IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GEORGE COOPER and SARA LYN COOPER,

Plaintiffs,

v.

PLOVER POLICE DEPARTMENT, DWAYNE WIERZBA, GARY WIDDER, SETH PIONKE, PORTAGE COUNTY, PORTAGE COUNTY CIRCUIT COURT, THOMAS FLUGAUR, VILLAGE OF PLOVER, HUMANE SOCIETY OF PORTAGE COUNTY, INC., JENNIFER BLUM, EMILY CARLSON, LAURA GOETZ, KATHY FRISCH, VISITING ANGELS, KELLY TUTLE, LIVING ASSISTANCE SERVICES, INC., STATE OF WISCONSIN, and WISCONSIN ATTORNEY GENERAL,

Defendants.

OPINION AND ORDER

12-cv-555-wmc

In this proposed civil action, plaintiffs George and Sara Lyn Cooper seek damages under 42 U.S.C. § 1983 and state tort law for an allegedly unlawful search of their apartment, unlawful seizure of their service dog, and threats made to them during subsequent confrontations with city and county officials. Plaintiffs have been granted leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915, which requires the court to determine whether their proposed action (1) is frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). For the reasons set forth below, plaintiffs will be permitted to proceed with their Fourth Amendment, trespass and conversion claims against defendants Carlson and Pionke, as well as their

claims against defendant Carlson under Wis. Stat. §§ 173.075(5)(e) and (f). All other claims will be dismissed.

ALLEGATIONS OF FACT

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). In their complaint, plaintiffs allege, and the court assumes for purposes of this screening order, the following facts.

A. Parties

Plaintiffs George and Sara Lyn Cooper reside in Wausau, Wisconsin, but during the events relevant to their complaint resided at 3357 Mission Lane, in Plover, Wisconsin. George had a bilateral, high-above-knee amputation in 1990. Sara has had spastic quadriplegic Cerebral Palsy since her birth in 1985 and suffers from seizure disorder, Post Traumatic Stress Disorder, Bipolar II disorder and bouts of extreme depression.

Defendant Plover Police Department ("PPD") is the law enforcement agency for the Village of Plover. Defendant Dwayne Wierzba is the Village's chief of police. Defendant Gary Widder is a lieutenant, and defendant Seth Pionke is an officer in the Plover Police.

Defendant Thomas Flugaur is a state circuit court judge presiding at the Portage County Circuit Court. Defendant Humane Society of Portage County, Inc. is the County's primary animal control agency. Defendant Jennifer Blum is the director and

defendant Emily Carlson is an animal control officer with the Humane Society.

Defendant Laura Goetz is a social worker and defendant Kathy Frisch is a registered nurse for Community Care of Central Wisconsin.

B. Search and Seizure on May 15, 2007

In December 2006, George Cooper purchased a Golden Retriever named Prince to train as a service dog, primarily for Sara's use. George has experience with training and certifying service animals, and has received instruction from well-regarded service dog trainers. He trained Prince to perform basic household tasks, render emotional comfort and support to Sara, detect and warn of oncoming seizures, and help bring Sara out of a seizure by licking and brushing against her. Prince also occasionally assists George, who is wheelchair-bound, with household tasks.

The Coopers receive assistance from Community Care of Central Wisconsin ("CCCW"). During the relevant time period, Laura Goetz was their assigned social worker and Kathy Frisch their assigned nurse. At some point, Laura Goetz notified the Humane Society of Portage County that the Coopers "had a puppy" and wanted the Humane Society to "go and take possession of it."

On May 15, 2007,[1] Animal Control Officer Carlson went to the Coopers' apartment to investigate. No one responded to her knock, so she opened the door, walked into the apartment, untied Prince and took him into custody. Officer Carlson did

[1] The complaint lists the date as "May 15, 2006," but given the other dates, this appears to be an error.

not have permission to enter the apartment, nor did she have a warrant to search the apartment.

The Coopers returned home to find Prince gone and a note left by Officer Carlson. They promptly called the Humane Society offices, which were closed for the night. They then called the Plover Police Department to report an unlawful entry by the Humane Society, but the police refused to investigate the incident.

The next day, May 16, George Cooper called the Humane Society and was told that Officer Carlson had taken Prince out of concern for his well-being after finding a few days' buildup of feces outside the back door of the apartment and no water for Prince to drink. George insisted that there was water, but it was hidden from view by the open door. The Humane Society also criticized the Coopers for keeping Prince on a four-foot leash while home alone in the apartment. George tried to explain why Prince was confined in this way but was not given a chance.

