2014 IL App (4th) 130685-U

NO. 4-13-0685

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
July 31, 2014
Carla Bender
4th District Appellate
Court, IL

JONATHAN M. GRANT and HEATHER N. CHILDERS, Plaintiffs-Appellants, v. CHELSEA ANGELO, DUANE MAXEY, and THE COUNTY OF CHAMPAIGN, ILLINOIS, Defendants-Appellees.	)	Appeal from Circuit Court of Champaign County No. 07LM1562 Honorable Charles McRae Leonhard, Judge Presiding.

PRESIDING JUSTICE APPLETON delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: (1) An animal control warden and a municipal police officer did not violate the due process clause of the fourteenth amendment (U.S. Const., amend. XIV) when, pursuant to a warrant, they came lawfully onto a third party's premises and seized plaintiffs' injured dog as evidence of the offense of dog fighting (720 ILCS 5/26-5 (West 2004)).

(2) Even though an assistant State's Attorney never served upon plaintiffs a copy of an amended petition for the posting of security (see 510 ILCS 70/3.04(a) (West 2006)), she did not thereby violate their right to due process under the fourteenth amendment, given plaintiffs' admission, on appeal, that the amended petition did not request the euthanizing of their dog.

(3) Even though a Champaign County employee euthanized plaintiffs' dog without first giving plaintiffs prior notice and an opportunity for a hearing, the record appears to contain no evidence that, in doing so, the employee acted pursuant to an established Champaign County procedure, and because state law affords plaintiffs an adequate postdeprivation remedy in the form of a common-law tort action, there has been no denial of due process.

¶ 2 Plaintiffs, Jonathan Grant and Heather Childers, owned a male pit bull terrier named Brodie, and the Champaign County Animal Control Department (Animal Control) euthanized the dog without their consent. In their third amended complaint, plaintiffs sued three defendants under section 1983 (42 U.S.C. § 1983 (2000)): (1) the animal control warden for Urbana, Chelsea Angelo; (2) an Urbana police officer, Duane Maxey; and (3) Champaign County. Plaintiffs alleged that defendants had violated the fourteenth amendment (U.S. Const., amend. XIV) by depriving them of their property, Brodie, without due process of law.

¶ 3 Defendants moved for summary judgment, and the trial court granted their motions. The court held that qualified immunity and a lack of causation entitled Angelo and Maxey to summary judgment. The court held the county likewise was entitled to summary judgment because the person by whom the county allegedly had acted, Senior Assistant State's Attorney Susan W. McGrath, was not a final policymaker. Plaintiffs appeal.

¶ 4 There are some factual issues in this case, such as whether telephone calls were returned or contact information was provided, but we find no genuine issue of *material* fact. See 735 ILCS 5/2-1005(c) (West 2012). Given the undisputed material facts, we conclude, *de novo*, that defendants are entitled to judgment as a matter of law. See *id.*; *Linn v. Department of Revenue*, 2013 IL App (4th) 121055, ¶ 18. Therefore, we affirm the trial court's judgment.

¶ 5 I. BACKGROUND

¶ 6 On December 7, 2005, Angelo submitted to the Champaign County circuit court a "Complaint and Affidavit for Search Warrant," in which she requested a warrant to search the premises of Eric Window for "evidence of[] the offense of[] Dog Fighting" (720 ILCS 5/26-5 (West 2004)). The court issued the requested warrant, and on December 8, 2005, Angelo, Maxey, and some other police officers executed the warrant.

¶ 7 They seized seven dogs from Window's property and took them to Animal Control. The dogs were Deadbolt, Sadie, Diego, Tall Boy, Texas, Tiasha, and Brodie. One of the seven dogs, Sadie, was dead: the police found her corpse behind the kennels on Window's property. The other dogs were alive, although several of them had deep lacerations.

¶ 8 That same day, December 8, 2005, the police arrested Window, and Angelo and Maxey interviewed him at the Urbana police station. In the audio recorded interview, Window told them that Jonathan Grant owned the dog named Brodie and that he, Window, merely had been taking care of Brodie for Grant. He gave Angelo and Maxey the number to Grant's cellular telephone, and he also gave them the telephone number of Grant's employer, Fisher Farms in Rantoul.

¶ 9 On December 9, 2005, in Champaign County case No. 05-CF-2266, a grand jury indicted Window on four felony counts of dog fighting. (Later, those counts were dismissed in return for Window's guilty plea to the Class A misdemeanor of animal cruelty (510 ILCS 70/3.01 (West 2004)).

