STATE OF MICHIGAN

COURT OF APPEALS

SHAHIN FAROKHRANY, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED July 29, 2010
V	No. 291616 Washtenaw Circuit Court
MARLIN JACKSON, Defendant/Counter-Plaintiff-Appellee.	LC No. 05-000570-NO

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Plaintiff/counter-defendant ("plaintiff") appeals as of right from a judgment in favor of defendant/counter-plaintiff ("defendant") following a jury trial. On appeal, plaintiff argues that the trial court erred when it denied his motions for directed verdicts on his claim for assault and battery and on defendant's claims for defamation and malicious prosecution. We affirm the jury's verdict with respect to the plaintiff's claim for assault and battery but reverse with respect to defendant's claims for defamation and malicious prosecution.

The parties were involved in an altercation in the early morning hours of June 1, 2003. Plaintiff alleged that defendant hit him with a bottle. Defendant was charged with felonious assault, MCL 750.82, but pleaded guilty to aggravated assault, MCL 750.81a(1). Defendant maintains that he only punched plaintiff with his fist. Plaintiff suffered an aggravation of a serious eye condition and complained that he has ongoing problems with his vision, plus dizziness and blackouts. Plaintiff sued defendant for assault and battery and defendant countersued for defamation and malicious prosecution.[1]

On appeal, plaintiff first argues that the trial court erred when it denied his motion for a directed verdict on his assault and battery claim. Plaintiff argues that because defendant testified

[1] Defendant's counter complaint also alleged intentional infliction of emotional distress, but that claim was never presented to the jury.

that he punched plaintiff, there was no factual question regarding whether defendant committed a battery against plaintiff. We disagree.

A trial court's decision on a motion for a directed verdict is reviewed de novo and the reviewing court must consider the evidence in the light most favorable to the nonmoving party. *Roberts v Saffell*, 280 Mich App 397, 401; 760 NW2d 715 (2008). "A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ." *Id*.

While defendant admitted punching the plaintiff he argued both self-defense and mutual affray. The jury was instructed on both defenses. Model Civil Jury Instruction 115.05 provides: "A person who is assaulted may use such reasonable force as may be, or reasonably appears at the time to be, necessary to protect himself or herself from bodily harm in repelling the assault." Model Civil Jury Instruction 115.06 provides: "If plaintiff voluntarily engaged in a fight with defendant for the sake of fighting and not as a means of self-defense, then plaintiff may not recover for an assault or battery unless the defendant beat the plaintiff excessively or used unreasonable force."

There was testimony raising a factual question regarding whether defendant was acting in self-defense, or whether defendant reasonably concluded that plaintiff was engaging in a fight with him. Defendant testified that plaintiff was heckling him and swearing at him at the party. He further testified that plaintiff approached him from behind in a way that made him feel "uncomfortable." Plaintiff then nudged defendant from behind. Defendant testified that plaintiff "obviously want[ed] trouble" and made him feel that "something's not right." Defendant felt threatened before he punched plaintiff. Defendant's roommate testified that defendant told him he felt uncomfortable at the party, and that plaintiff approached defendant outside the house. Additionally, both attorneys argued the issues of self-defense and mutual affray during their closing arguments. Therefore, plaintiff did not become entitled to a directed verdict when defendant acknowledged striking him, as a reasonable jury was permitted to conclude that the strike was a justified act of self-defense. Further, plaintiff's argument that the trial court required the jury to conclude that defendant hit plaintiff with a bottle in order to find defendant liable for assault is baseless. The jury was asked both whether defendant battered plaintiff with his fist and whether he battered plaintiff with a bottle. The issue of the bottle related to the defamation claim.

Plaintiff next argues that the trial court erred when it denied his motion for a directed verdict with respect to defendant's claim of defamation. As above, "[a] directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ." *Roberts*, 280 Mich App at 401.

Defendant's defamation claim was based on plaintiff's statements that defendant hit him with a bottle. Defendant presented evidence that his prospects in the National Football League draft fell as a result of this allegation. The elements of a defamation claim are: "(1) that the defendant made a false and defamatory statement concerning the plaintiff, (2) that the defendant published the defamatory statement to a third party, (3) that the defendant was at least negligent in publishing the statement, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication (defamation per quod)." *Colista v Thomas*, 241 Mich App 529, 538; 616 NW2d 249 (2000). Further, the statement to a third party must not have been a privileged communication. *Oesterle v Wallace*,

272 Mich App 260, 263-264; 725 NW2d 470 (2006). Plaintiff challenges whether there were any actionable unprivileged communications. The applicability of a privilege is a question of law this Court reviews de novo. *Oesterle*, 272 Mich App at 263.

Plaintiff first argues that his statements to the police were privileged. We agree. There was evidence presented at trial that plaintiff stated to the police that he was hit with a bottle during the incident. Defendant presented evidence that the allegation became widely known and had been published in the media. Statements to law enforcement in the course of an investigation are indeed absolutely privileged and may not support recovery for defamation. *Shinglemeyer v Wright*, 124 Mich 230, 239; 82 NW 887 (1900); *Hall v Pizza Hut of America, Inc*., 153 Mich App 609, 619; 396 NW2d 809 (1986). Therefore, the evidence of plaintiff's statements to the police regarding the incident could not be considered in determining whether plaintiff was liable for defamation.

Plaintiff also claims that his statements to physicians "are . . . subject to patient-physician confidentiality." Plaintiff himself testified that he told the physicians that he was hit with a bottle. There was no question of whether the information he provided to the doctors was "confidential." The privilege in that instance is held by the patient and allows the patient the right to sue the physician if that confidence is breached. However, the fact that the information was confidential is not determinative of whether the statement was protected by a defamation privilege. "[A]bsolute privilege against a defamation action is limited to narrowly defined areas." *Oesterle*, 272 Mich App at 264. There is no authority that affords a defamation privilege to statements made to a physician. Consequently, the jury was permitted to consider whether plaintiff's statements to his physician constituted defamation that proximately caused defendant harm.

We observe that there was no evidence presented at trial that plaintiff's *actionable* defamatory statements—those to the physician only—actually caused defendant's injury. There was never any evidence or allegation that plaintiff's physician disclosed plaintiff's statement; defendant merely relied on evidence that the statement was widely known. "[A] proximate cause is a foreseeable, natural, and probable cause of the plaintiff's injury and damages." *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 625; 769 NW2d 911 (2009) (internal quotation omitted). It is equally likely, however, that the source of the media reports was plaintiff's privileged communication to law enforcement. There was no direct evidence regarding the source of the "widely known" reports. Certainly there was no evidence that the physician shared the patient information with anyone. Thus, there is nothing more than speculation regarding whether the statements to the physician were a proximate cause of plaintiff's injury. The trial court should have entered a directed verdict in plaintiff's favor on defendant's defamation claim.

Because we conclude that there was inadequate evidence of proximate causation, it is unnecessary to address plaintiff's argument regarding the statute of limitations. Furthermore, we note that "[a]ffirmative defenses, such as a statute of limitations defense, must be raised in a party's first responsive pleading or by motion filed not later than this responsive pleading." *Attorney Gen ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 664-665; 741 NW2d 857 (2007); MCR 2.111(F)(2) and (3). Thus, it would be improper to address plaintiff's argument because the defense was waived when plaintiff failed to raise it in a timely manner. *Attorney Gen*, 276 Mich App at 665.

Plaintiff next argues that the trial court erred when it denied his motion for directed verdict on defendant's malicious prosecution claim because defendant's guilty plea was not a favorable determination. We agree.

> In an action for malicious prosecution, the plaintiff has the burden of proving (1) that the defendant has initiated a criminal prosecution against him, (2) that the criminal proceedings terminated in his favor, (3) that the private person who instituted or maintained the prosecution lacked probable cause for his action, and (4) that the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice. [*Cox v Williams*, 233 Mich App 388, 391; 593 NW2d 173 (1999).]

Defendant alleged that because he pleaded guilty to a misdemeanor for punching plaintiff, rather than a felony for hitting plaintiff with a bottle, the prosecution initiated by plaintiff was terminated in his favor. Whether a guilty plea constitutes a favorable termination, for the purposes of a malicious prosecution claim, is a question of law that this Court reviews de novo. *Id.*

The Court in *Cox* stated: "[D]ismissal of criminal charges at the instance of the prosecutor or the complaining witness implies a lack of reasonable ground for prosecution and is a favorable termination of the proceeding for purposes of a malicious prosecution cause of action." *Cox*, 233 Mich App at 393. The Court contrasted this with the situation where the accused procures the dismissal "as a courtesy or favor" or "by some act that prevents the litigation." *Id*. at 393-394. In that situation, the Court opined there would be no favorable termination for the purposes of a claim of malicious prosecution. *Id*.

In this case, there was no evidence presented that the felonious assault charges were dropped by the prosecutor for a want of evidence or failure to procure testimony from plaintiff. The only evidence in the record regarding why the felonious assault charge was dropped was defendant's testimony that he voluntarily pleaded guilty to aggravated assault. Thus, defendant's voluntary guilty plea does not evidence a "lack of reasonable ground for prosecution," but instead constitutes an act by defendant to "prevent the litigation." *Cox*, 233 Mich App at 393-394. We hold there was no favorable termination to support the elements of malicious prosecution. The trial court erred when it denied plaintiff's motion for a directed verdict.[2]

Finally, plaintiff argues that the trial court injected the issue of whether defendant hit plaintiff with a bottle by placing a question to this effect on the verdict form, which tainted the jury's consideration of the claims. The jury was instructed to answer, 1) whether defendant committed "an assault and battery" against plaintiff, and 2) whether defendant assaulted plaintiff with a bottle. Plaintiff has waived appellate review of the verdict form because he expressly assented to the form at trial. *Dedes v Asch*, 233 Mich App 329, 334-335; 590 NW2d 605 (1998),

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[2] Because we conclude that the trial court should have entered a directed verdict in plaintiff's favor with respect to both of defendant's claims, the damages awarded to defendant in the trial court's judgment are also vacated.

overruled on other grounds *Robinson v Detroit*, 462 Mich 439 (2000) (holding party waived issue of allocation of fault for failure to object to the verdict form); MCR 2.516(C). Moreover, plaintiff testified repeatedly that defendant hit him with a bottle; there is no evidence that the trial court introduced this issue at its own initiative.

Affirmed in part, reversed in part.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens