[Cite as *Wallace v. Noel*, 2009-Ohio-6984.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Phillip S. Wallace	Court of Appeals No. WD-09-032
Appellant	Trial Court No. 2008-CV-0967
v.	
Elaine Noel, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: December 31, 2009

* * * * *

Mark D. Tolles, for appellant.

Teresa L. Grigsby and Edward T. Mohler, for appellees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal of a March 16, 2009 judgment of the Wood County Court of Common Pleas that granted motions for summary judgment on the issue of liability and in an action for damages under 42 U.S.C. §1983 for alleged denial of civil rights and in an action, in tort, for malicious prosecution. Phillip S. Wallace is appellant. Elaine Noel, Windle Properties, LLC ("Windle Properties"), Deputy Sheriff James Kimble, and

Wood County Sheriff Mark Wasylyshyn are appellees. The dispute arises out of the arrest and prosecution of Wallace for aggravated menacing, a violation of R.C. 2903.21(A).

{¶ 2} Wallace asserts two assignments of error on appeal:

{¶ 3} "Assignment of Error No. 1

{¶ 4} "The trial court erred in granting the motion of defendants Kimble and Washylyshyn [sic] for summary judgment.

{¶ 5} "Assignment of Error No. 2

{¶ 6} "The trial court erred in granting the motion of defendants Noel and Windle Properties, LLC for summary judgment."

{¶ 7} The parties submitted a series of affidavits, sheriff's department reports, and court records for court consideration on the motions. Certain facts are undisputed.

{¶ 8} Phillip Wallace was a resident of the Lawndale Community mobile home park located in Weston, Ohio until September 2007. Windle Properties owns the mobile home park. Elaine Noel, an employee of Windle Properties, has acted as the park manager since April 2007.

{¶ 9} Windle Properties brought eviction proceedings against Wallace due to past due rent in September 2007. Bowling Green Municipal Court granted Wallace a period of time to remove his possessions from the park, including property from a shed located there. Wallace moved much of his belongings from the park on September 19, 2007. On the following day, Wallace, by telephone, requested permission to return to the park to

move additional property. Noel refused. What transpired between Wallace and Noel after that refusal is highly disputed.

{¶ 10} In her affidavit, Noel contended that Wallace then threatened her, stating that he would "beat the shit out of me – that he had to have what was in the shed." Noel also claimed that Wallace stated that Brian Martin, a park resident, would "kick my ass" and that Wallace would "beat the hell out of me if he lost his stuff and the he wouldn't take no for an answer."

{¶ 11} In two affidavits, Wallace denied any threats and claimed that he and Noel agreed in the telephone conversation that Brian Martin would retrieve the desired items on his behalf. In their affidavits, Wallace and Martin both stated that they were standing nearby each other when the telephone conversation with Noel occurred. Martin stated that he overheard Wallace's side of the conversation and that no threats were made.

{¶ 12} Deputy Kimble also testified by affidavit. Kimble is a deputy sheriff of the Wood County Sheriff's Office. He stated that on September 19, 2007, he was dispatched by the Wood County Sheriff's Office to the mobile home park, due to a complaint by Noel. Noel told him that Wallace attempted to take an air conditioning unit that did not belong to him. Kimble recalls speaking to Wallace on September 19, 2007, and that Wallace appeared agitated and upset with Noel. According to his affidavit, Kimble chose not to pursue charges against Wallace with respect to the air conditioning unit because of lack of evidence as to ownership.

{¶ 13} Kimble states that he returned to the mobile home park on September 20, 2007, after a report of threats by Wallace to Noel. Kimble spoke to Noel and she

appeared anxious and upset. According to Kimble, Noel told him of threats by Wallace to harm her. Kimble had Noel prepare a written statement setting forth her claims. A copy of the statement, prepared by Noel, is an exhibit to the Kimble affidavit.

{¶ 14} In the statement, Noel set forth the identical threats that are contained in Noel's affidavit submitted in support of her motion for summary judgment. Kimble stated in his affidavit that the handwritten statement that was prepared by Noel on September 20, 2007, accurately reflects what Noel stated to him on that date. Kimble concluded that "[n]othing I heard or observed suggested that Noel might be lying, or mistaken, about her perception of the threat."

{¶ 15} Kimble also states that he conducted a criminal background check on Wallace and that it disclosed that Wallace had been identified as an offender in a phone harassment incident and involved in a number of domestic violence and custody disputes.

{¶ 16} Later that day, Kimble prepared and signed a probable cause affidavit, stating his belief that there was probable cause to believe that Wallace had committed a criminal offense and setting forth Wallace's threats as recounted to him by Noel. A copy of the Noel statement was also attached to the probable cause affidavit.

{¶ 17} In his affidavit, Kimble states that Noel's demeanor, information secured in the background check of Wallace's criminal history, Wallace's demeanor the preceding day, and lack of any reason to believe Noel was mistaken or lying about the threats led him to conclude that Wallace committed the offense.

{¶ 18} The record also includes certified copies of the criminal complaint filed against Wallace and of the judgment entry filed on April 28, 2008, dismissing the charges at defendant's costs.