¶ 10 The same day Window was indicted, Grant spoke with Angelo on the telephone. He told her he was the owner of Brodie and that he wanted to take Brodie home. (The day before, he learned from either Window or his wife that Brodie had been taken to Animal Control when Window was arrested.) Angelo told Grant that Brodie would be held as evidence, and she requested Grant and his girlfriend to meet with her so they could discuss Brodie's injuries. Grant states in an affidavit:

> "8. After that, Heather [Childers] and I attempted to visit Brodie and take Brodie home, on several occasions by personally visiting the Champaign County Animal Control Facility but we

were not allowed to visit Brodie nor to take Brodie home, and were told that it was by orders of Chelsea Angelo and Stephanie Joos [(the administrator of Animal Control)].

9. Heather and I each spoke with Chelsea Angelo by telephone about Brodie and she told us we would be able to take Brodie home after she personally met with us.

10. After Chelsea Angelo told us to make an appointment to meet with her, we both repeatedly called Chelsea Angelo to make an appointment to meet with her in order to take Brodie home; she never answered and she did not return our calls."

(In her deposition, Angelo testified she had difficulties reaching Grant, but we are looking at the evidence in the light most favorable to plaintiffs. See *Weisberger v. Weisberger*, 2011 IL App (1st) 101557, ¶ 43.)

¶ 11 On April 11, 2006, in Champaign County case No. 06-LM-366, McGrath filed a "Petition for Posting of Security." This petition was pursuant to section 3.05 of the Humane Care for Animals Act (Act) (510 ILCS 70/3.05 (West 2004)), which provided that, in the case of "companion animals," a term defined to include dogs (510 ILCS 70/2.01a (West 2004)), the animal shelter having custody of the animal might file a petition that the person from whom the animal was seized or the owner of the animal be ordered to post security. 510 ILCS 70/3.05(a) (West 2004). The security was to be "in an amount sufficient to secure payment of all reasonable expenses expected to be incurred by the animal control or animal shelter in caring for and providing for the animal or animals pending the disposition of the charges." *Id.* The petition was to be served upon the defendant, the State's Attorney, and "any interested person." 510

ILCS 70/3.05(b) (West 2004). The term "interested person" included anyone having a "pecuniary interest" in the animal. *Id.* If the circuit court ordered the posting of security, the security had to be posted within five business days after the hearing on the petition, or else the animal would be "forfeited by operation of law," in which event the animal shelter was to dispose of the animal through adoption or euthanasia (but neither the defendant nor anyone residing in the defendant's household would be permitted to adopt the animal). 510 ILCS 70/3.05(c) (West 2004).

¶ 12 In her petition for the posting of security, McGrath pleaded that Window "should be required by this Court to post security in an amount sufficient to secure payment of all of the reasonable expenses incurred or expected to be incurred *** for *his* animals." (Emphasis added.) McGrath attached to her petition an affidavit by Joos, dated March 10, 2006, in which Joos stated:

> "4. *** I am familiar with the animals confined at our facility as a result of Champaign County Case Number 05-CF-2266. Those animals are as follows:
>
> a. Deadbolt, an adult male pit bull[;]
>
> b. Sadie [*sic*], an adult female [*sic*] pit bull[;]
>
> c. Diego, an adult male pit bull[;]
>
> d. Tall Boy, an adult male pit bull[;]
>
> e. Texas, an adult female pit bull[; and]
>
> f. Tiasha, a female pit bull[.]"

Actually, *Brodie*, a *male* pit bull terrier, was one of the six live dogs seized from Window's property, and of the six, he was the only dog who did not belong to Window. Sadie was the dead dog found behind Window's kennels.

¶ 13 On May 8, 2006, Judge Kennedy held a hearing on the original petition for the posting of security (we say "original petition" because, as we soon will discuss, McGrath afterward filed an *amended* petition for the posting of security). In the hearing, it emerged that one of the dogs the police had seized from Window, the male pit bull named Brodie, actually belonged to Grant. For instance, McGrath asked Angelo:

> "Q. Did [Window] tell you anything about the dog who you had found in the garage that you just described to the court?
>
> A. Yes. He stated the dog[']s name was Brodie and that he was boarding it for a friend named Jonathan Grant and Jonathan Grant had asked him to socialize the dog were the exact words that he had said."

¶ 14 Likewise, Maxey testified:

> "A. [Window] spoke of having taken a dog that he was boarding, Brodie, and having taken it outside, and to Tallboy and Texas having attacked it, much as Officer Angelo had testified to.
>
> Q. Did he say that he had sought any assistance for Brodie after the animal had been attacked by the other two dogs?
>
> A. He said that he called the owner of the dog, he reassured the owner of the dog that the injuries were insignificant or minor, and that he cared for it with a shot of penicillin.

* * *

Q. Okay. Sir, did he say anything to you further about Sadie, the dead animal?

A. He said that Sadie, who was found in plastic bags, trash bags behind the house, behind the kennels, on a large heap of dog manure had died a week prior."

