2013 WL 10342440 (Iowa) (Appellate Brief)
Supreme Court of Iowa.

Maxine Gail VEATCH, Appellant/Plaintiff,
v.
CITY OF WAVERLY and Jason Leonard, Individually and in His Official Capacity, Appellees/Defendants.

No. 13-0417.
July 17, 2013.

Bremer County Case No. CVCV003915
Appeal from the Iowa District Court for Bremer County
The Honorable Dedra Schroeder

Appellant's Final Reply Brief

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***iv** TABLE OF CONTENTS

***vi** TABLE OF AUTHORITIES

Cases:

***1 REPLY TO ARGUMENT**

L The District Court Erred In Finding This Action Is Barred By The Doctrine of Issue Preclusion.

There is no dispute that the issue of whether or not Officer Leonard had probable cause under the Fourth Amendment for a warrantless arrest cannot be re-litigated. However, the state law counterpart, Iowa Code § 804.7, requires more than probable cause for a warrantless arrest. Whether or not Officer Leonard met those additional requirements *has not* been litigated. Whether Officer Leonard's warrantless arrest under Iowa law was an act of negligence- failure to exercise due care in the execution of a statute - *has not* been litigated. Ms. Veatch's state law claims and the City of Waverly and Officer Leonard's (collectively "the City") defenses are distinct from the federal probable cause ruling. Additionally, the Iowa Supreme Court has guarded the protections that Iowa law accords its citizens, and a ruling by the federal court does not automatically extend to the state's own application of its laws. *See, e.g., Bierkamp v. Rogers*, 293 N.W.2d 577,579 (Iowa 1980) (stating "The result reached by the United States Supreme Court in construing the federal constitution is persuasive, but not binding upon this court in construing analogous provisions in our state constitution."); ***2** *State v. Effler*, 769 N.W.2d 880, 894-97 (Iowa 2009) (Appel, J., concurring with dissent) (discussing independence of state law and federal law). Therefore, the District Court erred in dismissing Ms. Veatch's claims on the basis of issue preclusion.

The first element the City has the burden to prove with respect to its claim of issue preclusion is that the issue concluded in the federal action is identical to the issue in the present state court action. *See George v. D.W. Zinser Co.*, 762 N.W.2d 865, 868 (Iowa 2009) (stating elements of issue preclusion). This requires identifying the issues in the prior and current litigation. As articulated by the Eighth Circuit Court of Appeals, the issue in the federal action was "whether Leonard's warrantless arrest of Veatch constituted a violation of federal law, namely, the Fourth Amendment's prohibition of unreasonable seizures." *Veatch v. Bartels Lutheran Home*, 627 F.3d 1254, 1257 (8th Cir. 2010). The issue in the present action is whether Officer Leonard's warrantless arrest of Ms. Veatch violated Iowa Code § 804.7. As explained in Ms. Veatch's initial brief, these issues are not identical.

The City is either misinterpreting or confusing the issue at hand. It attempts to create identical issues by asserting a very broad issue; "whether Leonard had probable cause to arrest Veatch." (Appellee Br. at 17). This formulation of the issue misses the mark. First, this formulation of the issue is ***3** inconsistent with the City's own statement of the issue one paragraph earlier in its own appeal brief. On page 16 of its brief, the City stated, "The specific issue before the court in the federal action was the City's argument that it could not be held liable under 42 U.S.C. § 1983 because its employee, Defendant Leonard, had committed no constitutional violation." (Appellee Br. at 16). The federal courts considered probable cause under the Fourth Amendment, but it was limited to that- the Fourth Amendment.

Additionally, "whether Leonard had probable cause to arrest Veatch" is an incorrect statement of the issue in the present action. Unlike the Fourth Amendment, Iowa Code § 804.7 *requires more than probable cause* for a warrantless arrest. Therefore, probable cause is not the say all, end all as the City suggests; Officer Leonard can violate state law without violating federal law. Whether Officer Leonard's warrantless arrest constituted a violation of federal law, and whether Officer Leonard's warrantless arrest constituted a violation of state law, are not identical issues. Therefore, issue preclusion does not apply.

The City's incorrect formulation of the issue has caused all of its arguments to miss the mark. In fact, the City's position that the present issue was material and relevant to the final disposition is completely at odds with ***4** Judge Reade's own proclamation that "Veatch's argument that a warrantless arrest for a simple misdemeanor violates Iowa law is irrelevant to her § 1983 claim." (App. p. 206). It is also at odds with the Eighth Circuit's ruling that gave no consideration to warrantless arrests under Iowa Code § 804.7, the basis of Ms. Veatch's state law claims. *C.f. Veatch*, 627 F.3d 1254. Whether Officer Leonard

violated Iowa law was not material and relevant to the disposition of the federal case or the determination of probable cause under the Fourth Amendment. For the reasons stated in Ms. Veatch's initial brief and those stated herein, this Court should reverse the District Court's erroneous ruling because issue preclusion does not apply.

A. The District Court Erred in Dismissing Ms. Veatch's Claim for False Imprisonment Because Iowa Code § 804.7 Requires More Than Probable Cause for Warrantless Arrests.

As addressed in Ms. Veatch's initial brief, Iowa Code § 804.7 requires *more than* probable cause for warrantless arrests. To hold otherwise would be contrary to the most basic rules of statutory interpretation. Therefore, the federal court's probable cause determination does not nullify Ms. Veatch's false imprisonment claim.

The City tries to argue that Ms. Veatch's acquittal after only one hour of deliberations does not show Ms. Veatch did not commit the alleged assault. ***5** The City has relied on two cases in support of this position: *State v. Adams* and *State v. DeVries.* Neither case supports the City's position. In both *Adams* and *DeVries,* the defendant did in fact commit fifth degree theft, but was prosecuted for, and convicted of, more serious crimes. *State v. Adams,* 554 N.W.2d 686 (Iowa 1996); *State v. DeVries,* No. 1-166/00-0576, 2001 Iowa App. LEXIS 330 (Iowa Ct. App. May 23, 2001). Unlike either of those defendants, Ms. Veatch was acquitted. She did not commit a public offense.

Despite having acknowledged that the law requires the offense to in fact have been committed, the City argues that such a requirement exposes police officers to liability for false arrest any time a person is acquitted. This simply is not true. First, Iowa Code §804.7 applies only to *warrantless* arrests. There is no such requirement when an officer obtains a warrant prior to making an arrest. Additionally, § 804.7 authorizes a warrantless arrest under other circumstances when no offense was committed, such as when an offense was attempted in the police officer's presence. See Iowa Code § 804.7. Therefore, the requirement under § 804.7(2) that an offense be committed does not expose officers to liability any time a person is acquitted.

The City's alternative argument that Officer Leonard's arrest was lawful because there was probable cause that Ms. Veatch committed dependent adult ***6** **abuse** should also be rejected. The City cites no controlling authority to support its position. Additionally, Officer Leonard's own actions show that he did not have reasonable grounds to arrest Ms. Veatch for such offense.

Officer Leonard testified that he discussed possible dependent adult **abuse** with Bartels and the Department of Human Services, yet arrested Ms. Veatch solely for a simple misdemeanor assault. (App. p. 245). Officer Leonard made the intentional decision to arrest Ms. Veatch for an alleged simple misdemeanor assault. To now change his position and argue that he could have arrested Ms. Veatch for dependent adult **abuse** is unpersuasive. If Officer Leonard had reasonable grounds to believe that Ms. Veatch had committed dependent adult **abuse**, as the City now argues, then why did he not arrest her for such an offense? Further, as the City admitted in its initial Statement of Material Facts, Ms. Veatch was found to have not committed dependent adult **abuse**. (*See* Defs. Statement of Material Facts and Mem. of Authorities in Supp. of Mot. for Summ. J. at 11, ¶57 (stating an Administrative Law Judge held allegations of dependent adult **abuse** are incorrect)). At the very least, there is a genuine issue of material fact with respect to this argument, making judgment as a matter of law inappropriate.