{¶ 19} Summary Judgment

{¶ 20} Appellate courts review judgments granting motions for summary judgment de novo; that is, an appellate court applies the same standard in determining whether summary judgment should be granted as the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Civ. R. 56(C) provides:

{¶ 21} "* * *Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule.* * *"

{¶ 22} Summary judgment is proper where the moving party demonstrates:

{¶ 23} "* * *(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶ 24} Summary judgment as to Deputy Kimble and Sheriff Wasylyshyn

{¶ 25} The allegations against Deputy Kimble in the complaint are that he prepared a criminal complaint charging Wallace with aggravated menacing "having conducted no independent investigation into the truth of the allegations made by Defendant Noel, and failing to have probable cause to believe that Plaintiff had committed a criminal act * * *." He argues that Kimble had few prior dealings with Noel from which to evaluate her credibility and reliability as a witness and therefore lacked probable cause to support his arrest and prosecution for charges arising from claimed threats against Noble.

{¶ 26} To establish a claim under 42 U.S.C. §1983, requires proof that "(1) the conduct in controversy must be committed by a person acting under color of state law, and (2) the conduct must deprive the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States." *1946 St. Clair Corp. v. Cleveland* (1990), 49 Ohio St.3d 33, 34, citing, *Parratt v. Taylor* (1981), 451 U.S. 527, 535; *Leasor v. Kapszukiewicz*, 6th Dist. No. L-08-1004, 2008-Ohio-6176, ¶ 12.

{¶ 27} Probable cause to arrest exists where facts and circumstances within the officer's knowledge and "of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the * * * [suspect] * * * had committed or was committing an offense." *Beck v. Ohio* (1964), 379 U.S. 89, 91. The offense at issue here is aggravated menacing under R.C. 2903.21. The statute provides:

{¶ 28} "2903.21 Aggravated menacing

a. "(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person * * *."

{¶ 29} The issue of probable cause presented here concerns whether Kimble held "reasonably trustworthy information" sufficient to warrant belief that Wallace caused Noel to believe that he would cause serious physical harm to her. We conclude that he did.

{¶ 30} Construing the evidence most favorably to appellant, we conclude that there is no dispute of material fact and that Kimble did have probable cause to pursue the arrest and prosecution of Wallace for aggravated menacing. Kimble had personal knowledge that both Noel and Wallace were upset and agitated by their dispute over removal of Wallace's property from the mobile home park pursuant to his eviction. Although Wallace claims that the incident reports kept by the sheriff's department concerning calls by Noel for assistance demonstrate that she was unreliable as a witness, there was no evidence to indicate that Kimble had knowledge of these other calls. There was also no evidence to contradict his claim that he lacked any information to indicate that Noel was lying or untrustworthy in reporting threats by Wallace to harm her. Kimble's check of Wallace's criminal record disclosed that he had been involved in domestic violence disputes and claimed telephone harassment in the past. Under the circumstances, in our view, a prudent officer could reasonably recognize a risk that Wallace might wish to intimidate or threaten Noel. We conclude that the trial court did

not err in granting summary judgment in favor of Kimble based upon the existence of probable cause.

{¶ 31} We also agree with Kimble's assertion that, even if probable cause were found lacking, he would nevertheless be immune from liability for Wallace's claims under qualified good faith immunity. "The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law." *Pearson v. Callahan* (2009), ___U.S.___, 129 S.Ct. 808, 823. Construing the facts most favorably to appellant, we find that there is no dispute of material fact and that there was an objectively reasonable basis for Kimble to believe that probable cause existed under the circumstances. Accordingly, appellant's civil rights claim against Kimble is also barred by qualified good faith immunity.

{¶ 32} We conclude that the trial court did not err in granting the motion for summary judgment of Deputy Kimble.

{¶ 33} Wallace's claim against Sheriff Wasylyshyn is asserted on the basis of respondeat superior[1], negligent supervision and negligent training. The law is well settled, however, that the doctrine of respondeat superior does not apply to Section 1983 civil rights claims against governmental entities. *Monell v. Dept. of Soc. Serv.* (1978), 436 U.S. 658, 691.

{¶ 34} To establish a civil rights claim against a local government, a plaintiff must establish that the violation of his rights was due to an established practice, policy or

[1]We treat the claim as a claim against the sheriff in his official capacity as there is no claim of any personal involvement of the sheriff in the arrest or prosecution of appellant.

custom of the entity. *Canton v. Harris* (1989), 489 U.S. 378, 388; *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 652. Appellant's claim of negligent supervision fails to meet that standard.

{¶ 35} With respect to training, the United States Supreme Court has limited civil rights claims asserting a failure to train to circumstances demonstrating "deliberate indifference" to the rights of others: "the inadequacy of police training may serve as a basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come in contact." *Canton v. Harris*, 489 U.S. at 388; see *Bachtel v. Jackson*, 10th Dist. No. 08AP-714, 2009-Ohio-1554, ¶ 17. Appellant's claim with respect to training does not present a basis for liability under §1983.

{¶ 36} We find no error in the trial court's granting summary judgment in favor of Sheriff Wasylyshyn on appellant's civil rights claims.