¶ 15 The State then called the veterinarian at Animal Control, Gretchen Ann Reid, who testified to the medications she had administered to Brodie, among other dogs. McGrath asked her:

"Q. And, Gretchen, are you familiar with the animals that we have discussed this afternoon that belong to Eric Window?

A. Yes, I am.

Q. You heard Officer Angelo's comments as to the investigation—examination that you and she performed on December 8th of 2005; is that correct?

A. That's correct.

Q. And if I were to ask you those same questions, would your answers be substantially the same as they were from Officer Angelo?

A. Yes, they would.

Q. Okay. What did you specifically recommend for the care and treatment of the animals after the examination had been complete?

A. For the three that had visible wounds, Brodie and Texas as well as the other male, I forget his name, the one that had the wound on his forehead, Deadbolt, he—all three of them required antibiotics, Brodie as well, because of the distinct swelling in his left shoulder, I also gave an anti-inflammatory injection, a steroid injection, to bring down the swelling and to relieve pain as well and he also received some pain medication for a few days."

¶ 16 Ultimately, Judge Kennedy dismissed the original petition for the posting of security because it was not heard within five business days, as required by section 3.05(b) of the Act (510 ILCS 70/3.05(b) (West 2004)).

¶ 17 Soon afterward, McGrath filed an amended petition for the posting of security. The amended petition does not appear to be in the record.

¶ 18 On May 16, 2006, Judge Kennedy held a hearing on the amended petition. Angelo testified: "We spoke briefly [with Window] as to the ownership of the dog that had been found in the small kennel. [Window] advised that it belonged to a friend of his; he was boarding it."

¶ 19 On May 17, 2006, Judge Kennedy entered an order granting the amended petition for the posting of security. In his order, he found:

"C. That the Champaign County Animal Control Department *** is *** entitled to file a petition with the Court requesting that Eric Window, a person from whom six animals were seized in Champaign County Case Number 05-CF-2266, *and who is the owner of the said animals*, be ordered to post security in

> an amount sufficient to secure payment of all reasonable expenses expected to be incurred *** in caring for and providing for those six animals pending the disposition of the charges in Champaign County Case Number 05-CF-2266." (Emphasis added.)

¶ 20 Judge Kennedy found that the reasonable expenses of boarding and medically treating the six animals for 30 days totaled $2,210. See 510 ILCS 70/3.05(a) (West 2004) ("The security must be in an amount sufficient to secure payment of all reasonable expenses ***. Reasonable expenses include, but are not limited to, estimated medical care and boarding of the animal or animals for 30 days."). He ordered Window to pay that amount within five business days and warned that if Window failed to do so, "the animals which [were] the subject of the Amended Petition for Posting of Security [should] be forfeited to [Animal Control, which then should] dispose of the animals through adoption or [euthanasia]."

¶ 21 In the spring of 2006, Grant learned that Animal Control had euthanized Brodie.

¶ 22 Plaintiffs filed their third amended complaint on December 28, 2011. In all three counts, they sought relief under section 1983.

¶ 23 Count I of the third amended complaint is against Angelo and Maxey. It seeks to hold them liable for two omissions: failing to (1) file the affidavit required by sections 3.04(a) and 4.02(a) of the Act (510 ILCS 70/3.04(a), 4.02(a) (West 2004)) and (2) serve upon plaintiffs the written notice required by sections 3.04(b) and 4.02(a) (510 ILCS 70/3.04(b), 4.02(a) (West 2004)).

¶ 24 According to those sections of the Act, the affidavit is supposed to go to the trial court in the criminal case, and the written notice is supposed to go to the animal's owner. Section 3.04 provides:

"(a) Any law enforcement officer making an arrest for an offense involving one or more companion animals under Section 3.01, 3.02, or 3.03 of this Act [(510 ILCS 70/3.01, 3.02, 3.03 (West 2004))] may lawfully take possession of some or all of the companion animals in the possession of the person arrested. The officer, after taking possession of the companion animals, must file with the court before whom the complaint is made against any person so arrested an affidavit stating the name of the person charged in the complaint, a description of the condition of the companion animal or companion animals taken, and the time and place the companion animal or companion animals were taken, together with the name of the person from whom the companion animal or companion animals were taken and name of the person who claims to own the companion animal or companion animals if different from the person from whom the companion animal or companion animals were seized. He or she must at the same time deliver an inventory of the companion animal or companion animals taken to the court of competent jurisdiction. The officer must place the companion animal or companion animals in the custody of an animal control or animal shelter and the agency must retain custody of the companion animal or companion animals subject to an order of the court adjudicating the charges on the merits and before which the person complained against is required

to appear for trial. The State's Attorney may, within 14 days after the seizure, file a 'petition for forfeiture prior to trial' before the court having criminal jurisdiction over the alleged charges, asking for permanent forfeiture of the companion animals seized. The petition shall be filed with the court, with copies served on the impounding agency, the owner, and anyone claiming an interest in the animals. In a 'petition for forfeiture prior to trial', the burden is on the prosecution to prove by a preponderance of the evidence that the person arrested violated Section 3.01, 3.02, 3.03, or 4.01 of this Act [(510 ILCS 70/3.01, 3.02, 3.03, 4.01 (West 2004))] or Section 26-5 of the Criminal Code of 1961 [(720 ILCS 5/26-5 (West 2004))].

