IN THE COURT OF APPEALS OF IOWA

No. 0-316 / 09-1423
Filed July 14, 2010

MARK DEBOWER,
Plaintiff-Appellant,

vs.

COUNTY OF BREMER, IOWA,
DUANE HILDEBRANDT, In his
Individual and Official Capacities,
And DENNIS MILLER, In his Individual
And Official Capacities,
Defendants-Appellees.

Appeal from the Iowa District Court for Bremer County, John S. Mackey, Judge.

Plaintiff appeals the district court's grant of summary judgment in favor of defendants. **REVERSED AND REMANDED.**

Bruce J. Toenjes of Nelson & Toenjes of Nelson & Toenjes, Shell Rock, for appellant.

John T. McCoy of McCoy, Riley, Shea, & Bevel, P.L.C., Waterloo, for appellees.

Heard by Sackett, C.J., and Eisenhauer and Mansfield, JJ.

EISENHAUER, J.

In 2005, Bremer County deputies seized over forty trees and numerous pots from Mark DeBower's acreage and immediately gave them to complaining witness/victim Earl Burkle. DeBower was acquitted in the subsequent criminal proceedings. DeBower filed an application for return of seized property and, after a successful appeal to this court, regained possession of sixteen living evergreen trees and numerous pots. DeBower filed a civil action against Deputy Dennis Miller, Sheriff Duane Hildebrandt, and Bremer County. DeBower appeals the district court's grant of summary judgment in favor of all defendants and dismissal of his petition. Because we conclude genuine issues of material facts exist, we reverse and remand.

I. Background Facts and Proceedings.

A. Criminal Proceedings.

On June 17, 2005, Earl Burkle told deputy Dennis L. Miller thirty-four evergreen trees, fifteen-seventeen pots, and one maple tree had been stolen from his property approximately three weeks earlier. Burkle stated he had recently seen the trees at the residence of Mark DeBower. Deputy Miller presented a warrant to the magistrate authorizing the seizure of "34 evergreen trees about 2 feet tall and in plastic pots [and] a 12-15 foot [variegated] maple tree that is not in a pot sitting in the yard at [DeBower's] address." Burkle was questioned by the magistrate during the warrant application. The magistrate authorized the warrant.

Late in the evening of June 17, and continuing into the morning of June 18, Bremer County deputies executed the search warrant at DeBower's acreage. Burkle was present and identified thirty-four evergreen trees, a number of plastic pots, and a twelve to fifteen-foot maple tree as being his property. Burkle identified all the potted evergreens as belonging to him. Additionally, some, but not all, planted evergreens were identified by Burkle as belonging to him. In determining the ownership of a planted evergreen tree, Burkle stated it was not his tree if it could not be pulled out of the ground because then "it wasn't planted in the last two weeks." The trees Burkle identified were immediately loaded into Burkle's truck. Deputy Miller photographed all the trees and gave DeBower an inventory sheet of all the trees seized.

As Burkle and the deputies were leaving, they stopped in the driveway. Burkle had noticed additional trees that appeared to be recently-planted in a curving row. Burkle identified eleven of the twelve trees as his trees. Deputy Miller contacted assistant county attorney Bryan Barker to discuss seizing the second set of trees and Barker authorized the seizure. Deputy Miller photographed the additional eleven trees and gave DeBower a second seized-property form. In all, the deputies seized forty-five evergreen trees. Subsequently, DeBower was charged with theft.

Five months after the seizure, in November 2005, Deputy Miller testified concerning the seizure and transfer of possession to Burkle:

> Q. Were you following directions from anyone else regarding the decision to deliver the trees to Mr. Burkle? A. What do you mean?

Q. Did the County Attorney's Office tell you to do this? Did the Sheriff tell you to do this? A. The Sheriff did not tell us to do that.

