DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

THOMAS JOSEPH REDMOND and LINDA JEAN REDMOND, husband and wife, Plaintiffs-Appellants, v. FRANK DANIEL "CHIP" SHILOSKY, a married man, fire marshal of Lake Havasu City Fire Department, LAKE HAVASU CITY, a body politic, Defendants-Appellees.	No. 1 CA-CV 09-0316 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Mohave County

Cause No. CV 2005-0822

The Honorable James E. Chavez, Judge

AFFIRMED

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B R O W N, Judge

¶1 This is a malicious prosecution case arising out of the indictment and prosecution of Thomas Joseph Redmond and Linda Jean Redmond (collectively "the Redmonds") for arson, criminal damage and insurance fraud. After the charges were dismissed, the Redmonds filed suit in Mohave County Superior Court against Lake Havasu City (the "City") and Fire Marshal Frank Daniel "Chip" Shilosky ("Shilosky"), alleging malicious prosecution and related claims. The trial court granted summary judgment against the Redmonds. For the following reasons, we affirm.

BACKGROUND

¶2 The Redmonds purchased L & P Paper Co. ("the Company") in Lake Havasu City in 1999. Linda Redmond was responsible for the Company's daily operations. Tom Redmond worked a separate job in California as the Company failed to provide the couple with sufficient financial support.

¶3 On September 13, 2001, Linda sent a letter to the City's mayor requesting $50,000 in financial assistance. According to the letter, Linda had lost $21,000 and the Small Business Administration had already deferred her loan payments "until the first of next year." The mayor promptly responded that she would forward Linda's letter to an entity responsible for business retention and expansion, but the City could not invest in a private business.

¶4 A fire occurred at the Company's facility two weeks later. The 9-1-1 dispatcher received a report of the fire at 4:48 p.m. on September 28, 2001. Shilosky estimated the building damage at $400,000 to $500,000, and the Redmonds claimed losses of $70,000 to $80,000 for the inventory, and $180,000 for the business. The blaze also damaged a machine shop housed in the same building.

¶5 Shilosky and Lake Havasu City Police Detective Scott Cheshire investigated the fire for the City's fire and police departments. Their investigation included physical inspection of the damaged property, witness interviews, and review of documents obtained by subpoena. Among the witnesses Shilosky interviewed was Ken Lopez, the Company's general manager. According to Lopez's recorded statement, Linda and Tom had allowed Company employees to leave early on the afternoon of the fire, which was not unusual on a Friday. Linda had arrived at work between 2:30 and 2:45 p.m. with a twelve-pack of beer, and she gave one of the beers to Lopez. Lopez reported that he, one of the janitors, and one of the sales representatives left the building at 4:00 or 4:05 p.m. As Lopez was pulling away, he saw the Redmonds walk out of the building, then walk back in, leaving the door open. Lopez assumed they had forgotten something and would be turning around and leaving again. The fire started shortly afterwards.

¶6 Linda told Shilosky things were a "little slow" in the afternoon and that she, Tom, and Lopez were outside of the building drinking a few beers when a customer came by so they went inside. She helped the customer and Lopez did the normal shutdown of everything. All three of them walked out together at 4:15 p.m. As to a possible cause of the fire, Linda stated the only mechanical problem they had recently was the repair of an air handler motor. She also mentioned there was one disgruntled former employee.

¶7 Another witness, Cynthia Carter, recounted Linda's repeated statements she was in financial trouble. Carter also reported that, according to Linda, Tom had lost $20,000 in gambling in one month and thereby deprived the Redmonds of money to pay their bills.

¶8 Holiday Inn bartender David Ortiz recounted Linda's statements that she wished someone would "drop a bomb on the place," and if someone went through the skylight on the roof, they could drop something down into the building. Linda also reportedly told him she was the last person to leave the building on the day of the fire.

¶9 Former employee Brian Salerno told Cheshire that Linda had told him she "would pay someone to burn it down" and she wanted to "burn the place down and collect from the insurance company." Although Salerno and Linda were friends, she had to

let him go because she could not pay him. According to Salerno, Linda had "burned so many bridges that she had to pay all her [deliveries] with C.O.D.'s." He also stated that two years before the fire, the Redmonds tried to sell the Company for $500,000, but in early September 2001 they lowered the price to $180,000.

¶10 Richard Thomas, also a former employee, told Detective Cheshire he had worked for the Company for six years, but left in July 2001 because business activity seemed to be dwindling and he wanted to start his own business. According to Thomas, the Company seemed to fail due to personnel and management problems. He also said the Company was on C.O.D. because Linda was not good about making payments on bills and the Company had bounced checks to vendors and employees. He also commented Linda had upset many of the vendors with her aggressive personality.

