

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

NORBY V. THE FARNAM BANK

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VIRGINIA NORBY ET AL., APPELLEES,

V.

THE FARNAM BANK, A NEBRASKA BANKING CORPORATION, ET AL., APPELLEES,
AND DAN RUPP, FRONTIER COUNTY SHERIFF, APPELLANT.

Filed March 4, 2008. No. A-07-656.

SIEVERS, CARLSON, and CASSEL, Judges.

SIEVERS, Judge.

PROCEDURAL BACKGROUND

This matter is before us upon the remand to this court from the Nebraska Supreme Court. In the interest of judicial efficiency, we refer the parties and any other interested readers to our lengthy memorandum opinion and judgment on appeal in *Norby v. The Farnam Bank*, case No. A-04-1171, filed on April 11, 2006. That opinion comprehensively sets forth the factual background of this case. That factual background, reduced to its essence, is that as a result of a security agreement with The Farnam Bank (Bank) signed by Keith Norby, the husband of Virginia Norby, Keith pledged “all livestock” and “offspring” now owned or hereafter acquired as collateral. The agreement was dated February 11, 1998, and filed with the Secretary of State the next day. It was later amended to include two registered quarter horses with colts. There was default upon the underlying notes, and as a result, the bank filed a petition in replevin in the Frontier County District Court resulting in the issuance of two orders of replevin. Simplified, the plaintiffs’ claim in case No. A-04-1171 was that livestock not belonging to Keith, but to one or more of the plaintiffs, was taken as a result of the replevin orders. The case was tried against all defendants except Frontier County Sheriff Dan Rupp, and a jury verdict rendered in favor of Darin Norby in the amount of \$6,100 which we affirmed.

There was no trial as to Rupp because in the course of the pretrial proceedings, the trial court had sustained a demurrer filed by Rupp with respect to the plaintiffs’ 42 U.S.C. § 1983 (2000) claim against him.

In our earlier decision, we found that the trial court had erred in sustaining the demurrer on the § 1983 claim and we remanded that cause of action to the district court with directions to reinstate such claim. As a result, Rupp filed an answer to the plaintiffs' second amended petition on September 18, 2006, in which he alleged that at all relevant times he was the duly elected and acting sheriff for Frontier County and that he was "absolutely and/or qualifiedly immune from suit." On January 8, 2007, Rupp filed a motion for summary judgment "based on qualified immunity." The trial court noted that in addition to Rupp's motion for summary judgment, the other defendants, the Bank, Donnie L. Franzen, and Karen Widick, had also filed motions for summary judgment. The trial court found that the other defendants' motion should be denied, and such claims went to trial resulting in the verdict we affirmed in case No. A-04-1171. Rupp timely filed an appeal from the order denying his motion for summary judgment after our earlier remand in A-04-1171, and such appeal was docketed as A-07-656.

On July 19, 2007, we dismissed Rupp's appeal under Neb. Ct. R. of Prac. 7A(2) (rev. 2001), citing *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004), noting that the denial of a motion for summary judgment is an interlocutory order rather than a final, appealable order. However, on July 13, 2007, the Nebraska Supreme Court decided *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007). After our dismissal, Rupp filed a petition for further review with the Nebraska Supreme Court of our order of dismissal which that court sustained on August 29.

On September 26, 2007, the Supreme Court reversed our dismissal and remanded the matter to us "for further consideration in light of *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007)." We then entered an order on October 1, providing for a new briefing schedule for the parties, which has now been completed. Accordingly, pursuant to the Supreme Court's directive, we now reconsider Rupp's appeal from the district court's denial of his motion for summary judgment that he based on qualified immunity in light of the Supreme Court's decision in *Williams v. Baird, supra*. We order this case submitted without oral argument pursuant to this court's authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2006).

ASSIGNMENT OF ERROR

Rupp assigns, restated, that the district court erred in failing to sustain his motion for summary judgment on the ground that he is entitled to qualified immunity in the instant lawsuit and therefore is also entitled to judgment as a matter of law in his favor.

STANDARD OF REVIEW

When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Egan v. Stoler*, 265 Neb. 1, 653 N.W.2d 855 (2002).

ANALYSIS

Williams v. Baird, supra, involves the "collateral order doctrine" and its application to appellate review of a trial court's denial of a defendant's claim of qualified immunity including when denied in a defendant's motion for summary judgment. The *Williams* court, citing U.S. Supreme Court precedent, held that

the denial of a claim of qualified immunity, where the issues presented are purely questions of law, should be immediately reviewable under the collateral order doctrine. Thus, as a threshold issue for appellate jurisdiction, we must consider whether the qualified immunity issue in this case presents disputed questions of fact.