Q. Who told you to do that? A. I had spoke[n] with [assistant county attorney] Barker and it was just a conclusion that we don't have the space for those trees in our facility, especially with the construction going on. And even if we did have space for them, they would have all died, and no one wanted to see those trees perish. So it was just—no one actually made a conscious decision or ordered me to put them in the back of that truck. It was just a decision that was made, communally; I guess I want to call it, to try to preserve the trees so they wouldn't die.

Q. You just consulted with Mr. Barker? A. And the other deputies that were at the scene.

Q. Was this done following a practice or a policy that your department has with respect to seized property or large seized property? A. The policy we have, that I'm aware of, is we filled out the inventory of seized property and then returned the seized property to the owner. . . . I guess I can't say specifically if we actually have that in writing or language where it's returned back to the victim, but I know it's been a practice to photograph everything and log everything on the seized property forms and stuff, and then things that are perishable like that can be—have been given back to the victim.

. . . .

Q. Have you been by [Burkle's] property to look at how he has the trees there? A. I might have been by there once, but I didn't specifically go there to look to see how the trees were.

. . . .

Court Q. When the trees were given to [Burkle] were any instructions given to him as far as, you know, you should keep these trees in a safe place or we may need to look at these again? A. I suggested to him that he keep them safe so that they weren't stolen again, but not to say that we would come back and look at them again.

Court Q. That was just kind of advice to prevent further theft; not to preserve the evidence? A. That's correct.

Court Q. Okay. . . . [H]as any additional step been taken to make sure that the trees are still okay? A. Not that I am aware of.

The court also questioned Sheriff Hildebrandt:

Court Q. And Sheriff, did you give [Burkle] any instructions as far as how to try to keep the trees separate? Any kind of evidence preservation instructions? A. I did not. I did not see him until the November 2nd date . . . .

> Court Q. On that date, though, did you give him—A. No, I did not.

A jury acquitted DeBower of theft of the trees and pots. Additionally, the court dismissed the State's subsequent juvenile delinquency petition prosecuting DeBower's son for theft.

B. Chapter 809 Disposition of Seized Property Proceedings.

On May 26, 2006, DeBower filed an application for the return of the seized trees and pots under Iowa Code section 809.3 (2005). At the time of DeBower's application, the trees were still in Burkle's possession. Burkle did not file an application for the property. In July 2006, the county attorney's office wrote to Burkle to inform him of the upcoming hearing for the disposition of the property and stated: "Obviously Bremer County believed that the property belonged to you as it was *returned to you* immediately upon execution of the search warrant." (Emphasis added.)

We reversed the district court's denial of DeBower's application for return of property. *In re 1972 Euclid Avenue, Mark DeBower*, No. 08-106 (Iowa Ct. App. May 14, 2008). We stated chapter 809 allowed Burkle the opportunity to respond with his own claim for possession of the trees and pots, but he had not. *Id*. Noting the State is a "mere stakeholder," we ruled "nothing in [chapter 809] gives the State the right . . . to advocate on the behalf of a claimant who has not made application for possession of seized property." *Id*. Accordingly, the State lacked standing and "the court erred in allowing the State to advocate on behalf of Burkle's right to possession." *Id*. We remanded for an accounting and further proceedings.

On July 8, 2008, Burkle filed an application for return of seized property. A hearing on the timeliness of Burkle's application and the status of the property was held in August, 2008. County attorney Wadding agreed that the State "isn't claiming to have in its possession *or under its control* any of those trees or pots at the present time." (Emphasis added.) Burkle testified to a discussion with assistant county attorney Bryan Barker after the criminal case was over about what Burkle should do with the property: "[Barker] told me that it was mine and I should do what I want with it."

In November 2008, the district court ruled Burkle had not waived his right to proceed under chapter 809 and stated it would hear evidence simultaneously on both Burkle's application and DeBower's remanded application. In February 2009, the court noted Burkle's dismissal of his application and granted DeBower's application for return of seized property. However, the court determined the State's accounting of the seized property was inadequate and ordered the State to supplement its accounting by March 6, 2009.