¶11 Similarly, John Ryan, who had worked at the Company for eight years, reported Linda had been bouncing checks to employees and vendors. Ryan also recalled throwing wet paper towels in a Company trash can and finding a burnt cigarette[1] on top of the towels upon returning to work the following Monday. When Ryan pointed this out to Tom Redmond, Tom replied: "You

[1] The cigarette brand was "Merit," the brand Tom smoked.

know it might be the best thing to let this place burn down!" Tom then threw his hands up and walked away. Although the Company had a no-smoking policy, Tom still smoked inside the building.

¶12 Shilosky also interviewed a person who claimed to have overheard two men discussing the Company fire at a bar at the Holiday Inn.

¶13 After completing their investigation, Shilosky and Cheshire submitted their reports to the Mohave County Attorney. Several months later, the case was assigned to Deputy County Attorney Kenneth Skousen. After reviewing the file, Skousen determined probable cause existed to present the arson case to a grand jury.

¶14 Shilosky testified before the grand jury that he believed the fire started when a cigarette was flicked into the mezzanine, a space above the roof accessible by stairs, and that it had ignited combustible materials. The grand jury voted to indict the Redmonds for arson in violation of Arizona Revised Statutes ("A.R.S.") section 13-1703 (2010); insurance fraud in violation of A.R.S. § 20-466.01 (2002); and criminal damage in violation of A.R.S. § 13-1602 (2010).

¶15 The State subsequently disclosed hundreds of pages to the Redmonds during the course of its prosecution. According to Skousen, however, there was no record the State disclosed a one-

page statement obtained by Shilosky from Cory Rubenking on November 13, 2002, the day before the grand jury convened.

¶16 Shilosky mentioned the Rubenking statement to the Redmonds' counsel during a deposition on July 30, 2004. According to Rubenking's handwritten statement, he had been working next door to the Company on the day of the fire and had pulled into the yard between 4:00 and 5:00 p.m. Rubenking wrote he "noticed a male & female coming out of [the Company]. They got into [a] late model El Camino." He did not recognize the couple. Rubenking reported he had gone inside his building for a fifteen-minute meeting, and heard the fire trucks after about ten minutes.

¶17 During a subsequent deposition, Rubenking stated that he was "[p]ositive" the male and female he had seen on the date of the fire were not the Redmonds. He recalled the two were younger than the Redmonds, and he was "pretty sure" the female was blonde and the male was "darker haired." Rubenking agreed it could have been "as late as 4:30 that [he] saw that couple." Rubenking also stated he did not have the exact times.

¶18 The Redmonds successfully moved to dismiss the criminal charges based upon Shilosky's failure to disclose the Rubenking statement. The superior court dismissed the case with prejudice following an evidentiary hearing, stating "that there does need to be a clear message that when State agents have in

their possession a document that may be exculpatory it must be timely disclosed."

¶19 The Redmonds then filed a lawsuit in the superior court against the Defendants that included a 42 U.S.C. § 1983 due process violation, an allegation of malicious prosecution under that statute, as well as state law claims for malicious prosecution, intentional infliction of emotional distress and negligent infliction of emotional distress, and fraudulent concealment.[2] Defendants removed it to United States District Court,[3] and then moved for summary judgment. The district court granted the motion, finding that the Redmonds' § 1983 claims failed as a matter of law. The remaining claims were remanded to the superior court, which susbseqently granted summary judgment in favor of Defendants. The Redmonds filed a timely notice of appeal.

DISCUSSION

I. Malicious Prosecution

A. Probable Cause

¶20 This court reviews a grant of summary judgment de novo. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, 518, ¶ 9, 212 P.3d 853, 856 (App. 2009). Summary

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[2] In their opening brief, the Redmonds do not present fraudulent concealment as an issue they are challenging, therefore we decline to address it.

[3] No. CV-05-2727-PHX-SMM.

judgment is warranted on the malicious prosecution and other claims if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c)(1).

¶21 The elements of a malicious prosecution claim are: "1) a criminal prosecution, 2) that terminates in favor of plaintiff, 3) with defendants as prosecutors, 4) actuated by malice, 5) without probable cause[,] and 6) causing damages." *Cullison v. City of Peoria*, 120 Ariz. 165, 169, 584 P.2d 1156, 1160 (1978) (citations omitted). Generally, whether sufficient facts exist to support probable cause is a question of law to be determined by the court. *Sarwark Motor Sales, Inc. v. Woolridge*, 88 Ariz. 173, 176, 354 P.2d 34 (1960). When conflicting probable cause evidence exists, however, the court may submit the issue to the jury in hypothetical form, with an explanation as to what facts would establish probable cause. *Gonzales v. City of Phoenix*, 203 Ariz. 152, 155, ¶ 14, 52 P.3d 184, 187 (2002).