***7** The City's attempt to legalize Officer Leonard's warrantless arrest for an alleged simple misdemeanor assault that did not occur in his presence is essentially an argument to eliminate Iowa Code § 804.7(2). This Court should not judicially remove a legislative requirement for warrantless arrests. In fact, this case illustrates the very reason that Iowa Code § 804.7(2) is important. To allow Officer Leonard to unilaterally decide to arrest now- an alleged simple misdemeanor offense that occurred outside of his presence-search for authority to arrest at a later time (in this case years later with the assistance of his attorney), violates Ms. Veatch's freedoms and causes unjustified damage to her personally and professionally. Ms. Veatch is a middle-aged professional woman. She has no criminal record, she poses no threat to society, and she was only accused of a simple misdemeanor offense. There was no reason to arrest Ms. Veatch without a warrant and send her to jail overnight. To allow the City to attempt to justify such an illegal arrest years later essentially eliminates the requirements of § 804.7(2).

Officers who violate § 804.7(2) should be held responsible for their actions. They should not be encouraged to make warrantless arrests for simple misdemeanor offenses that allegedly occurred outside of their presence. Rather, they should be required to act with such due diligence to determine that the ***8** alleged offense *did in fact* occur, or they should avail themselves of the judicial oversight of a magistrate. Officer Leonard admittedly met with Battels staff and collected irrelevant information, but refused to let Ms. Veatch talk about the same type of information. (App. pp. 246, 248). It would be bad policy to allow officers to complete such a one-sided investigation in attempt to find probable cause for a warrantless arrest.

The legislature recognized that the severity of the offense involved is important, and therefore it gave peace officers greater authority for warrantless arrests when dealing with more severe offenses. Therefore, holding peace officers to the standard proscribed by the legislature protects citizens without burdening police officers. It gives meaning to Iowa Code § 804.7(2). For all of the reasons stated herein and in Ms. Veatch's initial brief, issue preclusion does not apply to Ms. Veatch's claim for false imprisonment. This Court should reverse the District Court's erroneous ruling.

***9 B. The District Court Erred In Dismissing Ms. Veatch's Negligence Claim Because Officer Leonard Failed to Exercise Due Care When Executing His Statutory Authority to Arrest Without a Warrant.**

Both the City and Judge Schroeder have missed the mark on Ms. Veatch's negligence claim. Ms. Veatch is not claiming negligent investigation, as they argue. Rather, this claim is premised on Officer Leonard's failure to exercise due care in discharge of a statutory duty; namely, his statutory authority to arrest without a warrant. Such a claim is recognized under the law. *C.f. Kelley v. Story County Sheriff*, 611 N.W.2d 475,484 (Iowa 2000) (stating "a property owner may be entitled to compensation for damage to property when law enforcement officers fail to exercise due care in performing their statutory duties"). As Judge McKinley correctly recognized in his Ruling- the first ruling on Defendant's Motion for Summary Judgment, "there are genuine issues of material fact as to whether law enforcement exercised due care in the discharge of their statutory duty." (App. p. 46). Therefore, the District Court erred in granting Defendants' *Renewed* Motion for Summary Judgment.

***10 C. The City is Not Entitled to Statutory Immunity Because the Federal Court Decision Does Not Have Preclusive Effect.**

The City believes that the federal court's probable cause determination entitles it to statutory immunity. The first fallacy in this argument is the City's failure to accept that probable cause is not enough for an arrest under Iowa Code § 804.7. For all of the reasons stated herein and in Ms. Veatch's initial brief, issue preclusion does not apply to Officer Leonard's execution of Iowa Code § 804.7. Therefore, the District Court erred in holding the City is entitled to statutory immunity. As addressed in Ms. Veatch's initial brief, Officer Leonard failed to exercise due care and the City is not entitled to such immunity. Therefore, this Court should reverse the District Court's erroneous decision.

D. Ms. Veatch is Entitled to Punitive Damages Because Officer Leonard Acted With the Requisite Disregard of Her Rights.

The City and the District Court both base their rationale for denying punitive damages on the District Court's erroneous application of issue preclusion. Because the District Court committed reversible error with respect to issue preclusion, its dismissal of punitive damages is similarly reversible error. The City's reliance on *Muller v. Noelck* is misplaced, as that case does not even involve punitive damages. As the City recognizes, a claim for ***11** intentional infliction of emotional distress, as in *Muller* requires greater evidence of misconduct than does a claim for punitive damages. Therefore, the two elements of damage- punitive damages and intentional infliction of emotional distress- are not analogous. For the reasons stated in Ms. Veatch's initial brief, punitive damages should be available as an element of damage in this case.

II.This Court Should Not Consider the City's Judicial Estoppel Argument, as it Was Not Raised Before the District Court.

The City raises the doctrine of judicial estoppel as one of its arguments on appeal. The City does not state where in the record it raised this issue before the trial court, and Ms. Veatch has found no reference to it. Therefore, the City is barred from arguing it now.

Appellate courts "will not affirm a ruling on a ground not urged in the district court." *Estate of Harris v. Papa John's Pizza,* 679 N.W.2d 673, 679 (Iowa 2004). Neither party to an appeal is permitted to "sing" a "song" on appeal "not first sung in the trial court." *Id.* (*quoting State v. Rutledge,* 600 N.W.2d 324,325 (Iowa 1999). The City's judicial estoppel argument was "not first sung in the trial court." It is not found in the City's Motion for Summary Judgment, the City's Application for Interlocutory Appeal, or the City's ***12** Renewed Motion for Summary Judgment. Instead, it is first raised in the City's appeal brief. Therefore, this Court should not consider the City's judicial estoppel argument on appeal.

If this Court considers the City's judicial estoppel argument, it should reject the argument because it is based on documents not contained within the record. As a basis for its judicial estoppel argument, the City cites to a Memorandum of Law filed in the United States District Court for the Northern District of Iowa. (Appellee Br. at 18-19). That memorandum, filed in federal court, is not a part of the record in this case; it was not included in any of the appendices filed with the motions for summary judgment nor is it a part of the pleadings in the present case. The memorandum has not been designated as part of the appendix for the purpose of this appeal, and if it had been designated, Ms. Veatch would have objected since the memorandum is not a part of the record in this case. Therefore, this Court should not consider any references to the memorandum.

Regardless, the City's attempt to take prior court filings to suggest that Ms. Veatch believes issue preclusion applies is unpersuasive. For judicial estoppel to apply, Ms. Veatch must have "successfully and unequivocally assert[ed] a position" in one proceeding that is inconsistent with her position ***13** on appeal. *Duder v. Shanks,* 689 N.W.2d 214, 220 (Iowa 2004). Despite the City's assertion, Ms. Veatch's resistance to the City's Motion for Summary Judgment in the federal case does not suggest that Ms. Veatch believed a probable cause determination would summarily affect her remaining claims. If that memorandum was a part of the record, this Court would see that Ms. Veatch addressed all elements of her claims, which included more than probable cause. Therefore, Ms. Veatch did not "successfully and unequivocally assert[ ]a position" inconsistent with her claims on appeal.

Furthermore, Ms. Veatch's statements in her Motion to Stay State Court Proceedings During Pendency of Eighth Circuit Appeal are not inconsistent with her position on the appeal. Probable cause, however, is not the say all, end all. The federal court's probable cause determination applies only to that one element; it does not provide grounds to summarily dismiss each of Ms. Veatch's state law claims. Therefore, this Court should refuse to affirm the District Court's ruling on the basis of the City's new-found judicial estoppel argument.

***14 CONCLUSION**

For all of the reasons set forth in this brief and Appellant's initial brief, Ms. Veatch respectfully requests that this Court reverse the District Court's Ruling on Defendants' Renewed Motion for Summary Judgment.

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