On April 3, 2009, the district court accepted the State's new accounting, stating:

> Of the 45 evergreen seedlings initially taken from [DeBower], only 16 are living today. . . . [N]one of the 48 pots that were taken . . . have been destroyed or lost. The State delivered possession of all of the seized property to Earl Burkle immediately after the execution of the search warrant, and Mr. Burkle remains in possession of the 16 living evergreen trees and 48 pots. [The maple tree was reported stolen by Burkle and the current location and condition is unknown.] While [DeBower] is entitled to the return of all the property seized from him on June 17, 2005, the remedy afforded by Iowa Code Chapter 809 is limited. *The Court has no authority under Chapter 809* to enter judgment against the

> State for the value of the property that no longer exists or *to order Mr. Burkle to turn over any property*.

(Emphasis added.) The district court ordered the State to "use its best efforts to obtain" the property from Burkle and return it to DeBower. On April 29, 2009, the court approved the State's notice and receipt reflecting sixteen living evergreen trees, twenty-nine dead evergreen trees, and fifty-one pots were returned to DeBower.

C. DeBower's § 1983 and State Law Claims.

The case currently on appeal commenced in June 2007, when DeBower filed a petition against Sheriff Hildebrandt, Deputy Miller, and Bremer County.[1]

DeBower sought relief from *all* defendants: (1) under 42 U.S.C.§ 1983 for taking his property without compensation (1983 Takings Claim); and (2) under § 1983 for a violation of his due process rights, both procedural ("a pre-delivery hearing on his property rights") and substantive (not "being subjected to the arbitrary action of a non-judicial determination of his property rights by law enforcement") and for conducting an unreasonable search and seizure in violation of his Fourth and Fourteenth amendment rights. DeBower, as a § 1983 plaintiff, had to establish:

> (1) that the defendants deprived the plaintiff of a right secured by the Constitution and laws of the United States, (2) that the defendant acted under color of state law, (3) that the conduct was a proximate cause of the plaintiff's damage, and (4) the amount of damages.

Dickerson v. Mertz, 547 N.W.2d 208, 214 (Iowa 1996).

---

[1] DeBower's claims against Earl Burkle and Burkle's counterclaims against DeBower have been dismissed.

Additionally, DeBower sought relief from Bremer County for: (1) a state constitutional claim for taking his private property without just compensation; (2) a state law conversion claim; and (3) a state law indemnity claim.[2]

In November 2008, the defendants moved for summary judgment on all claims and, in March 2009, the court granted partial summary judgment. After determining the method for procuring the search warrant was proper, the court examined the execution of the warrant.

> When executing a warrant officers are scrutinized for unreasonable behavior "from the moment of entry until the moment of departure." [*Bailey v. Lancaster*, 470 N.W.2d 351, 358 (Iowa 1991)]. In this case the police actually seized more than what was on the warrant: the warrant allowed for police to seize a total of 35 trees, but in actuality they seized an additional 11 trees that were not on the warrant. However, the police have the right to seize objects other than those in the warrant when the police have the right to be at the place where the object is found and when the immediate illegality of the thing seized is known; this is the plain view exception. *State v. Chrisman*, 514 N.W.2d 57 (Iowa 1994). In this case, the police had a search warrant and had a right to be at DeBower's property, because the warrant was valid. Furthermore, Burkle identified the trees immediately as illegally being in DeBower's possession, as he recognized them as the type and number stolen from him before this incident. Because Burkle and the police had a right to be at DeBower's home and Burkle immediately recognized the trees in plain sight as his own, the other trees seized would also be a valid seizure because they fall into [the] plain sight exception. Because the warrant was valid and all the items seized were on the warrant or fell into the plain sight requirement, the search and seizure was proper up to that point.
>
> As mentioned above the actual seizure of the trees was valid; however, the final act that the state made in executing this warrant was taking the trees from [DeBower] and placing them in Burkle's custody. The court in *Bailey* held that the destruction of property in the execution of a search warrant can rise to the level of a 1983 violation. One could argue that dispossession of property for a number of years could also rise to a 1983 violation, because in both cases, the value of the property seized has been rendered

---

[2] DeBower does not appeal the court's dismissal of his state law indemnity claim.

