the welfare of someone is very different from picking that person up. Police do not take elderly people into protective custody pursuant to protective orders, and he had no DHS worker with him when he went to Koch's residence. He admits he did not speak with Nancy Byers from DHS until some time after he had arrested Koch, and that Byers told him they had been looking for Lance. (Aplt. App. 69). He never had a conversation with Pat Loar, Julia Wilson, or anyone else from DHS. (Aplt. App. 70).

Koch was on her porch when Beech approached her at her residence. Koch told him to leave her property. (Aplt. App. 71). Beech then continued to trespass on Koch's property, and lied to her saying he had an emergency pickup order for Lance. (Aplt. App. 72). Beech says he had a protective pickup order to take Lance into protective custody, although he had never seen it. (Aplt. App. 72). Beech had no authority to force Lance into police custody that evening. Beech says he told Koch that if she did not comply with the protective order she would be arrested for obstruction. (Aplt. App. 75). Neither he nor Koch had seen any protective custody order which Koch was to follow, nor did he have any reason to believe Koch knew the location of Lance. (Aplt. App. 76). Lance was not at Koch's residence and he

did not believe her to be there.

It does not matter when Koch told Beech Lance was in a nursing home. Koch had no duty at the time to tell him and did not know where Lance was. Beech was trespassing on Koch's property and yelling at her and threatening her. He told her if she didn't tell him where Lance was he would beat it out of her. (Aplt. App. 135). He threw her face down on the ground and was sitting on her back, even though he had hold of her hands. (Aplt. App. 210). Koch did not resist arrest for fear he might kill her as he kept wringing her arms. (Aplt. App. 270).

Koch suffered numerous injuries. (Aplt. App. 139-173). To this day, she continues to wear braces on her wrists, neck and ankles and experiences a great deal of pain due to the force used by Beech. She can no longer play piano, which she studied as a child and in college, or enjoy other daily activities as she did before the incident. She spent three nights in jail because of her arrest. She was also charged with the felony of assault and battery on a police officer and the misdemeanor obstructing an officer. She was forced to hire an attorney and go to court numerous times. The charges against her were not dismissed in the interest of justice until March 2, 2006. (Aplt. App. 137).

V. APPELLEES' OBJECTION TO APPELLANT'S STATEMENT OF FACTS.

On August 25, 2003, Lance signed a Nomination Of Guardian By An Adult designating Hugh Butrick, Vicki Butrick, Lucille Butrick, and Sandra Williams to serve as her guardians. (Aplt. App. 179). She had also signed a Durable Power of Attorney And Designation of Guardian in January 2004. (Aplt. App. 105). Lance believed the Butricks to be her guardians. (Aplt. App. 184). Attorney Joyce Good, who drafted the documents for them, believed this made the Butricks her guardians. (Aplt. App. 118).

DHS did contemplate no further action in August, as Mr. Butrick was advised by his counsel and Joyce Good was advised by Nancy Byers. (Aplt. App. 177). This is relevant as Koch had no indication of any of the actions by DHS or Pat Loar which were about to come. She was doing a good job taking care of Lance, and believed DHS and Lance's family felt she was doing a good job.

Lance says DHS forced her to sign a document which she was not allowed to read. (Aplt. App. 181). It is relevant to show the incompetence and maliciousness of DHS and worker Nancy Byers and why Koch and her family were reluctant to cooperate with them.

Beech did lie in saying he attached a pick-up order to his police report. Beech is well aware no pick-up order authorizing him to take Lance into protective custody ever existed and he has never seen such an order. Beech is not

entirely correct that he had authority to question Koch, which will be further explained in argument.

It is Koch's belief that Beech wanted to hurt her based on her observations of Beech at the time, and supported by affidavits of her father and neighbor and Beech's own statements that he was rolling around on the ground with her. Koch had every right to refuse to answer Beech's questions and order him off her property.

