November 2018

THE LOCAL GOVERNMENT
LIABILITY
BEAT

Presented by Local Government Risk Management Services, Inc.
A Service Organization of the Association County Commissioners of Georgia and the Georgia Municipal Association Risk Management Programs

Sixth Circuit Discusses Liability Regarding False Statements in a Search Warrant Affidavit

By Brian S. Batterton, JD, Legal and Liability Risk Management Institute

On May 14, 2018, the Sixth Circuit Court of Appeals decided *Newell v. Wayne County,*[i] in which the court discussed when intentionally false statements in a warrant affidavit could impose civil liability under the Fourth Amendment. The relevant facts of Newell are as follows:

> Newell was the Wayne County jail's Internal Compliance Manager until her firing in May 2012 for misconduct and lying in an internal affairs investigation. She did not go quietly. Newell insisted to multiple Wayne County Sheriff's Department (WCSD) staff that she was the victim of a "set up" and accused WCSD Executive Chief Eric Smith of misconduct.
>
> Approximately two months after Newell's termination, the sheriff and others at the WCSD received an email from pseudonymous author "Tom Truth." Attaching a criminal docket sheet from PACER, the email accused Smith of using "a large amount of money and superior connections" to dodge prosecution in a long-pending federal criminal case. The department reviewed the allegations against Smith and found them false. The sheriff then ordered an inquiry into the email's origin. Todd led the probe; Richardson supervised.
>
> At Richardson's request, Sergeant William Liczbinski of the WCSD's Internet Task Force determined that the Tom Truth email had been sent through a TOR network, meaning that the email had traveled through thousands of computers worldwide before arriving in recipients' inboxes, making it untraceable. But when he scrutinized the email's attached PACER docket, Liczbinski found the document's "author" listed as one "Renee Newell." According to Liczbinski, this meant that "the document was authored on a computer that at one time was registered to somebody named Renee Newell." He explained that the appearance of someone's name in the "author" field of a document's properties, although not definitive, "may give you some indication of the author."
>
> Todd and Richardson knew that Liczbinski could not definitively confirm who created the attachment. Given the circumstances, however—such as Newell's recent firing—Todd decided that the attachment's properties identified the recently-fired Renee Newell as the author. The properties also showed that the document was created shortly after midnight, leading Todd to infer that Newell likely created it in her home.
>
> Todd thought Newell's involvement in the creation of the Tom Truth email could violate several Michigan statutes, including prohibitions on criminal slander and "[m]alicious annoyance by writing." Seeking more evidence, he prepared a search warrant

affidavit. The relevant parts of the affidavit explained:

- That Newell had recently been fired;
- That various WCSD staff received the Tom Truth email;
- That the email was untraceable, but "the document attached to the email was created by the terminated employee identified as Renee Newell";
- That "the document authored by Renee Newell was created at 12:12:24 am and the email was sent at 1:37 am. Because of the late hours and the document being created in the middle of the night, it is reasonable to believe that the documents were created at Renee Newell's residence"; and
- That Newell had sent letters and emails to WCSD personnel, and that "[t]he theme of [her] language [in these messages] is consistent with the language used in the [Tom Truth] email and . . . the document authored by Renee Newell."

Moreover, he swore that there was "probable cause to believe that additional and supporting evidence" would be found at Newell's home. Richardson reviewed the application and affidavit before Wayne County prosecutors signed off.

A magistrate approved the warrant, and officers executed it without incident. Among other things, law enforcement recovered a copy of the PACER docket attached to the Tom Truth email, along with a letter from PACER administration showing that Newell had recently opened an account. Nonetheless, prosecutors never charged Newell. [ii]

Newell subsequently sued the county and the officers for various federal and state violations. Ultimately, the district court granted summary judgment in favor of all defendants except for Detectives Todd and Richardson, regarding their alleged Fourth Amendment violation pertaining to making false statements in the warrant affidavit.

Todd and Richardson appealed the denial of qualified immunity to the Sixth Circuit Court of Appeals. The court first noted that when a court examines whether qualified immunity is appropriate, they must decide (1) whether a constitutional right was violated, and (2) if so, whether the right was clearly established such that a reasonable officer in the same situation would have had fair warning that his conduct was unlawful.

The court then set out to determine the first prong of the qualified immunity analysis, particularly, whether Detective Todd violated the Fourth Amendment by use of intentional or reckless false or misleading statements in the warrant application. The Sixth Circuit articulated the legal standard, under *Franks v. Delaware,* [iii] for determining whether Todd violated the Fourth Amendment. The court stated this is a two-pronged test. Regarding the first prong of the test, the court stated

> Under *Franks v. Delaware*, Newell must make a "substantial preliminary showing" that Todd "knowingly and intentionally, or with reckless disregard for the truth" included a false statement in the warrant affidavit. 438 U.S. 154, 155-56 (1978). "Allegations of negligence or innocent mistake are insufficient." Id. at 171. Whether Newell makes this initial showing is a question of law for the court. See *Hale v. Kart,* 396 F.3d 721, 726-27 (6th Cir. 2005) [iv] [emphasis added]

If the plaintiff satisfies the above prong, then the court moves to the second prong of the analysis to determine whether the false statement amounts to a Fourth Amendment violation. Regarding the second prong, the court

> [Removes] the "material that is the subject of the alleged falsity or reckless disregard." *Franks,* 438 U.S. at 171-72. If the remainder of the affidavit is insufficient to establish probable cause, then the warrant violates the Fourth Amendment. *Hill v. McIntyre,* 884 F.2d 271, 275 (6th Cir. 1989). [v] [emphasis added]

Thus, if the court removes the false statement, and probable cause still exists based on the remainder of the warrant affidavit, there is no Fourth Amendment violation. However, if the removal of the false statement negates the probable cause, then there is a Fourth Amendment violation.