That same day, the Humane Society returned Prince and waived all associated fees, but only on the condition that the Coopers sign a statement allowing officers to inspect their apartment at will. George signed the statement because he didn't want to lose Prince and was intimidated by the Humane Society and police officers who were present.

C. Search and Seizure on August 5, 2009

On August 5, 2009, with the Coopers' permission, social worker Laura Goetz convened a meeting at the Coopers' apartment with nurse Kathy Frisch, some "Visiting

Angels,"[2] and the town fire marshal. The Coopers allege that all of these actors were in attendance to further a conspiracy to take Prince away.

Without the Coopers' permission, Goetz also invited police officer Seth Pionke to the meeting. Officer Pionke entered the apartment during the meeting without the Coopers' permission and without a warrant. When George asked Pionke to leave, he refused. Instead, he began asking the Coopers about Prince, and invited Animal Control Officer Carlson into the apartment as well. Carlson, too, refused to leave at George's request.

Officer Pionke then informed the Coopers that he and Officer Carlson would not leave without Prince. When George protested, Pionke threatened to arrest and criminally charge him if he resisted. Sara clung to Prince, but Pionke and Carlson pried her arms apart and removed Prince from the apartment. Before leaving, Carlson also issued the Coopers a citation for improper care of Prince.

At the time of the incident, Prince was not in any danger of imminent death or injury. Officer Pionke justified the removal of Prince on grounds that he was depressed and underweight, and that he was never walked, but the Coopers allege all of these assertions were plainly untrue. George and Sara Cooper have always shown a great deal of care for Prince. As Sara's service dog, Prince is also important to her physical and psychological health.

Officer Carlson also told the Coopers that Prince is not a service dog, and challenged them to prove that he is one. The Coopers were unable to show Prince's

[2] Although this group is not described in the complaint, the court notes that it is a charitable organization that provides assisted living services.

special abilities because Sara was not experiencing a seizure at that time and there were no prowlers for him to chase away. Carlson said that the fact that the Coopers had not neutered Prince showed that they could not afford to treat him properly. However, the Coopers had intentionally declined to neuter Prince because they were considering breeding him.

D. Call to the Police

After Prince was seized, George Cooper called the Plover Police Department to register a complaint against Seth Pionke. He spoke on the phone with Lieutenant Gary Widder. Widder informed George that if he wished to make a formal complaint he would have to come in and file it in writing, and that filing a false statement would have negative consequences. George felt intimidated and harassed.

E. Subsequent Legal Action

On January 20, 2010, after a two-day hearing on the citations issued by Officer Carlson, George Cooper was found guilty of "improper shelter" and "improper sanitation," but not guilty of "improper treatment" and "improper food and water" for Prince.

On February 17, 2010, at a hearing regarding custody of Prince, Judge Thomas Flugaur stated that the only animal he considers a service animal is one that would aid a "blind man into my courtroom and out of the building." Thomas further stated that a service dog can only be trained by a Christian training facility. Thomas concluded by

imposing sanctions for violating a county ordinance.

OPINION

I. Dismissal of Immune and Unmentioned Defendants

At the outset, the court can immediately dismiss plaintiffs' damages claims against all defendants except Seth Pionke, Emily Carlson, Laura Goetz, Cathy Frisch and the Visiting Angels.

Plaintiffs' claims against the State of Wisconsin and the Wisconsin Attorney General are barred by the Eleventh Amendment, which prohibits damages claims against a state in federal court. U.S. Const. amend. XI. Similarly, Judge Flugaur is protected from suit by the doctrine of judicial immunity. *Dawson v. Newman*, 419 F.3d 656, 660-61 (7th Cir. 2005) (judges are immune for actions taken in their judicial capacity). Finally, the following captioned defendants either are not mentioned at all in the body of the complaint or are mentioned only in a context that does not give rise to any explicit or inferable legal claim: Dwayne Wierzba, Gary Widder, Portage County, Portage County Circuit Court, Village of Plover, Humane Society of Portage County, Inc., Jennifer Blum, Kelly Tutle, and Living Assistance Services, Inc.