VI. ARGUMENT

A. BEECH DID NOT HAVE PROBABLE CAUSE TO ARREST KOCH.

To determine whether probable cause existed for an arrest, the facts and circumstances known to a police officer must be sufficient to warrant a belief that an offense has been or is being committed. *U.S. v. Espinosa*, 771 F.2d 1382, 1407 (10th Cir. 1985). The officer does not need facts which would prove guilt, but more than mere suspicion is required. *Id.*

Beech argues that Koch obstructed him in his investigation as to the location of Lance. That is not a criminal investigation. The location of Gladys Lance was not a crime. He was told to go to Koch's residence to check on the welfare of Lance in reference to a pick-up order, which he did. (Aplt. App. 65). He made contact with Koch at her residence and did not find Lance there. He was

never told to execute a pick-up order, nor was he in any position to do so since a DHS employee was not present at the residence with him. Officer Beech told Koch he had an emergency pick-up order for Lance, which was untrue, and that if she did not tell him where Lance was she would be arrested. (Aplt. App. 72, 75).

Beech admits the Order Appointing Special Guardian is not a pick-up order. (Aplt. App. 73).

Detaining a person for a brief examination or investigation implicates the Fourth Amendment even though the reasonableness of a seizure involving a brief detention is less intrusive than a traditional arrest. *Brierley v. Schoenfeld*, 781 F.2d 838, 841 (10th Cir. 1986). It requires a reasonable suspicion based on objective facts that the person is involved in criminal activity. *Id.* In order to justify the stop, the officer must be able to point to specific and articulable facts which reasonably justify the intrusion. *Id.*, at 842.

The Protective Services For Vulnerable Adults Act can be found at 43A O.S. §§10-101 through 10-110. Emergency protective services are found at 43A O.S. §10-108, which requires the court to specifically designate any approved services in its order. 43A O.S. §10-108(G)(1). An order for involuntary protective services and the appointment of a temporary guardian does not deprive the vulnerable adult of any rights except to the extent validly provided for in the order

or appointment. 43A O.S. §10-108(I).

Beech has pointed out no specific and articulable facts which suggested to him that Koch was involved in criminal activity on the evening in question. It is fair to say that Beech does not understand what is contained in an APS pick-up order, if one had existed. He did not have any such order with him and had never been told he was to take Lance into police custody. He certainly would have needed a copy of an order authorizing him to do so. He was merely told to check on the welfare of Lance. That instruction contains no suggestion of criminal activity. Judge DeGiusti is not correct in stating Beech had lawful authority to require Koch to answer question about Lance's location. Even if Beech had the Order Appointing Special Guardian in his hand that evening, which he admits he did not, it only directed Koch to disclose Lance's location to DHS, Pat Loar, or Gladys Lance's family. No missing persons police report had been filed as authorized by the order. Beech had no duty to locate Gladys Lance.

The only crime committed that evening was the trespass by Beech after he was rightfully told to leave Koch's property and refused to do so. Beech argues in his brief that he reasonably believed Koch had information about where Ms. Lance was located. He stated in deposition that he did not know Ms. Koch knew where Gladys Lance was. (Aplt. App. 76, 77).

Appellees point to *U.S. v. Sanchez*, 555 F.3d 910 (10th Cir. 2009) in support of its arguments Koch was obstructing Beech in his duties. *Sanchez* involved the execution of a search warrant at a private home. The search warrant was directed to investigate numerous suspected crimes occurring within the home. The Court stated that the warrant provided an objection basis for the detention of a male attempting to exit the home, because officers had probable cause to believe someone inside the home was committing a crime. *Id.* at 916. Comparing those facts to the facts of Koch's case is a difficult task. Beech had no search warrant for Koch's residence that evening, and an officer did unlawfully search the home while Beech stood by. He had no reason to believe a crime had been committed at the residence. Koch made no attempt to flee. She was simply attempting to go inside her residence, which she had every right to do. Koch never told Beech her attorney Joyce Good knew the location of Lance. She told him to speak with her attorney when he refused to leave her property. The case of *Marsh v. State*, 761 P.2d 915 (Okla.Crim.App. 1988), also cited by Appellees, involved an investigation surrounding the death of an infant in which the defendant gave a false statement to the investigating officer when police were called to the scene. This involved the investigation of a crime, which Koch's case does not, and Koch never gave any false information to Beech. She told him to go speak with Joyce

Good because he refused to leave her property, not because Good would know the location of Lance.

B. OFFICER BEECH IS NOT ENTITLED TO QUALIFIED IMMUNITY.

The law regarding probable cause to arrest and detention based on reasonable suspicion are well established.

It is patently clear that Beech had neither probable cause nor reasonable suspicion to be Koch was involved in any sort of criminal activity.

Koch had every right to attempt to enter her home after Beech began yelling at her and threatened to arrest her unless she told him the location of Lance, which she did not know and he had no reason to believe she knew. American common law has generally upheld the right to resist an unlawful arrest. The freedom to refuse to obey a patently unlawful order of a police officer, resist his trespasses, his unlawful efforts to effect illegal arrests is fundamental and must remain inviolate. *Brown v. City of Oklahoma City*, ¶18, 1986 OK CIV APP 1, 721 P.2d 1346. 22 O.S. §193, cited by Appellees, is unconstitutional on its face and contradicts federal excessive force case law, but it matters not since Beech had no authority to tell Koch he intended to arrest her. He had no right to arrest, and therefore no right to use all means necessary either.

C. BEECH USED EXCESSIVE FORCE.

A police officer's liability under 42 U.S.C. §1983 for violating a person's constitutional rights through the use of excessive force in completing an arrest is well established. *Mick v. Brewer*, 76 F.3d 1127 (10th Cir. 1996). The Fourth Amendment requires officers to use no greater force than that reasonably necessary to effect a lawful arrest. *Fisher v. City of Las Cruces*, 584 F.3d 888, 893-894 (10th Cir. 2009). Three factors are to be considered: [1] the severity of the crime; [2] whether the suspect poses an immediate threat to the safety of the officer or others; and [3] whether she is actively resisting arrest or attempting to evade arrest by flight. *Id.*, at 894, quoting *Graham*, 490 U.S. at 396, 109 S.Ct. 1865.

Beech could not have suspected Koch of any possible crime. However, the crime of obstruction is a misdemeanor, and therefore a non-severe crime. *Id.*, at 895. Beech had absolutely no reason to fear for his safety. Koch was not actively resisting arrest. She merely turned around in front of him to unlock the door to her home, as she had been in the process of going into her home when he approached her at her residence. Beech never instructed Koch she was under arrest. He forcefully grabbed her and started twisting her arms, while Koch was telling him he did not have to hurt her, and then threw her face down on the ground.

One instance of excessive force is where unduly tight handcuffing where a

plaintiff alleges injury from the handcuffing and the officer ignored complaints that the handcuffs were too tight, so long as the injuries are more than de minimus. *Cortez v. McCauley*, 478 F.3d 1108, 1129 (10th Cir. 2007). The injuries can be either physical or emotional. *Id.*

The use of force must be reasonable in light of the threat presented and the surrounding circumstances. Patently unreasonable conduct is required in an excessive force claim, but actual physical conduct is not. *Id.*, at 1131. A plaintiff can recover damages for humiliation, embarrassment, and mental suffering. *Id.*

Officer Beech's account of what occurred is he grabbed Koch's left arm while Koch's back was turned to him, and she struck him in the chest. He then took her to the ground, maintaining control of her left arm while her right arm was under her body. (Aplt. App. 78). Koch's neighbor's account is that Beech used his radio to request back-up while she was still on the ground with his knee in her back, and Beech does not dispute that. (Aplt. App. 80). Koch's account is that he pushed her and grabbed both her arms and made a wringing and twisting motion on them while she was telling him he didn't have to hurt her. (Aplt. App. 201). Koch did not resist him for fear he might kill her. Beech threw her on the ground and sat on her. (Aplt. App. 270).

Beech was unreasonable in throwing Koch on the ground and sitting on her

back in order to handcuff her. He acted out of anger. He admits he had control of her arm while they were standing, and gives no explanation why he could not get her in cuffs at that point. He continued to sit on her while he radioed for back-up, instead of cuffing her and putting her in a police car. Koch told him he did not have to hurt her and tried to be quiet and still so he would stop hurting her. This is not actively resisting arrest. Koch suffered numerous physical injuries, as shown by the many pages of medical records and pictures of her injuries. Koch's medical records also reflect she is fairly petite at only 5'3" tall and 169 pounds and age 54 on the day of arrest. She was greatly embarrassed when she was attacked by Beech in front of her parents and neighbors. The incident caused Koch severe emotional distress.

D. KOCH CAN STATE A MALICIOUS PROSECUTION CLAIM AGAINST BEECH.

Koch did state sufficient facts and allegations within her Petition to support a malicious prosecution claim against Beech. Her Petition makes several statements about her criminal prosecution and the malicious actions of Beech in causing that prosecution, and its ultimate dismissal in her favor.

A §1983 malicious prosecution claim includes five elements: (1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the

original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages. *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008). Criminal proceedings are terminated in favor of the defendant by the formal abandonment of proceedings by the prosecutor. *Id.*, at 802. Continued confinement or prosecution based on falsified evidence and the withholding of exculpatory evidence in determining probable cause is looked at by setting aside the false evidence and examining the evidence as though the withheld information had been included. *Pierce v. Gilchrist*, 359 F.3d 1279, 1293 (10th Cir. 2004). It violates the Fourth Amendment for an officer to knowingly or recklessly omit from an affidavit information which would have vitiated probable cause, or to knowingly or with reckless disregard for the truth, include false statements in the affidavit. *Taylor v. Meacham*, 82 F.3d 1556, 1562 (10th Cir. 1996).

The Affidavit Of Probable Cause signed by Beech contains several false statements and omissions. He states he was advised Koch was hiding Gladys Lance. (Aplt. App. 101). His own deposition testimony stating what he was told at lineup and his admissions that he did not have reason to believe Koch knew where Lance refute that. He says he advised Koch he had a court order to take Lance into protective custody. While it is true he did make that statement to Koch, he has

omitted the fact he did not have any such court order and no such court order has ever been in existence. He states she tried to run inside her residence, when in fact Koch had just turned to unlock her door when Beech grabbed her. He states she struck him in the chest with her right first and forearm, which Koch denies. The prosecution did rely on Beech's false statements and omission in prosecuting Koch, specifically that he had a judge's order to take Lance into protective custody. (Aplt. App. 93). These false statements and omissions, as well as the anger and rage shown toward Koch during her arrest show malice on the part of Beech.

E. KOCH'S STATE LAW CLAIMS SHOULD BE REMANDED FOR TRIAL.

Koch requests that in the interest of judicial economy and because her §1983 federal claims should not have been dismissed, that her state law claims against the City of Del City be remanded for trial upon reversal and remand of her federal law claims.

F. KOCH SHOULD HAVE BEEN GRANTED A CONTINUANCE.

The medical records shown by Koch reflect that she was still seeking medical treatment in December 2007. She was not trying to state new claims, but merely to properly show her physical injuries at trial. Koch's request for a

continuance placed no great inconvenience to Appellees or their witnesses, and its denial prejudiced Koch from fully presenting her claims. *Manlove v. Tansy*, 981 F.2d 473 (10th Cir. 1992). Koch should have been granted a continuance.

VII. CONCLUSION

WHEREFORE, Appellant Vicki Koch requests that the orders granting summary judgment, remanding her state law claims to Oklahoma County District Court, and denying her continuance be reversed, and that this case be remanded for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in that it contains approximately 4,427 words.

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2010, I electronically transmitted the foregoing Reply to the Clerk of Court using the ECF system for electronic filing and that a notice of electronic filing was transmitted to the following ECF registrants:

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I also certify that all privacy redactions have been made, that this ECF submission is an exact copy of what is being mailed to the Clerk of Court, and that the ECF submission was scanned using Spyware Doctor With Antivirus 2011 and according to the program is free of viruses.

s/Valerie Williford