273 Neb. at 985, 735 N.W.2d at 931. Accordingly, under *Williams*, if the determination of Rupp's motion for summary judgment turns on disputed questions of fact, the trial court's decision is not immediately reviewable under the collateral order doctrine. On the other hand, if the issues presented by Rupp's motion for summary judgment are questions of law, they are immediately reviewable under the collateral order doctrine. The Nebraska Supreme Court's remand directs our focus to these questions which became part of Nebraska's jurisprudence after the decision in *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

The *Williams* court set forth a three-part inquiry into whether the collateral order doctrine applies thereby allowing for what would otherwise be an interlocutory appeal over which we normally would not have jurisdiction. First, the appellate court determines whether the plaintiff has alleged the violation of a constitutional right; second, whether that right was clearly established at the time of the alleged violation; and finally, whether the evidence shows that the particular conduct alleged was a violation of the right at stake. *Williams v. Baird, supra*. The *Williams* court noted that the first two inquiries are questions of law, while the third could require factual determinations to the extent that the evidence is in conflict. *Williams v. Baird, supra*.

Examination of the operative pleading, the second amended petition, filed March 1, 2004, shows that the format of such pleading was to set forth in 25 paragraphs factual allegations surrounding the replevin action by which livestock was seized. With respect to the 42 U.S.C. § 1983 cause of action which is the subject of this remand, the plaintiffs' pleading simply realleged paragraphs 1 through 25 as though fully set forth and then asserted in paragraph 34 as follows:

The acts and omissions of the defendants, and each of them, is a deprivation of the plaintiffs' interest in their property as hereinabove alleged, without due process of law, and under color of law, in accordance with Title 42 U.S.C. § 1983 and plaintiffs have been damaged thereby, for which the plaintiffs are entitled to such damages as hereinabove alleged, for punitive damages, together with attorney fees by reason thereof, as provided in said section, as more particularly set forth in the prayer hereafter.

We consider this allegation only as it relates to the Frontier County sheriff, Rupp, because after our decision in case No. A-04-1171, it is only the claim against Rupp, or any other defendant, which is still "alive." When reduced to its essence, the claim against Rupp under 42 U.S.C. § 1983 is that he took possession of livestock belonging to one or more of the plaintiffs "without due process of law."

Due process of law with respect to property has been delineated in *Prime Realty Dev. v. City of Omaha*, 258 Neb. 72, 602 N.W.2d 13 (1999), as the concept that the State cannot deprive any person of life, liberty, or property without due process of law. The court in *Prime Realty Dev.* further stated:

The protections of this procedural due process right attach when there has been a deprivation of a significant property interest. *Howard v. City of Lincoln*, 243 Neb. 5, 497

N.W.2d 53 (1993), citing *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). If a significant property interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the nature of the case. *Blanchard v. City of Ralston*, 251 Neb. 706, 559 N.W.2d 735 (1997).

258 Neb. at 76, 602 N.W.2d at 16. Because Rupp's action in taking possession of the livestock had its genesis solely in the replevin actions filed against Keith by the Bank pursuant to a security agreement, we briefly examine the nature of a replevin action. The court in *Arcadia State Bank v. Nelson*, 222 Neb. 704, 386 N.W.2d 451 (1986), reiterated previous holdings that the subject matter of a replevin action is very narrow. "[S]ince the main issue in a replevin action is one of title and right to possession, all matters foreign thereto must be excluded from consideration and are not available as defenses." *Id.* at 711, 386 N.W.2d at 457. "[T]he issue in replevin is not *ownership* of the property . . . but the *right to immediate possession at the time of the commencement of the action.*" (Emphasis in original.) *Id.* at 712, 386 N.W.2d at 457-58. Therefore, it is clear that the replevin action filed by the Bank determined the right to possession of the livestock at the time the replevin action was commenced.

As a result of such action, the Frontier County District Court issued two orders of replevin, one dated October 10, 2001, and another dated November 1, 2001. The first order instructed the Frontier County sheriff, Rupp, to recover from Keith's possession "all of [Keith's] livestock, including, but not limited to the following: 5 steers, 10 heifers, 25 fall calves, 80 cows, 3 bulls, [and] 2 horses." The other order was issued to the Lincoln County sheriff. In the "FACTUAL BACKGROUND" portion of our previous opinion in case No. A-04-1171, we set forth the evidence regarding the seizure of livestock by Rupp and by the Lincoln County sheriff--and we will not repeat that evidence here. Suffice it to say, that at all times Rupp was acting pursuant to the order of the Frontier County District Court when he took possession of the livestock.

It is established that a citizen's claim against a sheriff and his deputies that they deprived the citizen of property without due process by taking possession on the basis of a writ of replevin are entitled to quasi-judicial immunity for suit from § 1983 damages. See *Dellenbach v. Letsinger*, 889 F.2d 755, 762 n. 7 (7th Cir. 1989). See, also, *Henry v. Farmer City State Bank*, 808 F.2d 1228 (7th Cir. 1986). The Nebraska replevin statutes, Neb. Rev. Stat. §§ 25-1093 through 25-10,110 (Reissue 1995 & Cum. Supp. 2006), contain a multitude of various provisions for prior notice to persons such as the plaintiffs, who might claim an interest in the livestock which the Bank sought to seize, as well as multiple opportunities to be heard. There is no evidence that the statutory provisions for notice and hearing were not followed.

In conclusion, in applying the three-part inquiry into whether the collateral order doctrine applies so as to make the denial by the trial court of Rupp's claim for qualified immunity immediately reviewable, we conclude that the collateral order doctrine does in fact apply. First, the plaintiffs have alleged a violation of a constitutional right--the right not to be deprived of their property without due process of law. Generally, the right is clearly established at the time of the alleged violation. However, with respect to the third category as to whether the evidence shows that the particular conduct alleged was a violation of the right at stake, we find that the evidence unquestionably shows that there was no such violation, and without a violation, there can be no viable claim under 42 U.S.C. § 1983.

Additionally, and of paramount importance, is the undisputed fact that Rupp's seizure of the livestock was based upon a facially valid order of replevin. When acting pursuant to such a court order, the law is well established that the law enforcement officer is entitled to immunity--which has been described in the cases as "quasi-judicial immunity." See, *Lawal v. Fowler*, 196 Fed. Appx. 765 (11th Cir. 2006) (unpublished) (law enforcement personnel, acting in furtherance of their official duties and relying on a facially valid court order, are entitled to absolutely quasi-judicial immunity from suit in a 42 U.S.C. § 1983 action); *Dunn v. City of Elgin*, 347 F.3d 641 (7th Cir. 2003) (even when they are not protected by absolute immunity, law enforcement officers typically receive qualified immunity for conduct performed within the scope of their official duties); *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997) (bailiff entitled to "absolute quasi-judicial immunity" from § 1983 liability for carrying out the judge's orders to handcuff the plaintiff and remove her from the courtroom). An official who executes a facially valid court order is entitled to absolute immunity from liability for damages in a suit challenging conduct prescribed by that order. *Martin v. Bd. of County Com'rs of Pueblo County*, 909 F.2d 402 (10th Cir. 1990) (citing *Valdez v. City and County of Denver*, 878 F.2d 1285 (10th Cir. 1989)). The court in *Martin* further explained:

In *Valdez*, we repeatedly emphasized our concern that law enforcement officers not become scapegoats for unconstitutional court orders simply by virtue of their status as the only available targets for challenging the authority of the immune judicial official actually responsible: "Enforcing a court order or judgment is intrinsically associated with a judicial proceeding. If losing parties were free to challenge the will of the court by threatening its officers with harassing litigation, the officers might neglect the execution of their sworn duties. . . . To force officials . . . to answer in court every time a litigant believes the judge acted improperly is unacceptable. . . . [I]t is simply unfair to spare the judges who give orders while punishing the officers who obey them. Denying these officials absolute immunity for their acts would make them a 'lightning rod for harassing litigation aimed at judicial orders.' . . ." 878 F.2d at 1288-90 (footnotes and citations omitted). The holding in *Valdez* was, accordingly, expressed specifically in terms of the direct relationship between the challenged conduct and the underlying directive of the court: "In this case, we hold that an official charged with the duty of executing a facially valid court order enjoys absolute immunity from liability for damages in a suit *challenging conduct prescribed by that order.*" 909 F.2d at 404-05.

Rupp took possession of the cattle pursuant to a facially valid court order in a replevin notice--of which the plaintiffs had notice and an opportunity to be heard before its entry. Rupp is entitled to absolute immunity because he simply did what the court order told him to do. Therefore, the trial court should have sustained his motion for summary judgment, and we hereby reverse such denial, and remand the cause to the district court with directions to enter judgment in favor of Rupp and to dismiss the cause as to him.

REVERSED AND REMANDED WITH DIRECTIONS.