(b) An owner whose companion animal or companion animals are removed by a law enforcement officer under this Section must be given written notice of the circumstances of the removal and of any legal remedies available to him or her. The notice must be posted at the place of seizure, or delivered to a person residing at the place of seizure or, if the address of the owner is different from the address of the person from whom the companion animal or companion animals were seized, delivered by registered mail to his or her last known address." 510 ILCS 70/3.04(a), (b) West 2004).

The three sections that section 3.04(a) (510 ILCS 70/3.04(a) (West 2004)) references, namely, sections 3.01, 3.02, and 3.03, define the offenses of "cruel treatment," "aggravated cruelty," and "animal torture."

¶ 25 Like section 3.04, section 4.02(a) (510 ILCS 70/4.02(a) (West 2004)) requires both the filing of an affidavit and the giving of written notice; it merely references different offenses. Section 4.02(a) provides in part:

> "(a) Any law enforcement officer making an arrest for an offense involving one or more animals under Section 4.01 of this Act [(510 ILCS 70/4.01 (West 2004))] or Section 26-5 of the Criminal Code of 1961 [(720 ILCS 5/26-5 (West 2004))] shall lawfully take possession of all animals and all paraphernalia, implements, or other property or things used or employed, or about to be employed, in the violation of any of the provisions of Section 4.01 of this Act or Section 26-5 of the Criminal Code of 1961. When a law enforcement officer has taken possession of such animals, paraphernalia, implements or other property or things, he or she shall file with the court before whom the complaint is made against any person so arrested an affidavit stating therein the name of the person charged in the complaint, a description of the property so taken and the time and place of the taking thereof together with the name of the person from whom the same was taken and name of the person who claims to own such property, if different from the person from whom the animals were seized and

> if known, and that the affiant has reason to believe and does believe, stating the ground of the belief, that the animals and property so taken were used or employed, or were about to be used or employed, in a violation of Section 4.01 of this Act or Section 26-5 of the Criminal Code of 1961. He or she shall thereupon deliver an inventory of the property so taken to the court of competent jurisdiction. A law enforcement officer may humanely euthanize animals that are severely injured.
>
> An owner whose animals are removed for a violation of Section 4.01 of this Act or Section 26-5 of the Criminal Code of 1961 must be given written notice of the circumstances of the removal and of any legal remedies available to him or her. The notice must be posted at the place of seizure or delivered to a person residing at the place of seizure or, if the address of the owner is different from the address of the person from whom the animals were seized, delivered by registered mail to his or her last known address." 510 ILCS 70/4.02(a) (West 2004).

Again, section 26-5 is the dog fighting statute. Section 4.01, which pertains to animals other than dogs, forbids the use of fighting animals for entertainment or the intentional killing of an animal for entertainment.

¶ 26 In sum, count I seeks money damages from Angelo and Maxey for breaching their statutory duty to file an affidavit in the criminal case against Window and for breaching their purported statutory duty to send a written notice to Grant outlining his "legal remedies." We say

"purported" statutory duty because the statute uses the passive voice—the owner "must be given written notice," and the notice "must be *** delivered" (510 ILCS 70/3.04(b), 4.02(a) (West 2004))—without really specifying who is responsible for giving the notice and delivering it.

¶ 27 The remaining two counts of the third amended complaint, counts II and III, are against Champaign County. In count II, plaintiffs allege that, in Champaign County case No. 06-LM-366, McGrath, a "final policymaker" for the county, had a duty under section 3.05(b) (510 ILCS 70/3.05(b) (West 2004)) to serve on "any interested person," including Grant, a copy of the petition for the posting of security, in which she "petitioned the Court to allow the killing of Brodie." Paragraph 59 of count II alleges:

> "59. Pursuant to an amended petition drafted and filed by Susan McGrath, in her final policymaking role, the Court, on May 17, 2006[,] Ordered Eric Window to post security of $2,210.00 by May 23, 2006[,] and, pursuant to amended petition drafted and filed by Susan McGrath in her final policymaking role, ordered that if Eric Window did not post the required security, the animals would be forfeited to the Champaign County Animal Control Department which was authorized to humanely euthanize the animals, including Brodie, who was owned by Jonathan and Heather."