II. Federal Law Claims

A. Section 1983 Claims

Plaintiffs assert that their Fourth and Fourteenth Amendment rights have been violated and they seek monetary damages, prompting this court to interpret their complaint as an action under 42 U.S.C. § 1983. Section 1983 provides redress against any "person who under color of any [state law] . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . ." 42 U.S.C. § 1983. Defendant Emily Carlson is an employee of the Portage County Humane Society. The court will assume for purposes of screening that she is a person acting under color of state law, and thus a proper defendant in a § 1983 suit. *See* HSPC Website, http://www.hspcwi.org/index.php/our-mission ("Portage County contracts with the Humane Society to provide animal control services."); *Brunette v. Humane Soc'y of Ventura Cnty.*, 294 F.3d 1205, 1208 (9th Cir. 2002) (noting that the local humane society "engages in a quasi-public function" and thus the "society and its officers are state actors for the purposes of § 1983".).

i. Fourth Amendment Claims

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Plaintiffs assert that their apartment was twice searched without warrant: first on May 15, 2007, when Officer Carlson entered their home without permission and removed Prince, and again on August 5, 2009, when Officers Carlson and Pionke entered their apartment without permission and refused to leave when requested.

"[S]earches . . . inside a home without a warrant are presumptively unreasonable," *Payton v. New York*, 445 U.S. 573, 586 (1980), and thus constitute a violation of the Fourth Amendment unless a valid exception applies. Therefore, it would appear that in the two warrantless searches described above, plaintiffs have alleged two actionable Fourth Amendment violations. There is one possible complication, because the allegations suggest that George Cooper may have consented to the August 5, 2009, search by previously signing a waiver allowing random inspections of his home. Without the text of the waiver, however, it is impossible to say. Moreover, Cooper alleges that any such consent was coerced. Thus, at this early screening stage, the court will assume neither search was consensual. Accordingly, plaintiffs have articulated viable Fourth Amendment claims for illegal searches, as well as for the two associated seizures of Prince, against defendants Carlson and Pionke. *See Soldal v. Cook Cnty, Illinois*, 506 U.S. 56, 61 (1992) (A seizure of property occurs "when there is some meaningful interference with an individual's possessor interests in that property.").

ii. Fourteenth Amendment Due Process Claim

Plaintiffs allege that the seizure of Prince also amounts to a deprivation of property without due process of law, and thus a violation of their Fourteenth Amendment rights. Prince surely qualifies as property, but the complaint fails to allege facts showing lack of adequate process surrounding his removal.

At the outset, it is impossible to tell from the allegations whether Officers Carlson and Pionke were acting according to the letter of an approved county or police policy when they seized Prince. If the officers were *not* and had in fact gone "rogue," then there

was no due process violation, because plaintiffs would have recourse against the officers in state common law remedies for tort damages and for replevin under Wisconsin Statutes Chapter 810. *See Parratt v. Taylor*, 451 U.S. 527, 542 (1981) ("(T)he existence of an adequate state remedy to redress property damage inflicted by state officials avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.").

On the other hand, if officers Carlson and Pionke seized Prince pursuant to approved policy, then this court must consider whether the policy itself provides for adequate process. This inquiry requires balancing "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Under this analysis, even if the officers acted according to official policy, the Coopers still have no due process claim, because as a matter of law, the process given (immediate seizure followed by a post-deprivation court hearing) is constitutionally adequate. The mere temporary seizure of an animal, without any act to euthanize it, neuter it or otherwise permanently deprive the owner of a valuable interest in it, is generally considered a minor hardship on the owner and is further mitigated here by the fact that, as plaintiffs themselves allege, a full hearing was later conducted on their fitness as pet owners. Moreover, a denial of pre-seizure due process is outweighed by competing

interests on the other side of the scale: when an animal is being seized for its own health and safety, both the state and the animal have a strong interest in effecting the seizure without the delay that a hearing would require. See *Daskalea v. Wash. Humane Society*, 480 F. Supp. 2d 16, 35 (D.D.C. 2007) ("The Court does not doubt that animal cruelty or neglect will often justify immediate seizure."). Accordingly, plaintiffs' have not pled facts showing inadequate process, and thus have no legally cognizable due process claim.

B. Equal Rights Claim -- 42 U.S.C. § 1981

Plaintiffs also assert that in the course of searching their apartment and seizing their property, various defendants violated their rights under 42 U.S.C. § 1981. Section 1981(a) provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981 (emphasis added). As the emphasized phrase above indicates, a claim under § 1981 is restricted by its language to discrimination based on race or color. *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 387-89 (1982). Accordingly, to state a claim under 42 U.S.C. § 1981, a plaintiff is required to plead facts demonstrating that he or she is a member of a racial minority, that there was intent to discriminate on the basis of race, and that discrimination concerned one or more of the activities enumerated in the statute. This, plaintiffs have failed to do, and it is impossible

to infer racial discrimination from the existing allegations. Thus, the § 1981 claim will not be allowed to proceed.

C. Conspiracy Claim -- 42 U.S.C. § 1985

Plaintiffs also claim that defendants Carlson, Pionke, Goetz, Frisch and the Visiting Angels conspired to deprive them of their civil rights, in violation of 42 U.S.C. § 1985. Even accepting as true plaintiffs' somewhat conclusory allegations of conspiracy, § 1985 does not apply to the instant facts. There is no hint of a conspiracy: (1) aimed at preventing an officer from performing his or her duties, § 1985(1); (2) to interfere with the judicial process, § 1985(2); or (3) motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus," § 1985(3). *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). Accordingly, plaintiffs do not allege facts that would support a legally cognizable claim under § 1985.

D. Americans With Disabilities Act Claim

During the August 5, 2009, search and seizure, George Cooper tried to convince Officers Carlson and Pionke not to take Prince because he is Sara Cooper's service animal. Skeptical, the officers demanded that the Coopers prove that Prince is a service animal, and the Coopers were apparently unable to demonstrate this to the officers' satisfaction. The Coopers claim that this demand (and presumably the officers' subsequent decision to seize Prince) violates the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. ("ADA"), but their allegations do not support this claim.

The ADA is a multipurpose act, prohibiting, among other things, discrimination in employment, services offered by public entities, public transportation and public accommodations. Even if the Coopers are correct that a person may neither be denied any of those benefits or services simply because they are accompanied by a service animal, nor be denied those benefits or services for failure to prove that their animal is a service animal,[3] nothing in the ADA suggests that the mere request for proof of an animal's service status is an actionable violation in and of itself. Not surprisingly, the ADA also does not prohibit an animal control officer or police officer from seizing a service animal that he or she suspects is being mistreated. Ultimately, animal welfare is a completely separate issue from disability discrimination, and the allegations here do not support a finding that Officers Carlson or Pionke engaged in any sort of disability discrimination.

III. State Law Claims[4]

A. Violations of the "Animals and Humane Officers" Statutes -- Unlawful Entry and Use of Force to Remove an Animal

Plaintiffs maintain that when Humane Society Animal Control Officer Carlson entered their apartment without a warrant and without permission and seized Prince, she

[3] *See, e.g.*, 28 C.F.R. § 36.302(c)(6) ("A public accommodation shall not ask about the nature of extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public accommodation may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public accommodation shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.").

[4] A federal district court may exercise supplemental jurisdiction over state law claims that form part of the same case or controversy as federal law claims. 28 U.S.C. § 1367(a).

not only violated their Fourth Amendment rights, but also violated Wisconsin Statutes § 173.075(5)(e) and (f).

Section 173.07(5) provides in pertinent part:

> Prohibited actions. Unless also a law enforcement officer, a humane officer may not in the course of his or her duties do any of the following: . . . (e) Enter any place or vehicle by force or without the consent of the owner, except in an emergency occasioned by fire or other circumstance in which that entry is reasonable and is necessary to save an animal from imminent death or a person from imminent death or injury. (f) Remove any animal from the custody of another person by force.

Wis. Stat. § 173.07(5)(e), (f).

The Coopers' allegations taken as true, do suggest that Officer Carlson violated subparagraph (e), if not (f), on May 15, 2007, and again on August 5, 2009. However, it is one thing to violate a statute and quite another for the statute to create a private right of action for the benefit of members of the public aggrieved by the violation. On this latter point, the Wisconsin Supreme Court has observed that:

> The legislative intent to grant or withhold a private right of action for the violation of a statute, or the failure to perform a statutory duty, is determined primarily from the form or language of the statute. The nature of the evil sought to be remedied, and the purpose it was intended to accomplish, may also be taken into consideration. In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity, is not subject to a construction establishing a civil liability.

McNeill v. Jacobson, 55 Wis.2d 254, 258-59, 198 N.W.2d 611 (1972) (citation omitted).