The Sixth Circuit then set out to examine the three instances where the plaintiff alleged that Todd provided intentional or reckless false information in the search warrant affidavit. It is noted that Richardson is Todd's supervisor so if Todd did not violate the Fourth Amendment, then neither did the supervisor.

The first alleged false statement(s) occurred in the affidavit where Todd, three times, stated that the fraudulent PACER document "was authored and/or created by Renee Newell." Detective Todd was actually told by Sergeant Liczbinski that the document "properties" that showed the document stamped "Renee Newell" meant only that the document was created on a computer that at one time was registered to Renee Newell. The plaintiff argued that the Todd, in stating factually that the document was authored or created by Renee Newell, made an intentional, false statement.

Regarding this allegation, the court stated

> [W]hat matters for establishing probable cause is not whether a particular piece of evidence proves something. Rather, what matters is whether the evidence establishes "the kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act.'" *Florida v. Harris,* 568 U.S. 237, 244 (2013) (alteration in original) (quoting *Illinois v. Gates,* 462 U.S. 213, 238, 241 (1983)). So it is of no consequence that Liczbinski could not prove who created the attachment. Both Richardson and Todd testified that they believed the presence of the name "Renee Newell" in the author field amounted to strong evidence of the Renee Newell's involvement in the document's creation. Todd further testified that he "made a reasonable inference" that the Renee Newell who authored the attachment and the Renee Newell who had recently been fired from the Wayne County Jail were one and the same.
>
> Todd was not out of bounds. Even if his averments were technically inaccurate, they were a reasonable interpretation of the significance of seeing the name "Renee Newell" in the attachment's properties.

The court also noted that even if they were to remove the statement in the affidavit that read "Sergeant Liczbinski was able to determine by examining the properties of the attached document that the document was authored and created by Renee Newell . . .", probable cause would still exist based on other ample facts in the affidavit. As such, the statements regarding the document being "authored or created" by Renee Newell did not satisfy the first prong of the test under *Franks v. Delaware.*

The second alleged false statement, according to the plaintiff, made by Todd is the statement that read as follows:

> [T]he email was sent at 1:37 a.m. Because of the late hours and the document being created in the middle of the night, it is reasonable to believe that the documents were created at Renee Newell's residence . . .

Todd stated that this incorrect time was typographical error and it should have read 1:37 p.m. It was also noted that the correct time was used elsewhere in the affidavit. The court held that this error was "precisely the sort of negligence or innocent mistake" that does not violate the Fourth Amendment under *Franks v. Delaware.* [vi]

The last allegation of a false statement made by the plaintiff was that Todd stated that the "Tom Truth" email amounted to a "consistent theme" with previous correspondence Newell had with the sheriff's department after her employment was terminated.

Regarding this allegation, the court stated

> As Todd and Richardson see it, Todd was simply interpreting some of the evidence, opining that there were commonalities between Newell's earlier communications and the Tom Truth email. He "sought to link Newell's anger regarding her termination from the WCSD [to] her involvement in the plot to harass . . . the Sheriff." And as they note, "[t]he magistrate was certainly free to reject the evidentiary inference." In response, Newell only manages conclusory allegations that there was no "common theme" with her other correspondence and that Todd's statements to that effect amount to a fabrication of grounds for probable cause. But *Franks* requires more from her, because "the challenger's attack must be more than conclusory." 438 U.S. at 171. We deem this portion of the affidavit well within the protected range of decisions entitled to qualified immunity.

Thus, the court held that the "common theme" language did not amount to a violation under *Franks v. Delaware.*

Since the plaintiff was unable to satisfy the first prong under the test from *Franks v. Delaware* on any of her allegations, the Sixth Circuit reversed the district court's denial of summary judgment for Todd and Richardson.

Citations

i. No. 17-1481, 17-1610 (6th Cir. Decided May 14, 2018 Unpublished)
ii. Id. at 2-3.
iii. 438 U.S. 154 (1978).
iv. Newell at 5.
v. Id. at 6
vi. Id. at 8

LGRMS
RISK CONTROL
ACCG | GMA

Local Government
Risk Managment Services
3500 Parkway Lane . Suite 110
Norcross, Georgia 30092

A Service Organization of the Association County Commissioners of Georgia and the Georgia Municipal Association

This Issue . . .

False Statements in Affadavits for Search Warrants

GEORGIA MUNICIPAL ASSOCIATION

ACCG
Advancing Georgia's Counties.