> worthless to the claimant because the destroyed property is gone, and the dispossessed property [cannot be] enjoyed or transferred and therefore of no value to claimant.

Accordingly, the court ruled summary judgment should not be granted for the following claims:

> 1. 1983 claim, because seizing the trees from DeBower and placing them with Burkle may have violated 4th and the 14th Amendments.
> 2. Immunity for the officers who participated in the execution of the warrant, because a jury could decide that transferring possession to Burkle may have been unreasonable and therefore not protected by immunity.
> 3. Conversion [because] there exists material issues as to the good faith of the officers.

The parties did not agree on the interpretation of the partial summary judgment order and DeBower requested reconsideration and clarification. Additionally, the defendants filed a second motion for summary judgment. In September 2009, after hearing, the court granted summary judgment on all claims and dismissed DeBower's petition.[3] DeBower appeals.

II. Scope of Review.

To the extent the appeal involves statutory interpretation, we review for the correction of errors at law. Iowa R. App. P. 6.907 (2009). We review constitutional claims de novo. *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 258 (Iowa 2007). "Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*. We "view the entire record in a light most favorable to the nonmoving party." *Mason v. Vision Iowa Bd*., 700 N.W.2d 349, 353 (Iowa 2005).

---

[3] We find no merit to DeBower's claims the court erred in considering the second motion for summary judgment and in failing to grant his request for sanctions.

III. Qualified Immunity for Individual Defendants.

DeBower argues the district court erred in concluding Sheriff Hildebrandt and Deputy Miller are entitled to summary judgment based on qualified immunity.[4]

The court ruled:

> The facts reflect that the officers not only gave the trees to Mr. Burkle because they thought they were his, but also he was a convenient and expedient choice for preservation of the evidence after the trees were logged and photographed for evidence.
> . . ..
> Iowa's statutory scheme regarding the return of seized property envisions that an owner may make application for its immediate return at any time after the property is seized subject to the restrictions contained under Chapter 809. It is further clear from a reading of Section 808.9 that these seized trees were always subject to the jurisdiction of the court to make a determination of possession, and of ownership claims pursuant to Chapter 809. The court has not come across any case which would indicate that the officers violated any clearly established constitutional right of [DeBower] by transferring the trees to the complaining victim, Mr. Burkle, for safekeeping. By placing the trees with the complaining witness for safekeeping, the officers were not determining which of the individuals, DeBower or Burkle, were entitled to possession; under the law that determination awaited the court as the property was being held in custodia legis,[5] and such decision could not be usurped by the officers in simply transferring temporary possession pending the criminal trial and any eventual application for return of seized property. Accordingly, the court concludes that the individual defendants, Sheriff Hildebrandt and Deputy Miller, are entitled to qualified immunity from [DeBower's section] 1983 takings and procedural and

---

[4] We find no abuse of discretion by the court in rejecting DeBower's claim the qualified immunity defense was waived due to improper pleading.

[5] In custodia legis is defined as: "In the custody of the law the debtor's automobile was *in custodia legis* after being seized by the sheriff. The phrase is traditionally used in reference to the property taken into the court's charge during pending litigation over it." Black's Law Dictionary 783 (8th ed. 2004).

> substantive due process claims and, therefore, summary judgment should be rendered in their favor thereon.

Police officers may have qualified immunity from liability in suits brought under 42 U.S.C. § 1983. *Pearson v. Callahan*, __ U.S. __, __, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565, 573 (2009); *see also Hlubek v. Pelecky*, 701 N.W.2d 93, 96 (Iowa 2005). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, __ U.S. at __, 129 S. Ct. at 815, 172 L. Ed. 2d at 573; *see also Leydens v. City of Des Moines*, 484 N.W.2d 594, 596 (Iowa 1992) (recognizing the balancing of conflicting concerns and noting actions for damages may be the only realistic avenue for redress when government officials abuse their offices).

Qualified immunity protects officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982). "Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law . . . permit[s] the resolution of many insubstantial claims on summary judgment." *Id*. "[Iowa] adopted the Supreme Court's test of 'objective reasonableness' as the proper inquiry, 'rather than good faith . . . .'" *Hlubek*, 701 N.W.2d at 96. Therefore, "qualified immunity protects [officers] from liability where they

reasonably misjudge the legal standard." *Catlin v. City of Wheaton*, 574 F.3d 361, 368-69 (7th Cir. 2009).

In resolving officials' qualified immunity claims, courts utilize a two-prong analysis: (1) "whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right"; and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson*, __ U.S. __, __, 129 S. Ct. at 816, 172 L. Ed. 2d at 573. Judges have "discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id*. at __, 129 S. Ct. at 818, 172 L. Ed. 2d at 576. Therefore, *Pearson* allows courts to consider whether an official could reasonably have believed his conduct was lawful without first analyzing whether the facts alleged make out a constitutional violation.

Here, the relevant issue is the objective question of whether a reasonable officer could have believed the officer's (a) seizing the additional eleven trees; and/or (b) immediate transfer of all seized property to the complaining witness to be lawful, "in light of clearly established law and the information the [seizing] officer possessed. [The officer's] subjective beliefs are irrelevant." *See Leydens*, 484 N.W.2d at 597.

A. Plain View Exception.

The district court's first ruling on summary judgment concluded Deputy Miller was entitled to invoke the "plain view" exception to the warrant requirement in seizing the additional eleven trees. DeBower argues "invoking the plain view

exception based on a conclusion of illegality made solely by an unsworn civilian assistant with a personal interest in the outcome of the case" is a violation of the Fourth Amendment.

"Seizures of property are subject to Fourth Amendment scrutiny . . . ." *Soldal v. Cook County*, 506 U.S. 56, 68, 113 S. Ct. 538, 547, 121 L. Ed. 2d 450, 463 (1992). "The plain view doctrine is an exception" to the general rule that a seizure of personal property must be authorized by a warrant. *State v. Chrisman*, 514 N.W.2d 57, 60 (Iowa 1994). "The State must prove by a preponderance of the evidence that such a recognized exception applies." *State v. Nitcher*, 720 N.W.2d 547, 554 (Iowa 2006).

> An example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character.

Horton v. California, 496 U.S. 128, 135, 110 S. Ct. 2301, 2307, 110 L. Ed. 2d 112, 121-22 (1990). An object in plain view may be seized if (1) the police intrusion was lawful; and (2) the item's "incriminating character" is "immediately apparent." *Id.* at 136, 110 S. Ct. at 2308, 110 L. Ed. 2d at 123.

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused . . . . [T]he extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

Id. at 135-36, 110 S. Ct. at 2307, 110 L. Ed. 2d at 122.

We conclude Deputy Miller's conduct in seizing the additional eleven trees based on Burkle's new allegations of ownership after he spotted newly-planted trees as he was leaving the property and based on whether the trees could be pulled out of the ground during a night-time search engenders a fact issue on whether "the incriminating feature of the object was immediately apparent." Burkle's handwritten statement clearly asserts "34 trees" were stolen "about 3 weeks ago" and thirty-four trees had already been seized under the warrant. Three weeks is sufficient time to accurately identify the number of trees stolen. Further, defendants provide no authority to support a seizure of property not listed in the warrant based upon unsworn claims made by a civilian participating in the search. Because a fact issue remains, summary judgment was improper. *See Price-Cornelison v. Brooks*, 524 F.3d 1103, 1117-18 (10th Cir. 2008) (stating "whether a police officer has actually aided a private party's seizure of property 'is particularly fact-sensitive'" and the right to avoid state participation in private party's wrongful seizure of property was clearly established in 2003). Since the *Bailey* decision in 1991, Iowa officers knew "that the officers' conduct in executing a search warrant is subject to review and an officer may face section 1983 liability for executing a warrant in an unreasonable manner." *Bailey v. Lancaster*, 470 N.W.2d 351, 358 (Iowa 1991). A factual issue exists concerning the reasonableness of the officers' actions based on existing law.