(In its answer, the county denies the phrase "in her final policymaking role," and the county pleads insufficient knowledge of whether plaintiffs owned Brodie. Otherwise, the county admits paragraph 59.) Plaintiffs complain that McGrath failed to send them a copy of the amended petition for the posting of security. They allege: "Had Jonathan been notified, he would have

appeared in court to assert his claim to Brodie and he would have paid any security required or any fees required to get Brodie out of [Animal Control]."

¶ 28 Count III is substantially the same as count II, except that it emphasizes the permanence of the seizure in the sense that Brodie was euthanized. Paragraphs 67 and 68 allege:

> "67. Defendant County, through its agent and employee, Susan McGrath, permanently deprived the Plaintiffs of that property by petitioning the court for an order allowing the killing of Brodie, resulting in the killing of Brodie, which constitutes a seizure of an 'effect.'
>
> 68. The permanent seizure, as herein alleged, was done without giving the Plaintiffs any notice of opportunity to save their property from destruction."

(As for paragraph 67, the county admits, in its answer, that McGrath is its employee. The county also admits that she "petitioned the Court for an order that Eric Window post security for six dogs, including Brodie," and that "Window's non-compliance with this Order resulted in the humane euthanization of Brodie." The county denies the remainder of paragraph 67 and pleads insufficient knowledge to admit or deny paragraph 68.)

¶ 29 On December 20, 2012, Judge Leonhard held a hearing on defendants' motions for summary judgment. He noted that, in her deposition, Angelo testified she had thought she merely was investigating Window's compliance with section 3 of the Act (510 ILCS 70/3 (West 2004) (describing an "[o]wner's duties" to provide food, shelter, and other "humane care and treatment" for his or her animals)). Because sections 3.04 and 4.02 (510 ILCS 70/3.04, 4.02 (West 2004)) said nothing about section 3, Angelo had assumed the notice requirement in

sections 3.04(b) and 4.02(a) (510 ILCS 703.04(b), 4.02(a) (West 2004)) was inapplicable, or so she explained in her deposition. Judge Leonhard concluded a police officer could reasonably be confused in this respect and, furthermore, that Angelo's "set of mind [could] be imputed to Officer Maxey." Therefore, he held that Angelo and Maxey had qualified immunity from liability for failing to serve the statutory notice on Grant.

¶ 30 As for the failure to file the affidavit required by sections 3.04(a) and 4.02(a) (510 ILCS 70/3.04(a), 4.02(a) (West 2004)), those sections called for such an affidavit when a "complaint" was filed with the court. Judge Leonhard thought it was unclear what those sections meant by a "complaint." Therefore, he concluded that Angelo and Maxey had qualified immunity to liability for failing to file the affidavit as well.

¶ 31 Aside from qualified immunity, Judge Leonhard thought the element of causation was lacking in the action against Angelo and Maxey because it was impossible to surmise (1) what guidance they could have offered regarding "legal remedies" and (2) what effect, if any, that guidance would have had on plaintiffs. According to the Act, the notice was supposed to state "any legal remedies available to [the owner of the animal]." 510 ILCS 70/3.04(b), 4.02(a) (West 2004). Sections 3.04(b) and 4.02(a), however, did not specify what "legal remedies" the notice should mention. For that matter, Judge Leonhard noted that, throughout the extensive litigation in the trial court, plaintiffs never ventured to suggest what, exactly, the notice should say on the subject of "legal remedies." He remarked:

> "The lack of guidance certainly informs the qualified immunity calculus here because what's an officer to do, and it's almost humorous to envision a police officer trying to draft a notice from whole cloth and including such remedies as a conversion action or

> replevin action or even a 1983 action, but that's precisely the position in which the legislature placed Officers Angelo and Maxey. *** [The statute is] impossibly vague and it puts enforcement personnel in a situation that they're not well equipped to deal with. That is, to give legal advice or draft legal notices. *** It's just a matter of speculation what this notice would have, could have or should have contained. It is furthermore a matter of utter speculation how, if at all, these good plaintiffs, Mr. Grant and Ms. Childers, would've acted on any such advice ***."

¶ 32 As for the claims against the county, Judge Leonhard reasoned that unless McGrath were a final policymaker, the county could not be held liable under section 1983 for her failure to serve a copy of the amended petition on plaintiffs in Champaign County case No. 06-LM-366. He held:

> "The court is of the view that Ms. McGrath's role and her various errors or omissions, if any there were, in 06-LM-266, aren't imbued with policymaking at all. The policies at issue, as they relate to Ms. McGrath's role in 06-LM-366 are policies established not by her, policies established not by her employer, the State's Attorney, policies not established by the County, but instead policies that are established by the legislature, and to a lesser extent, the judiciary in the form of rule making authority. Those are the policies involved. *** There wasn't a policy implemented

> by Ms. McGrath there. The policy was to give notice, very salutary policy, one might add, and it simply wasn't followed."

¶ 33 For all of those reasons, Judge Leonhard granted defendants' motion for summary judgment. He subsequently denied plaintiffs' timely motion to vacate the judgment.

¶ 34 This appeal followed.

¶ 35 II. ANALYSIS

¶ 36 A. Did Angelo and Maxey Violate the Fourteenth Amendment?

¶ 37 Plaintiffs are suing under a federal statute, section 1983 (42 U.S.C. § 1983 (2000)). All three counts of their third amended complaint sound in section 1983. That section provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ***." 42 U.S.C. § 1983 (2000).

¶ 38 The first thing to note about section 1983 is it refers to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" (*id.*), that is, the Constitution of the United States and *federal* statutes (*Maine v. Thiboutot*, 448 U.S. 1, 4 (1980)). Section 1983 does not refer to "the deprivation of any rights, privileges, or immunities secured

by the Humane Care for Animals Act" (510 ILCS 70/1 to 16.4 (West 2004))—or, for that matter, any other state statute.

¶ 39 The Supreme Court has interpreted section 1983 as setting down two essential elements of a cause of action for the deprivation of a federally protected right: (1) a person was acting under the color of state law when he or she engaged in the conduct of which the plaintiff complains, and (2) the conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution of the United States or a federal statute. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

¶ 40 There appears to be no question that defendants acted under the color of state law. All along, they acted in their capacities as governmental employees. See *id.* at 535-36.

¶ 41 The only real question is whether, in doing what they did or in failing to do what they should have done, defendants deprived plaintiffs of a right, privilege, or immunity secured by the federal constitution or by a federal statute. In their third amended complaint, plaintiffs allege that defendants violated the due process clause of the fourteenth amendment by depriving them of their property, Brodie, without due process of law. The fourteenth amendment says: "[No] State [shall] deprive any person of *** property[] without due process of law[.]" U.S. Const., amend. XIV.

¶ 42 The Act does not determine what process is due under the fourteenth amendment. "[O]nce it is determined that the Due Process Clause applies, the question remains what process is due. [Citation.] The answer to that question is not to be found in the [state] statute." (Internal quotation marks omitted.) *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985). The Constitution of the United States is above state statutory law. U.S. Const., art. VI, cl. 2. Thus, if the question is what the due process clause of the fourteenth amendment required,

the answer is not to be found in the Act. See *Loudermill*, 470 U.S. at 541. Instead, the answer is to be found in case law interpreting the due process clause of the fourteenth amendment.

¶ 43 In count I of their third amended complaint, the count against Angelo and Maxey, plaintiffs allege:

> "34. Defendants Angelo and Maxey each participated in the seizure of Brodie on December 8, 2005, and each defendant was aware, on December 8, 2005, that Brodie was owned, or reportedly owned, by Jonathan Grant.
>
> * * *
>
> 39. Defendants Angelo and Maxey, acting under color of state law, knowingly, willfully, wantonly and recklessly and with a callous disregard for the plaintiffs' statutory and constitutional rights, seized Brodie, a pit bull terrier belonging to the plaintiffs herein without providing the statutory notice to plaintiffs required of police officers ***.
>
> ***
>
> 41. As the proximate result of the illegal actions of defendants Angelo and Maxey, plaintiffs suffered the irreversible loss of their dog ***."

¶ 44 For one thing, Angelo and Maxey could not have violated plaintiffs' constitutional rights by seizing Brodie from Window's property. They had a warrant, which authorized them to seize any evidence of dog fighting, including pit bull terriers. Plaintiffs do not question the validity of the warrant. "If a search warrant has been properly issued and executed, then

unquestionably the executing officers may seize those items particularly described in the warrant as the objects of the seizure." 2 Wayne R. LaFave, Search and Seizure § 4.11 (5th ed.). There is no dispute that a judge issued a search warrant and that Angelo and Maxey entered Window's property lawfully, pursuant to the warrant.

¶ 45 Police officers "are normally permitted to seize evidence of crime when it is lawfully encountered." *United States v. Edwards*, 415 U.S. 800, 806 (1974). The injured pit bull terriers, including Brodie, were evidence of the crime of dog fighting (720 ILCS 5/26-5 (West 2004)) or, at a minimum, the crime of cruel treatment of animals (510 ILCS 70/3.01 (West 2004)). Reid described the injuries as follows:

> "Q. Could you please tell the court briefly the condition of the animals when they first came to the Animal Control Department?
>
> A. We examined them—some of my staff helped me as well as Officer Angelo, and when they came in, several of them were badly injured. As Officer Angelo explained with Texas, she had very severe swelling underneath her neck. It had fluid and cellulitis which is basically swelling of the soft tissue. She had multiple wounds on her neck and under her eye. Her ears were scarred up. She had scars on her legs.
>
> Brody [*sic*], who is the red male, he had an extremely severely swollen shoulder with fresh wounds. It was oozing a little bit of pus so it did have an infection. He had wounds about his head and his ears, and scars on his legs as well.