Viewed in light of this standard, it is difficult to say for sure whether § 173.07(5) was meant to create a private right of action. As the matter appears to be one of first

impression, the court will leave a final determination of the question until another day, assuming for screening purposes that there is an actionable claim here.

B. Criminal Acts

Plaintiffs also maintain that when Officers Carlson and Pionke entered their apartment without a warrant and without permission and seized Prince using force, they violated Wisconsin Statutes § 322.130, § 322.127, § 943.14, § 943.30(1), § 943.20 and § 943.32. None of these provisions applies in this case.

Section 322.130 deals with the crime of housebreaking, and § 322.127 describes the crime of extortion, both under the Wisconsin Code of Military Justice. As no military personnel are alleged to be involved, and this court does not handle state military courts martial, these statutory sections cannot form the basis of an actionable claim here. Likewise, § 943.14 describes the crime of trespass to dwellings; § 943.30 describes the crime of extortion; § 943.20 describes the crime of theft; and § 943.32 describes the crime of robbery. All of these are state crimes under Wisconsin's regular Criminal Code, which does not, on its own, provide any sort of remedy to private citizens. Finally, the decision to charge an individual with a crime is a prosecutorial function, not a judicial one, and is, therefore, wholly beyond the scope of this civil lawsuit. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). Accordingly, the court will also not allow any of these claims to proceed.

C. Conversion and Trespass

While plaintiffs do not specifically invoke the common law torts of conversion and trespass in their complaint, the court reasonably infers an intention to make such claims from plaintiffs' allegations of criminal trespass, theft, etc. The elements of common law conversion are: (1) intentional control or taking of property belonging to another, (2) without the owner's consent, (3) resulting in serious interference with the rights of the owner to possess the property. *Bruner v. Heritage Cos.*, 225 Wis. 2d 728, 736-37, 593 N.W.2d 814, 818 (Wis. Ct. App. 1999). Common law "[t]respass occurs when a person enters or remains upon land in the possession of another without privilege to do so." *Geyso v. Daly*, 278 Wis.2d 475, 481, 691 N.W.2d 915, 918 (Wis. Ct. App. 2004). Having already concluded that plaintiffs' allegations support claims for unconstitutional search and seizure against Officers Carlson and Pionke, the court finds that the same alleged acts give rise to state law claims for trespass and conversion.

D. Compliance with Wis. Stat. § 893.80

The court has one additional concern respecting the state law claims that it will allow to proceed. Plaintiffs' complaint fails to allege that they have complied with § 893.80 of the Wisconsin Statutes, which provides in pertinent part:

> [N]o action may be brought or maintained against any . . . [city or county] employee . . . for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:
>
> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the

> claim signed by the party, agent or attorney is served on the [city or county and on its employee] . . . under § 801.11. . . . ;
>
> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the [city or county] . . . and the claim is disallowed.

Wis. Stat. § 893.80.

Unless the notice and denial of claim requirement has been satisfied, this court lacks discretion to decide these state law claims on their merits. At this early stage, the court will grant plaintiffs leave to proceed on their state law claims even in the absence of an assertion of compliance with the notice provisions, but these claims will be dismissed if defendants move for dismissal on notice grounds and plaintiffs cannot proffer evidence that they gave proper notice under Wisconsin law.

ORDER

IT IS ORDERED that:

(1). Plaintiffs George and Sara Lyn Cooper's request to proceed is GRANTED as to their Fourth Amendment and trespass and conversion claims against defendants Carlson and Pionke, and as to their Wisconsin Statutes § 173.075(5)(e) and (f) claims against defendant Carlson.

(2) Plaintiffs' request to proceed on all other claims and as to all other defendants is DENIED.

(3) The summons and complaint are being delivered to the U.S. Marshal for service on defendants.

(4) For the time being, plaintiffs must send defendant a copy of every paper or document they file with the court. Once plaintiffs have learned what lawyer will be representing defendants, they should serve the lawyer(s) directly rather than defendants. The court will disregard any documents

submitted by plaintiffs unless plaintiffs show on the court's copy that they have sent a copy to defendants or to defendants' attorney(s).

(5) Plaintiffs should keep a copy of all documents for their own files. If plaintiffs do not have access to a photocopy machine, they may send out identical handwritten or typed copies of the documents.

Entered this 31st day of December, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge