2012 IL App (4th) 110368-U

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NO. 4-11-0368

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

DAVID K. PROUGH, Independent Administrator of the Estate of DENNIS K. PROUGH, Deceased, Plaintiff-Appellant and Cross-Appellee, v. GREENE COUNTY SHERIFF'S DEPARTMENT; RICKY GRAHAM, Sheriff; KERRY PAGE, Deputy Sheriff; and GREENE COUNTY, ILLINOIS, Defendants-Appellees and Cross-Appellants.	)	Appeal from Circuit Court of Greene County, No. 10L7 Honorable Joshua A. Meyer, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Pope and McCullough concurred in the judgment.

ORDER

¶ 1 *Held*: Because a writ for the detention and psychological examination of a person specified that the writ was to be performed on a certain date, a sheriff did not incur liability under section 3-6020 of the Counties Code (55 ILCS 5/3-6020 (West 2008)) for declining to detain the person on a subsequent date, when the sheriff first learned of the writ; and besides, absent a special duty, the elements of which the plaintiff failed to plead, the sheriff's refusal to obey the writ would not be considered the proximate cause of the person's harming someone else.

¶ 2 The plaintiff is David K. Prough, independent administrator of the estate of Dennis K. Prough, deceased, and the defendants are the Greene County sheriff's department; the sheriff, Ricky Graham (who actually is the former sheriff); a deputy sheriff, Kerry Page; and Greene County. Plaintiff seeks to recover damages from defendants for failing to perform a writ by the Jersey County circuit court requiring any peace officer to detain Mark Prough and take him to a hospital for a psychological examination. Plaintiff claims that as a result of Deputy Sheriff Page's refusal to

perform the writ, Mark Prough murdered the decedent. The trial court granted defendants' motions to dismiss the second amended complaint with prejudice, and plaintiff appeals.

¶ 3 Taking the well-pleaded facts of the second amended complaint to be true and regarding those facts in a light most favorable to plaintiff (see *Board of Trustees of Community College District No. 502 v. Department of Professional Regulation*, 363 Ill. App. 3d 190, 196 (2006)), we agree with the trial court that the second amended complaint fails to state a cause of action. The second amended complaint is legally insufficient for the following reasons. First, because the writ for the detention and psychological examination of Mark Prough said that he was to be detained and taken to the hospital on a certain date (May 18, 2009), the Greene County sheriff and his agents did not incur liability under section 3-6020 of the Counties Code (55 ILCS 5/3-6020 (West 2008)) for declining to take custody of him on a subsequent date (July 19, 2009), when they first learned of the writ. Second, unless the conditions of the special-duty rule are fulfilled—and plaintiff has not pleaded those conditions—an act or omission by the police is not considered to be a proximate cause of harms committed by others. In the context of this case, the sheriff's disobedience of the writ (assuming, for the sake of argument, that he did disobey it) is not the proximate cause of Mark Prough's murdering Dennis Prough. Therefore, we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 A. The Defendants in the Various Versions of the Complaint

¶ 6 In the original version of his complaint, which he filed on June 29, 2010, plaintiff named, as defendants, the "Greene County sheriff's department," Greene County, and "other unknown members of the Greene County sheriff's department."

¶ 7 On November 24, 2010, the trial court granted plaintiff permission to file the first amended complaint, which named, as defendants, Greene County, the "Greene County sheriff's department," "Deputy Sheriff Kerry Page," and "Greene County Sheriff Ricky Graham."

¶ 8 On February 16, 2011, the trial court granted defendants' motions to dismiss the first amended complaint for failure to state a cause of action (see 735 ILCS 5/2-615 (West 2010)), and the court allowed plaintiff 21 days to file a second amended complaint. Plaintiff did so on March 3, 2011. In the second amended complaint, plaintiff named, as defendants, Greene County, the "office of the Greene County sheriff," "Sheriff Ricky Graham," and "Deputy Sheriff Kerry Page."

¶ 9 B. The Allegations in the Second Amended Complaint

¶ 10 Plaintiff pleads the following facts in his second amended complaint. Mark Prough is the son of the decedent, Dennis K. Prough, and in several different localities—Jersey and Greene Counties in Illinois, the state of Michigan, and Miller County in Missouri—Mark Prough "has an extensive history of mental illness and violent behavior."