> Dead Bolt, who is the gray male, had a large swelling on his head. It was abscessed. It looked like it had been a wound that had closed over, and there was pus underneath the skin.
>
> The other three that came in mainly just had some scarring about their legs and their face, and I believe Tall Boy had a few just kind of fresh wounds. They weren't—they were scabbed over."

¶ 46 In short, Angelo and Maxey had a warrant to search Window's property for evidence of dog fighting, and in the execution of that warrant, they seized evidence of dog fighting. No reasonable argument could be made that they are subject to liability under section 1983 for doing that.

¶ 47 Granted, "the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). When we look at the evidence in the light most favorable to plaintiffs (see *Weisberger*, 2011 IL App (1st) 101557, ¶ 43), they never received an opportunity for a hearing before the county euthanized their dog, permanently depriving them of a property interest. According to Grant's affidavit, Angelo led him to believe a hearing would be unnecessary to regain his dog: all he and Childers had to do was personally meet with Angelo. Nevertheless, he states in his affidavit that he and Childers "repeatedly called Chelsea Angelo to make an appointment to meet with her in order to take Brodie home" but that "she never answered and she did not return [their] calls." Subsequently, in the spring of 2006, he learned that the county had euthanized Brodie.

¶ 48 The record appears to contain no evidence, however, that either Angelo or Maxey euthanized Brodie. Joos, rather than Angelo, was the administrator and director of Animal Control. Maxey was merely an Urbana police officer. Other than by arguing that Angelo and Maxey failed to comply with some provisions of the Act—a state statute, which, as far as we can see, is irrelevant to the constitutional question of due process (see *Loudermill*, 470 U.S. at 541)—plaintiffs do not explain why Angelo and Maxey should incur liability for the euthanizing of Brodie. Plaintiffs seem to reason that because Angelo and Maxey failed to file the affidavit required by sections 3.04(a) and 4.02(a) of the Act (510 ILCS 70/3.04(a), 4.02(a) (West 2004)) and because they failed to serve upon plaintiffs the written notice required by sections 3.04(b) and 4.02(a) (510 ILCS 70/3.04(b), 4.02(a) (West 2004)), they violated the due process clause of the fourteenth amendment and hence are liable under section 1983. Seemingly, in plaintiffs' view, what due process requires depends on what the Act requires, such that a violation of the Act is, *ipso facto*, a violation of due process. On the contrary, statutory law does not control the due process clause of the fourteenth amendment. "The United States Supreme Court has made clear that due process is a matter of federal constitutional law, so compliance or noncompliance with state procedural requirements is not determinative of whether minimum procedural due process standards have been met." *Lyon v. Department of Children and Family Services*, 209 Ill. 2d 264, 274 (2004) (citing *Loudermill*, 470 U.S. at 541).

¶ 49 B. Did the County Violate the Fourteenth Amendment?

¶ 50 1. *The Problem of Causation When Seeking To Hold the County Liable For McGrath's Conduct in Champaign County Case No. 06-LM-366*

¶ 51 In counts II and III of the third amended complaint, plaintiffs seek to hold the county liable under section 1983 for the conduct of its employee, McGrath, in Champaign County case No. 06-LM-366. Specifically, plaintiffs allege in those counts that McGrath drafted

an amended petition for the posting of security, in which she requested the trial court to authorize the euthanizing of Brodie unless Window posted security; that McGrath failed to serve a copy of this amended petition on plaintiffs, thereby depriving them of notice of the threatened destruction of their property; that the court granted the amended petition; and that, ultimately, when Window failed to pay the security, the county euthanized Brodie, as the order allowed.

¶ 52 On the other hand, the county argued to the trial court and also argues on appeal, that the order in Champaign County case No. 06-LM-366 was a superseding cause of Brodie's death, considering that McGrath never misled the court about Brodie's owner but, rather, repeatedly presented evidence that Grant was his owner. See *Murray v. Earle*, 405 F.3d 278, 291-92 (5th Cir. 2005) (trial court's ruling that evidence is admissible and creates probable cause is a "superseding cause" for purpose of section 1983 liability); *Wallace v. Suffolk County Police Department*, 809 F. Supp. 2d 73, 80 (E.D.N.Y. 2011) ("One example of a superseding cause that breaks the chain of proximate cause is the intervening exercise of independent judgment." (Internal quotation marks omitted.)). In their brief, plaintiffs try to head off this argument. They insist, in apparent contradiction of counts II and III of their third amended complaint, that "Brodie was NOT one of the six dogs named" in the petition for the posting of security, that "the Order did not include Brodie," and that consequently "[t]here was no order to kill Brodie." (Capitalization in original.) Then, 15 pages later in their brief, plaintiffs argue that McGrath "failed to provide Grant with notice and an opportunity to hearing *before requesting the killing of Brodie*." (Emphasis added.) Finally, in their reply brief, plaintiffs revert to the position that "Brodie was not being considered in the Petition," that the petition "made absolutely no mention of Brodie," and that "[t]he Order entered did not authorize anyone to collect security for Brodie and it did not authorize anyone to euthanize Brodie." We will resolve this quandary by regarding

plaintiffs' latest position as the position they are settling on, the position they take in their reply brief.

¶ 53 If indeed, in Champaign County case No. 06-LM-366, McGrath never petitioned for authority to euthanize Brodie and if indeed, in response to her amended petition, the trial court never authorized the euthanizing of Brodie, it is irrelevant that McGrath failed to serve upon plaintiffs a copy of the amended petition in that case, given that the amended petition had nothing to do with their dog. A section 1983 claimant must prove that the defendant caused the deprivation of his or her rights. *Taylor v. Brentwood Union Free School District*, 143 F.3d 679, 686 (2d Cir. 1998). By plaintiffs' latest admission, McGrath did not do so.

¶ 54 2. *The Lack of Evidence That the County Had a Policy of Euthanizing Dogs Without First Giving Their Known Owners an Opportunity for a Hearing*

¶ 55 The argument could be made that, quite apart from any act or omission of McGrath in Champaign County case No. 06-LM-366, the county violated the due process clause of the fourteenth amendment by euthanizing Brodie, thereby permanently extinguishing plaintiffs' property interest in him, without first giving plaintiffs notice and an opportunity for a hearing. See *Logan*, 455 U.S. at 434 ("To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement."); *People v. Cardona*, 2013 IL 114076, ¶ 22 ("[P]rocedural due process is founded upon the notion that, prior to a deprivation of life, liberty, or property, a party is entitled to notice and opportunity for [a] hearing appropriate to the nature of the case." (Internal quotation marks and emphasis omitted.).).

¶ 56 Even so, the record appears to contain no evidence that the county had a policy of euthanizing dogs without giving their known owners prior notice and an opportunity for a hearing. Apparently, the euthanizing of Brodie was the random and unauthorized act of a county

employee in Animal Control. Requiring the county to offer plaintiffs a hearing before the euthanizing of Brodie would require the county to foresee random and unauthorized acts—an impossibility. For that very reason, the Supreme Court does not require predeprivation process in such circumstances. The Supreme Court has said:

> "The justifications which we have found sufficient to uphold takings of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under 'color of law,' is in almost all cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation. That does not mean, of course, that the State can take property without providing a meaningful postdeprivation hearing. The prior cases which have excused the prior-hearing requirement have rested in part on the availability of some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities." *Parratt*, 451 U.S. 527 at

541, *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986).

¶ 57 Although, under color of state law, someone in Animal Control permanently deprived plaintiffs of their property, "the deprivation did not occur as a result of some established state procedure." *Id.* at 543. Rather, "the deprivation occurred as a result of the unauthorized failure" of someone in Animal Control "to follow established state procedure." *Id.*

¶ 58 The procedure was in section 3.05 of the Act (510 ILCS 70/3.05 (West 2006)). It would be untenable to deny that section 3.05 was a county procedure, considering that, as the county's attorney in Champaign County case No. 06-LM-366, McGrath filed a petition pursuant to section 3.05. Plaintiffs might argue that, by leaving Brodie out of the amended petition for the posting of security, McGrath failed to fully comply with section 3.05. Even so, her invocation of section 3.05 on behalf of the county shows that section 3.05 was an established county procedure, regardless of whether, in this instance, she fully complied with the procedure.

¶ 59 Plaintiffs had a postdeprivation remedy for the random and unauthorized euthanizing of Brodie. (The county informs us that, in the proceedings below, plaintiffs conceded that the one-year period of limitation in section 8-101(a) of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/8-101(a) (West 2006)) barred their state-law tort claims.) Plaintiffs could have brought a timely tort action against the county for the destruction of their property. Although their relief under state law might not have been as extensive as the relief under section 1983, it does not follow that state law was inadequate to satisfy due process. *Parratt*, 451 U.S. at 544. A common-law tort action could have fully compensated plaintiffs for the property loss they had suffered. The State's postdeprivation remedy satisfies due process. See *id.*

¶ 60 III. CONCLUSION

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

¶ 62 Affirmed.