B. Immediate Transfer of Seized Property.

When the Bremer County officers seized the property, chapter 808 Search and Seizure, instructed: "Property seized and its containers, if any, shall be

safely kept *by the officer* . . . ." Iowa Code § 808.8 (emphasis added). Additionally,

> 808.9 Safekeeping of seized property.
>
> Property of an evidentiary nature seized in the execution of a search warrant shall be safely kept, subject to the orders of any court having jurisdiction . . . so long as reasonably necessary to enable its production at trials. *The disposition of such property shall be in accordance with chapter 809.*

Id. § 808.9 (emphasis added). Because these procedures were enacted nearly thirty years ago, the law on disposition of seized property is clearly established. *See* 1976 Iowa Acts ch. 1245, § 808, effective January 1, 1978. Therefore, the property "shall be safely kept *by the officer*" subject to court order and disposed of pursuant to chapter 809. (Emphasis added.)

In 2005, chapter 809, Disposition of Seized Property, stated:

> 1. Seized property which is no longer required as evidence or for use in an investigation may be returned to the owner without . . . a hearing, provided that the person's possession of the property is not prohibited by law and there is no forfeiture claim filed on behalf of the state. The seizing agency or prosecuting attorney *shall send notice* . . . to the last known address of *any person having an ownership or possessory right in the property* stating that the property is released and must be claimed within thirty days. . . . *In the event that there is more than one party who may assert a right to possession or ownership of the property, the seizing agency shall not release the property to any party until the expiration of the date for filing claims unless all other claimants execute a written waiver.* In the event that there is more than one claim filed . . . the seizing agency or prosecuting attorney shall file a copy of all such claims with the clerk of court and the clerk shall proceed as if such claims were filed . . . under section 809.3 [court order after judicial hearing or judgment on the pleadings]. . . .
>
> 2. Upon the filing of a claim and *following hearing by the court*, property which has been seized shall be returned to the person who demonstrates a right to possession, unless . . . [possession is prohibited by law, there is an unresolved forfeiture action, or the state demonstrates the evidence is still needed].

> 3. The court shall . . . make orders appropriate to the final disposition of the property . . . .

Iowa Code § 809.5 (emphasis added).

A reasonable officer would recognize seized property may only be *released* to a complaining witness/victim thirty days after the mandatory notice is given to any other party who may claim possession. *See id*. Where there are conflicting claims to possession, release by the officers is allowed only after a court hearing resolves the conflicting claims. *Id*. The statute specifically prohibits the immediate release of seized property to the complaining witness/victim unless the possessor waives his rights. *Id*.; *see Bailey*, 470 N.W.2d at 358 ("From the moment of entry until the moment of departure, [the officers] conduct was subject to scrutiny for reasonableness under the fourth amendment.")

The district court found the officers "transfer[ed] the trees to the complaining victim, Mr.Burkle, for safekeeping" and "the officers not only gave the trees to Mr. Burkle because they thought they were his, but also he was a convenient and expedient choice for preservation of the evidence after the trees were logged and photographed for evidence." However, on the evening of the transfer to Burkle and thereafter, the deputy gave no instructions to Burkle on his obligation to preserve the trees as evidence and no instructions to segregate the trees to continue a chain of custody. The deputy did not instruct Burkle he was safeguarding the trees for the county, rather he told Burkle to safeguard the trees against further theft. Further, Burkle testified the county attorney told him the seized property "was mine and I should do what I want with it."

Additionally, we note the inconsistency of granting summary judgment on a safekeeping basis here when the opposite conclusion was reached in the chapter 809 proceeding. The county attorney told the chapter 809 court the State did *not* have the trees or pots *under its control*. The chapter 809 court ruled it lacked authority "to order Mr. Burkle to turn over any property." Accordingly, in the chapter 809 case, the State admitted and the court concluded the State had *released* the property to Burkle without the State keeping control.[6] The county's "lack of control" admission and the court's "limited authority" conclusion in the chapter 809 proceedings directly contravene the district court's conclusion in this proceeding that no constitutional violation occurred because the trees were transferred "for safekeeping." Since the *Bailey* decision in 1991, Iowa officers knew the destruction of property seized in the execution of a warrant can be the basis for a § 1983 violation. *See Bailey*, 470 N.W.2d at 362.

DeBower argues persuasively that for a government official to transfer property from one private party to another without an opportunity for a hearing is similar to a form of replevin without the protections normally associated with that remedy. *See Dixon v. Lowery*, 302 F.3d 857, 865 (8yj Cir. 2002) (stating that "law enforcement officers in general are well aware of the need for a neutral determination of property rights," and finding that officers who intervened in a

---

[6] The fact the officers photographed the trees in 2005 does not lead to a different conclusion. The amendment to Iowa Code section 809.5(1) authorizing return of seized property to an owner if "the photograph will be used as evidence" became effective on May 10, 2008, and is inapplicable to property seized in 2005. 2008 Iowa Acts Ch. 1153, § 1. Even as amended, however, the statute does not allow the release of seized property without notice and the opportunity to file a claim for "any person having an ownership or possessory right." Iowa Code § 809.5(1)(a), (b) (2009).

dispute over ownership of a restaurant and effectively locked the claimed owner out of the restaurant were not entitled to summary judgment based on qualified immunity).

Whether the officers transferred temporary possession of the trees to Burkle for safekeeping or improperly released the property is a disputed factual issue. Where, as here, facts material to the qualified immunity analysis remain in dispute, a jury question is generated and summary judgment is inappropriate. *See Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1311-1312 (10th Cir. 2002) (stating when the record shows an unresolved dispute of historical fact relevant to the qualified immunity analysis, summary judgment should be denied); *Thomas v. Roach*, 165 F.3d 137, 143 (2nd Cir. 1999) ("Summary judgment on qualified immunity is not appropriate when there are facts in dispute that are material to a determination of [the officer's] reasonableness."). DeBower has shown factual issues concerning the reasonableness of the officers' actions based on existing statutory and constitutional law.

IV. Summary Judgment for Bremer County.

DeBower argues the district court erred in concluding Bremer County is entitled to summary judgment on § 1983, state law takings, and conversion claims.

A. Section 1983 Claims.

Bremer County is only liable under § 1983 "where the [county] *itself* causes the constitutional violation at issue. *Respondeat superior* or vicarious liability will not attach under [§] 1983." *City of Canton v. Harris*, 489 U.S. 378,

385, 109 S. Ct. 1197, 1203, 103 L. Ed. 2d 412, 424 (1989). Accordingly, Bremer County is liable under § 1983 "only where its policies are the 'moving force [behind] the constitutional violation.' . . . [L]iability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives." *Id*. at 389, 109 S. Ct. at 1205, 103 L. Ed. 2d at 427.

In dismissing the claims against Bremer County under § 1983, the court stated:

> Once the trees were seized pursuant to a validly obtained search warrant on probable cause, the court again finds no constitutional right violated by defendant Bremer County as a municipality which would subject it to 1983 liability. The trees were subject to possession by no one until further order of the court as they were being held in custodia legis. Indeed, [DeBower] could have filed an application for return of the property at any time immediately following their seizure, especially as the officers intended to use photographs as evidence in the eventual criminal trial. Any claim by [DeBower] for spoliation or destruction of evidence was rendered moot by the fact he was eventually acquitted of the criminal charge. Accordingly, the court concludes there were no violations by Bremer County of [DeBower's] constitutional rights to procedural and substantive due process, and no deprivation of constitutional magnitude of [DeBower's] alleged property.

We conclude the court erred because of fact issues concerning the warrantless seizure of the eleven trees in excess of the warrant and the immediate and intentional transfer to Burkle. Further, the criminal acquittal has no bearing on whether Bremer County has a policy depriving DeBower of his constitutional rights.[7] The county policy was described by Deputy Miller:

---

[7] Both sides, perhaps, try to read too much into DeBower's acquittal. Even though DeBower was acquitted, he could still have suffered an invasion of his property rights. However, the acquittal does not establish the trees were automatically his. Because of

> Q. Was this done following a practice or a policy that your department has with respect to seized property or large seized property? A. The policy we have, that I'm aware of, is we filled out the inventory of seized property and then returned the seized property to the owner. . . . I guess I can't say specifically if we actually have that in writing or language where it's returned back to the victim, but I know it's been a practice to photograph everything and log everything on the seized property forms and stuff, and then things that are perishable like that can be—have been given back to the victim.

The record shows the immediate delivery of seized, perishable property to the alleged victim without notice and hearing to another who claims possession was the policy and practice of Bremer County. Accordingly, summary judgment on DeBower's § 1983 claims against Bremer County was inappropriate.

B. State Law Claims.

DeBower's state law takings claim against Bremer County was also dismissed:

> A governmental subdivision, like a county, is immune from liability of its employee when the employee, acting within the scope of his employment, is negligent by failing to exercise due care. In order to survive this motion for summary judgment, DeBower must show that the state actors' alleged bad acts were intentional and not merely negligent, as the county is not liable for negligence alone. In examining this it appears as though the officers did not owe a duty to DeBower, but did have a duty to ensure the care of the trees as evidence, which they did when they placed the trees in Burkle's care. . . . (First Ruling on Summary Judgment).
>
> [T]he claimed deprivation of trees from a purported owner pursuant to the execution of a valid search warrant pending determination of ownership while in custodia legis does not seem, at least to this court, to be so permanent as to rise to the level of a constitutional violation. (Second Ruling on Summary Judgment).

---

the different standards of proof in criminal and civil proceedings, the acquittal has no preclusive effect in the present case.

In dismissing DeBower's conversion claim against Bremer County, the court stated:

> [T]he court concludes that the valid seizure of [DeBower's] property pursuant to the search warrant, as well as transfer to Mr. Burkle for safekeeping under the discretion afforded under Section 808.9 while the property remained in custodia legis, cannot, as a matter of law, constitute wrongful dominion or control over [DeBower's] alleged property.

The court granted summary judgment on both state-law claims based on its determination the seizure was valid under the search warrant and Burkle was merely safekeeping the property and the property was being held in custodia legis. As discussed above, a factual issue exists concerning whether "the incriminating feature of the object was immediately apparent" to justify a warrantless search under the plain view exception. Additionally, the issue of whether the officers transferred temporary possession of the trees to Burkle for safekeeping and the property remained in custodia legis or the officers intentionally released the property to complaining witness/victim Burkle without keeping control is a disputed factual issue preventing summary judgment.

Further, the conversion claim presents an additional factual issue. In resolving the *first* motion for summary judgment, the court ruled there was a factual dispute concerning the "good faith" factor of the interference element of conversion. We agree with and adopt the court's reasoning on this additional factual issue:

> When looking at these factors, it is apparent that DeBower has not had possession of these trees for a significant time. Additionally, the cost lost by having the trees taken and the cost associated with recovering the trees has been great. However, the real sticking point is whether or not the police acted in good faith. Based on the

facts presented, a reasonable jury could decide that either way. Because a jury could decide the issue of good faith either way, and the fact that the element of good faith is material, summary judgment is inappropriate, because there is a material factual dispute.

Costs are taxed to the appellees.

REVERSED AND REMANDED.