¶22 To prevail on a malicious prosecution claim, a plaintiff must prove the underlying criminal action was brought without probable cause, which means "a reasonable ground of suspicion, supported by circumstances sufficient to warrant an ordinarily prudent man in believing the accused is guilty of the offense." *Id.* at ¶ 13, 52 P.3d at 187 (citation omitted).

"The test generally applied is: upon the appearances presented to the defendant, would a reasonably prudent man have instituted or continued the proceeding?" *Id.* The facts need not warrant a "conviction of guilt beyond a reasonable doubt." Restatement (Second) of Torts § 662 cmt. c; *see also id.* cmt. e (the facts known to the accuser need only supply reasonable grounds for a belief that the accused has engaged in criminal activity). "Probable cause, by its very nature, implies the use of probabilities." *Cullison*, 120 Ariz. at 168, 584 P.2d at 1159.

¶23 The Redmonds argue that the trial court erred in failing to submit to a jury disputed questions of fact that affect the determination of whether probable cause existed. The Redmonds rely on Shilosky's handling of the Rubenking statement, contending that the statement creates different factual scenarios that should have been presented to a jury, such as whether the Redmonds were the last people to leave the building and whether Shilosky intentionally withheld evidence from the prosecutor or grand jury. Defendants counter that the grand jury's decision to indict the Redmonds is prima facie evidence of probable cause. Alternatively, Defendants argue notwithstanding the indictment, the record supports the trial court's finding of probable cause.

¶24 Without addressing whether Defendants could rely on the indictment as prima facie evidence of probable cause, *see*

Conrad v. United States, 447 F.3d 760, 768 (9th Cir. 2006), we find that the information presented to Shilosky was sufficient to establish that he acted in a reasonably prudent manner in pursuing criminal charges against the Redmonds. The basis for Shilosky's determination of probable cause includes statements from multiple sources about the financial instability of the Company; Linda's statements to witnesses about burning the building and collecting insurance proceeds; the suspicious nature of Tom's lack of compliance with the no-smoking policy; all employees except Lopez and the Redmonds had left the building prior to the fire; and Lopez and the Redmonds had been consuming alcohol. Additionally, based on his physical inspection of the premises, together with his training and experience, Shilosky determined that an outside source, not an electrical short, had started the fire.

¶25 Rubenking's written statement does not defeat the existence of probable cause. According to his statement, Rubenking observed a man and a woman, neither of whom he recognized, exit the Company building sometime between 4:00 and 5:00 p.m. on the afternoon of the fire. Thus, a reasonable inference could be drawn that people other than the Redmonds were in the building. Notwithstanding the potentially conflicting information, Shilosky could still have reasonably believed the Redmonds had committed the crimes charged. *See*

Slade v. City of Phoenix, 112 Ariz. 298, 301, 541 P.2d 550, 553 (1975) (holding that the officer's preparation of a report containing a factual misstatement was reprehensible but did not change the fact that the officer had acted on information furnishing probable cause). Probable cause is judged by facts known to a defendant at the initiation of the proceedings, not at their conclusion. *Brown v. Cluley*, 179 A.2d 93, 97 (Del.Super. 1962); *Sisler v. City of Centerville*, 372 N.W.2d 248, 253 (Iowa 1985) (affirming summary judgment in favor of officer defendants because the facts known to them at the time they brought the charge were sufficient to warrant a person of reasonable caution to believe the suspect had committed the offense and evidence was insufficient to generate a fact issue on probable cause). Nothing in Rubenking's statement necessarily proves the innocence of the Redmonds. The statement provides relevant information that arguably creates some doubt as to whether the prosecution could ultimately have proven its case, but it does not eliminate the basis for Shilosky's determination of probable cause. Thus, we agree with the trial court's finding that notwithstanding the Rubenking statement, there was probable cause to support the prosecution of the Redmonds.

¶26 The Redmonds nevertheless contend that Shilosky should have followed through and investigated whether the couple were

former employees and whether the Redmonds drove an El Camino. But "the law does not require that a prosecutor explore every potentially exculpatory lead before filing a criminal complaint or initiating a prosecution." *Trabal v. Wells Fargo Armored Serv. Corp.*, 269 F.3d 243, 251 (3d Cir. 2001).