¶ 11 Because of Mark Prough's "increasing[ly] erratic, violent, and disturbing behavior," Dennis Prough obtained an order of protection against him in Jersey County. The order expired, however, on January 3, 2009.

¶ 12 On May 18, 2009, in the Jersey County circuit court, Dennis Prough's daughter, Brenda Lorton, petitioned for a new order of protection against Mark Prough. She also petitioned the court to order his involuntary detention for the purpose of having him undergo a psychological evaluation pursuant to section 3-700 of the Mental Health and Developmental Disabilities Code (405 ILCS 5/3-700 (West 2008)). That same day, the court issued two orders for the detention and diagnostic evaluation of Mark Prough (exhibits A and B of the second amended complaint).

¶ 13 These two orders were the same fill-in-the-blank form, and the only difference between them was that one order (exhibit A) designated Memorial Medical Center in Springfield as the place of examination whereas the other order (exhibit B) designated Jersey Community Hospital. Both orders required Mark Prough to submit to an examination "at anytime on 5-18, 2009," at the designated medical facility, and required the circuit clerk to "issue a writ directing a peace officer to take custody of Mark Prough and to take him or her to [the medical facility] on May 18, 2009."

¶ 14 Accordingly, on May 18, 2009, the Jersey County circuit clerk issued a "Writ for Detention, Examination, and Appearance Before Court" (exhibit C of the second amended complaint), in which "the peace officer" was "commanded to" (1) "take Mark Prough to Memorial Hosp[ital,] Dr. Brisan[,] at anytime, on 5-18-09, 2009 [*sic*] for examination pursuant [to] order of this court entered May 18, 2009," and (2) "take custody of Mark Prough at 208 Gidding, Jerseyville, IL and to take him/her to Jersey Comm[unity] Hospital on May 18, 2009, 2009 [*sic*] to detention and examination pursuant to an order of this court entered May 18, 2009."

¶ 15 On information and belief, plaintiff alleges that, shortly after the Jersey County circuit court entered these orders and the circuit clerk issued the corresponding writ, Mark Prough fled to Ozark, Missouri, to stay with a friend of his, Gary Benedict. Eventually, Mark Prough returned to Illinois. In the early morning hours of July 19, 2009, the Jerseyville police department received a tip that his vehicle was seen at the firehouse in the village of Kane in Greene County, Illinois. The dispatcher of the Jerseyville police department called the Greene County sheriff's office, requesting that a deputy sheriff detain Mark Prough so that the Jerseyville police department could enforce the writ. The Greene County sheriff's office replied that no deputy sheriff was on duty and that Deputy Sheriff Kerry Page, who was scheduled to come on duty within a half-hour, was unwilling to travel

to Kane and detain Mark Prough.

¶ 16 After Page's refusal, a Jerseyville police officer traveled to Kane in an attempt to locate Mark Prough (even though Kane was outside the Jerseyville police department's jurisdiction). By the time the Jerseyville police officer arrived at the firehouse in Kane, Mark Prough's vehicle no longer was there.

¶ 17 In the early morning hours of July 20, 2009, Mark Prough went to the residence of his father, Dennis Prough, and shot him to death. Mark Prough then burned the residence, along with his father's body inside, and fled into the countryside of Greene County. He was apprehended, and on July 29, 2009, in Jersey County, he was charged with the murder of Dennis Prough.

¶ 18 After alleging those facts, the second amended complaint set forth three counts. Count I was directed against three defendants: (1) the "office of the Greene County sheriff," (2) Graham, and (3) Page. It alleged that those defendants had engaged in "willful and wanton misconduct" in that they had "knowingly, deliberately, and intentionally failed to serve, execute, and return the Jersey County 'mental health warrant' legally directed to them upon Mark Prough, in violation of 55 ILCS 5/3-6019," and they had failed to "even travel to the Village of Kane, Greene County, Illinois, to detain Mark Prough until representatives from the City of Jerseyville Police Department and/or Jersey County Sheriff's Department could enforce the mental health warrant and Jersey County 'Orders for Detention and Examination.' " Pursuant to the Wrongful Death Act (740 ILCS 180/1 (West 2008)), plaintiff sought damages for Dennis Prough's surviving spouse and next of kin, who had "suffered great losses of a personal and pecuniary nature including, loss of society, loss of consortium, loss of companionship, and loss of guidance."

¶ 19 Count II, entitled "Survival Action," was directed at the same three defendants—the

"office of the Greene County Sheriff," Graham, and Page—and sought compensation for Dennis Prough's estate for his personal injuries and suffering. See 755 ILCS 5/27-6 (West 2008) ("actions to recover damages for an injury to the person" survive the injured person's death).

¶ 20 Count III, entitled "Statutory Indemnification," was directed against four defendants: (1) Greene County, (2) the "office of the Greene County Sheriff," (3) Graham, and (4) Page. This count was based on section 9-102 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/9-102 (West 2008)), which, in its first sentence, provided: "A local public entity is empowered and directed to pay any tort judgment or settlement for compensatory damages (and may pay any associated attorney's fees and costs) for which it or an employee while acting within the scope of his employment is liable in the manner provided in this Article."

¶ 21 B. Dismissal of the Second Amended Complaint With Prejudice

¶ 22 On March 11, 2011, defendants filed four motions to dismiss the second amended complaint. (More precisely, one of the motions for dismissal was directed solely at count III.) Some of the motions were pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)), and other motions were pursuant to sections 2-619(a)(2), (a)(5), and (a)(9) (735 ILCS 5/2-619(a)(2), (a)(5), (a)(9) (West 2010)). In addition to contending that the second amended complaint failed to state a cause of action, these motions contended that the causes of action were barred by statutory immunities (745 ILCS 10/2-201, 2-202, 4-102, 4-107 (West 2008); 750 ILCS 60/305 (West 2008)) as well as by a one-year period of limitation (745 ILCS 10/8-101(a) (West 2008)). One of the motions for dismissal was entitled "Section 2-615 Motion To Dismiss or Strike Second Amended Complaint for Misjoinder," and it sought the dismissal of Graham and Page from the lawsuit on the ground that plaintiff had failed to join them as defendants within one year after

the injury or the accrual of the cause of action, as section 8-101(a) of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/8-101(a) (West 2008)) required. (Again, the original version of the complaint named "other unknown members of the Greene County sheriff's department" instead of naming Graham and Page specifically.)

¶ 23 On April 25, 2011, the trial court denied Graham's and Page's motion to dismiss the second amended complaint for misjoinder, but the court otherwise granted the motions for dismissal. Specifically, the court held that defendants owed Dennis Prough no duty to protect him against the criminal acts of third parties, such as Mark Prough, and that, besides, plaintiff had failed to plead any facts showing that defendants' acts or omissions had proximately caused Dennis Prough's death. The court disagreed with plaintiff that the order of May 18, 2009, was still in effect on July 19, 2009, given that "the plain language of the Order state[d] that Mark Prough was to be taken into custody *on May 18, 2009*." (Emphasis in original.) In any event, the court concluded that defendants had immunity under sections 2-201, 4-102, and 4-107 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-201, 4-102, 4-107 (West 2008)). Consequently, the court dismissed the second amended complaint with prejudice.

¶ 24 Plaintiff appeals from the dismissal of the second amended complaint, and Graham and Page cross-appeal from the denial of their motion to dismiss the second amended complaint on the ground of misjoinder.

¶ 25 II. ANALYSIS

¶ 26 A. The Impossibility of Obeying a Writ That Required Performance on a Specified Day in the Past

¶ 27 As we have discussed, the trial court dismissed the second amended complaint not

only because it failed to state a cause of action but also because various statutory immunities applied to defendants. Because an immunity, like a statute of limitations, is an affirmative defense (*Sandholm v. Kuecker*, 2012 IL 111443, ¶ 54; *Burnett v. West Madison State Bank*, 375 Ill. 402, 408 (1940); *Smith v. Menold Construction, Inc.*, 348 Ill. App. 3d 1051, 1058 (2004)) and because an affirmative defense presupposes that the plaintiff has pleaded a cause of action (*Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003)), we first will address the question of whether plaintiff has pleaded a cause of action. Absent a legally sufficient claim, there is no occasion to consider the applicability of an immunity or a statute of limitations, because there is no claim for the immunity or statute of limitations to defeat.

¶ 28 In his brief, plaintiff premises his claim solely on defendants' refusal to "serve and execute the orders for detention"—a refusal that, according to plaintiff, renders defendants liable for damages under section 3-6020 of the Counties Code (55 ILCS 5/3-6020 (West 2008)). That section provides: "The disobedience of any sheriff to perform the command of any *** order *** legally issued to him or her, shall be deemed a contempt of the court that issued the same, and may be punished accordingly; and he or she shall be liable to the party aggrieved for all damages occasioned thereby." *Id.*

¶ 29 Actually, the orders for detention (exhibits A and B of the second amended complaint) were directed not at peace officers but at Mark Prough and the Jersey County circuit clerk. Only the writ (exhibit C of the second amended complaint) was directed at peace officers, and hence the question is whether the Greene County sheriff or his agents disobeyed the writ.

¶ 30 According to the trial court's reasoning—reasoning which defendants endorse on appeal—plaintiff is incorrect in his assertion that the Greene County sheriff disobeyed the writ of

May 18, 2009, because in order to disobey the writ, the sheriff had to have an opportunity to perform the writ when he (or his agents) first learned of it on July 19, 2009, and that opportunity simply did not exist, given that, by its terms, the writ required performance on a specific date in the past. Performance of the writ was impossible on July 19, 2009, because it commanded the peace officer (1) to "take Mark Prough to Memorial Hosp[ital,] Dr. Brisan[,] at anytime, *on 5-18-09*" and (2) to "take custody of Mark Prough at 208 Gidding, Jerseyville[,] IL[,] and to take him/her to Jersey Comm[unity] Hospital *on May 18, 2009*." (Emphases added.) If the court intended the peace officer to detain Mark Prough and take him to the hospital on any later date as well, the court could have easily said "immediately" instead of "on 5-18-09." But the court did not say that. Because the specified date of performance—May 18, 2009—was in the past on July 19, 2009, the writ was moot and impossible to perform. It would be unreasonable to hold defendants liable for failing to perform a writ that the passage of time had rendered moot and impossible to perform.

¶ 31 For essentially two reasons, plaintiff maintains that this reasoning is fallacious. First, he argues, the writ contains no expiration date, and the Mental Health and Developmental Disabilities Code (405 ILCS 5/1-100 through 5/6-107 (West 2008)) does not provide for the termination or expiration of orders entered pursuant to section 3-704 (405 ILCS 5/3-704 (West 2008)). True, the writ contains no explicit expiration date, but it contains an implied expiration date, *i.e.*, May 18, 2009, because, on its face, it requires performance on that date alone. Although it might be true that the Mental Health and Developmental Disabilities Code says nothing about the expiration of an order for involuntary detention and examination (other than the provision that "[n]o person may be detained for examination under this Section for more than 24 hours" (405 ILCS 5/3-704(a) (West 2008)), the question, under section 3-6020 of the Counties Code (55 ILCS 5/3-6020

(West 2008)), is not whether defendants disobeyed the Mental Health and Developmental Disabilities Code but whether they disobeyed the writ of May 18, 2009. They did not disobey the writ, because on July 19, 2009, obeying or disobeying the writ was impossible.

¶ 32 Second, plaintiff argues that "even if the trial court is correct in its finding that the inclusion of the May 18, 2009 date renders the orders for detention invalid or expired on July 19, 2009, the Defendants still lack legal standing to assert such defect as a defense to their statutory obligation to enforce all orders legally directed to them." "Standing" is a legal term of art meaning "having a real interest in the outcome of the controversy." *Powell v. Dean Foods Co.*, 2012 IL 111714, ¶ 35. Obviously, defendants have a real interest in the outcome of this controversy: plaintiff is suing them for damages. If "standing" is a misnomer for "right"—in the sense that "defendants still lack *a right* to assert such defect as defense to their statutory obligation to enforce all orders legally directed to them"—logic would suggest that a sheriff's statutory obligation to enforce an order depends on whether enforcement of the order is humanly possible. Enforcement of the writ was impossible on July 19, 2009.

¶ 33 B. Causation Under the Public-Duty Rule

¶ 34 The argument might be made that a commonsense interpretation of the writ would have looked beyond the temporal specification—the phrase "on May 18, 2009," or "on 5-18-09"—and would have perceived that the Jersey County circuit court really meant "forthwith." After all, if Mark Prough possibly was suffering from a psychological disorder that put him or others at risk of physical harm (see 405 ILCS 5/3-601(a) (West 2008)), why would the circuit court want him detained and examined only on May 18, 2009, and not on any day thereafter should the police be unable to locate him on May 18?

¶ 35 This argument has some force, but, on the other hand, it is understandable why a sheriff would feel reluctant to second-guess or look behind the explicit terms of a judicial order, considering that the explicit terms of the order are what insulates the sheriff from blame. Surely, no sheriff wants to be in the position of defending his or her actions by arguing that the circuit court failed to say what it meant.

¶ 36 Let us assume, though, for the sake of argument, that the Greene County sheriff and his deputy sheriff should have interpreted the writ as commanding the detention and psychological examination of Mark Prough not only "on May 18, 2009," as the writ said, but also on any day thereafter. Even so, disobeying the writ (so interpreted) would render the sheriff "liable to the party aggrieved" only for "damages *occasioned* thereby." (Emphasis added.) 55 ILCS 5/3-6020 (West 2008). To "occasion" damages means to "bring about" or "cause" them. Merriam-Webster's Collegiate Dictionary 802 (10th ed. 2000). In our decisions applying the public-duty rule, we have held that "a police department's negligence—its oversights, blunders, omissions—is not the proximate or legal cause of harms committed by others." *Porter v. City of Urbana*, 88 Ill. App. 3d 443, 445 (1980); see also *Fessler v. R.E.J. Inc.*, 161 Ill. App. 3d 290, 295 (1987). Thus, if the sheriff or his agents omitted to perform the writ, that omission was not the proximate or legal cause of Mark Prough's murder of Dennis Prough, and it follows that the sheriff and his agents do not incur liability under section 3-6020 of the Counties Code (55 ILCS 5/3-6020 (West 2008)).

¶ 37 There is one exception to this principle of noncausation: the special-duty rule; but under the facts of the second amended complaint, that exception is inapplicable. Four propositions had to hold true in order for the sheriff to owe a special duty to Dennis Prough: (1) the sheriff had to be "uniquely aware of the particular danger or risk to which [Dennis Prough was] exposed," (2)

plaintiff must allege specific acts or omissions on the part of the sheriff, (3) the specific acts or omissions had to be "either affirmative or wilful in nature," and (4) the injury to Dennis Prough had to occur while Dennis Prough was under the "direct and immediate control of employees or agents of the [sheriff]." (Internal quotation marks omitted.) *Burdinie v. Village of Glendale Heights*, 139 Ill. 2d 501, 508 (1990). Again, even if we assume, for the sake of argument, that the writ, properly interpreted, required the sheriff to take Mark Prough into custody on July 19, 2009 (the second condition in *Burdinie*), plaintiff has not pleaded the remaining three conditions of the special-duty rule. The sheriff's failure to perform the writ was neither affirmative nor wilful, considering that the writ specified the detention and examination were to occur on May 18, 2009, and one had to creatively read between the lines to understand that detention on a subsequent date likewise was commanded. Also, plaintiff has pleaded no facts from which one could reasonably infer a "unique awareness" on the sheriff's part that Dennis Prough was in danger of getting shot. Nor has plaintiff pleaded that Dennis Prough was under the sheriff's "direct and immediate control" when Mark Prough shot him. Consequently, plaintiff has failed to plead a duty, and we affirm the dismissal of the second amended complaint with prejudice.

¶ 38 Given this affirmance, the cross-appeal by Graham and Page is moot.

¶ 39 III. CONCLUSION

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

¶ 41 Affirmed.