¶27 In sum, we find the Redmonds have failed to meet their burden of proving that there was no probable cause for the prosecution of the crimes they allegedly committed or that there were material issues of fact related to probable cause that had to be presented to a jury.[4]

B. Negligent Failure to Train and Supervise

¶28 The Redmonds also challenge the grant of summary judgment on their claim that the City negligently failed to train and supervise Shilosky. Summary judgment was warranted. The Redmonds' complaint alleged failure to train and supervise claims only in conjunction with their § 1983 claims and did not bring them as separate state law claims. The district court dismissed the § 1983 claims.

¶29 The superior court, however, impliedly found that the claims survived as part of a state law malicious prosecution claim. Assuming these negligence claims survived the district

[4] This conclusion obviates the need to consider Defendants' alternative arguments that Shilosky is entitled to qualified immunity from damages for malicious prosecution and that the prosecutor's independent decision insulates Shilosky from liability.

court's ruling, they fail as a matter of law. To be liable for negligent hiring, retention, or supervision of an employee, the court must find that the employee committed a tort. *Mulhern v. City of Scottsdale*, 165 Ariz. 395, 398, 799 P.2d 15, 18 (App. 1990). "If the theory of the employee's underlying tort fails, an employer cannot be negligent as a matter of law for hiring or retaining the employee." *Kuehn v. Stanley*, 208 Ariz. 124, 130, ¶ 21, 91 P.3d 346, 352 (App. 2004) (citation omitted). Because Shilosky committed no underlying tort, the Redmonds' claims that the City failed to supervise and failed to train Shilosky were properly disposed of by the trial court.

II. Intentional Infliction of Emotional Distress Claims

¶30 The Redmonds further assert summary judgment was not warranted on their claims of intentional and negligent infliction of emotional distress. Arizona has adopted the Restatement (Second) of Torts version of the intentional infliction of emotional distress claim:

> *[F]irst*, the conduct by the defendant must be "extreme" and "outrageous"; *second*, the defendant must either intend to cause emotional distress or recklessly disregard the near certainty that such distress will result from his conduct; and *third*, severe emotional distress must indeed occur as a result of defendant's conduct.

Ford v. Revlon, Inc., 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987) (emphasis in original) (citations omitted). The underlying acts

must be "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Mintz v. Bell Atl. Sys. Leasing Int'l, Inc*., 183 Ariz. 550, 554, 905 P.2d 559, 563 (App. 1995) (quoting *Cluff v. Farmers Ins. Exchange*, 10 Ariz. App. 560, 562, 460 P.2d 666, 668 (1969)). Whether a defendant's conduct qualifies as extreme and outrageous is initially a question of law for the court. Restatement (Second) of Torts § 46 cmt. h (1965).

¶31 Shilosky's actions in this case do not go beyond all possible bounds of decency. He conducted the investigation under lawful authority, and found evidence to create probable cause. The intentional infliction claim therefore fails as a matter of law. *See Rondelli v. Pima County*, 120 Ariz. 483, 490, 586 P.2d 1295, 1302 (App. 1978) (rejecting intentional infliction of emotional distress claim as a matter of law by an appellant who claimed he was stereotyped as "Mafiosi," detained with his family for an hour without explanation, searched and handcuffed outside his car in full view of [his] neighbors and friends, treated like a dangerous criminal for failing to file a tax return, and falsely arrested); *Keates v. City of Vancouver*, 869 P.2d 88, 92 (Wash. Ct. App. 1994) (holding as a matter of law that the police officer's yelling at a husband suspected of his wife's murder did not constitute outrageous conduct); *Rhodes*

v. Smithers, 939 F.Supp. 1256, 1281 (S.D. W. Va. 1995) (finding for defendant police officers on the intentional infliction claim as a matter of law because their conduct had failed to support a malicious prosecution claim).

III. Negligent Infliction of Emotional Distress

¶32 The record also fails to show a genuine dispute of material fact on key elements of negligent infliction of emotional distress. To prevail in an action based on this tort, a plaintiff must "(1) witness an injury to a closely related person, (2) suffer mental anguish manifested as physical injury, and (3) be within the zone of danger so as to be subject to an unreasonable risk of bodily harm created by the defendant." *Pierce v. Casas Adobes Baptist Church*, 162 Ariz. 269, 272, 782 P.2d 1162, 1165 (1989) (citations omitted).[5] Here, the Redmonds have not provided any evidence establishing a material issue of fact as to a physical injury or the existence of an unreasonable risk of bodily harm. Thus, the trial court properly granted summary judgment on this claim.

[5] We reject the Redmonds' suggestion that Arizona has adopted different requirements for proving negligent infliction of emotional distress.

CONCLUSION

¶33 We affirm the trial court's grant of summary judgment in favor of Defendants.

/s/
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MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PATRICK IRVINE, Presiding Judge

/s/
_____
DONN KESSLER, Judge