{¶ 37} Accordingly we find that appellant's Assignment of Error No. 1 is not well-taken.

{¶ 38} Claims against Elaine Noel and Windle Properties

{¶ 39} Appellant argues that a factual dispute over whether Noel made false claims of threats to Kimble to secure his arrest precludes summary judgment as to his claims against Elaine Noel and Windle Properties. Regardless of the dispute, however, no viable civil rights claim exists under the undisputed facts against either Noel or Windle Properties. A necessary element for claims under 42 U.S.C. §1983 is proof that "the conduct in controversy * ** [was] * * * committed by a person acting under color of state

law." *1946 St. Clair Corp. v. Cleveland*, 49 Ohio St.3d at 34; *Leasor v. Kapszukiewicz*, at ¶12. The claimed conduct of Noel and Windle Properties is entirely private conduct. Accordingly, we conclude that the trial court did not err in granting summary judgment in favor of Noel and Windle Properties on appellant's civil rights claims against them.

{¶ 40} The trial court treated appellant's tort claims against Noel and Windle Properties as claims for malicious prosecution. "The elements of the tort of malicious criminal prosecution are (1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused." *Trussel v. General Motors Corp.* (1990), 53 Ohio St.3d 142 at syllabus. The trial court concluded that there was no dispute of material fact and that Wallace could not establish two elements of the tort – lack of probable cause and that the prosecution terminated in his favor.

{¶ 41} On appeal, appellant claims that his affidavits and the affidavit of Brian Martin demonstrate that Noel's report to deputy Kimble of claimed threats by him were false, made for purposes of harming him, and resulted in his arrest and imprisonment. In response, Noel and Windle Properties argue that the trial court was correct that summary judgment was appropriate as appellant could not prove probable cause to support a malicious prosecution claim.

{¶ 42} In its judgment, the trial court appears to treat the finding that Kimble held probable cause to prosecute, as considered in the §1983 civil rights claim against the deputy, precludes finding of lack of probable cause to support a claim for malicious prosecution against Noel or Windle Properties.

{¶ 43} However, the claims are independent. In the malicious prosecution claim against Noel and Windle Properties, the issue is whether Noel had probable cause to institute or procure appellant's prosecution, not whether the deputy, relying on the truth of Noel's accusations, had probable cause to believe a crime had been committed. See *Harvey v. Republic Services of Ohio II, LLC*, 5th Dist. No. 2007 CA 00278, 2009-Ohio-1343. This is due to the fact that a private citizen can be held liable for malicious prosecution even where criminal charges were filed by police authorities. *Archer v. Cachat* (1956), 165 Ohio St. 286, 287-88; *Harvey v. Republic Services of Ohio II, LLC*, at ¶ 33-37; 3 Restatement of the Law 2d, Torts (1977) 406, Section 653, Comments d and g.

{¶ 44} Here there is clearly a dispute of material fact on whether Noel falsely claimed that appellant had threatened her, made such accusations knowing that they were false and in order to induce Kimble to institute the criminal prosecution of appellant, and on whether that the false accusations were a determining factor in the deputy's decision to initiate prosecution. Deputy Kimble stated in his affidavit that he relied on the claims made by Noel as to threats in determining probable cause to issue the criminal complaint. Such facts, if proven, are sufficient to support a conclusion that Noel procured the institution of criminal proceedings for purposes of liability for malicious prosecution. *Archer v. Cachat*, 165 Ohio St at 287-88, quoting, 3 Restatement of the Law 2d, Torts (1977) 409, Section 653, Comment g with approval. They also establish a dispute of material fact on whether Noel lacked probable cause to procure prosecution of appellant.

{¶ 45} We find appellees' arguments claiming lack of probable cause to support a malicious prosecution claim against Noel and Windle Properties to be without merit and that the trial court erred in granting the motion for summary judgment of Noel and Windle Properties on the claim based upon a lack of probable cause.

{¶ 46} Termination in Favor of the Accused

{¶ 47} Here, the criminal charges against appellant were dismissed upon motion of the prosecutor at appellant's costs. The trial court held in its judgment that the dismissal failed to meet the requirement that the criminal prosecution terminated in appellant's favor.

{¶ 48} In *Ash v. Ash* (1995), 72 Ohio St.3d 520, the Ohio Supreme Court adopted the analysis of the Section 660(a) of the Restatement of the Law 2d, Torts on the issue of when termination of criminal proceedings, other than upon an acquittal, is to be treated as termination in favor of the accused for purposes of claims for malicious prosecution:

{¶ 49} "A prosecution that is terminated by reason of a voluntary settlement or agreement of compromise with the accused is not indicative of guilt or innocence and, therefore, is not a termination in favor of the accused. (3 Restatement of the Law 2d, Torts [1977], Section 660[a], approved and adopted.)" *Ash v. Ash* at syllabus.

{¶ 50} The criminal charges considered in Ash were dismissed upon agreement of the two defendants to pay costs and for one of the defendants to be bound by a restraining order. Id., 72 Ohio St.3d at 521. Although the case did not involve an agreement by the prosecution to dismiss criminal charges based upon the defendant's paying court costs

alone, the court cited with approval a Tennessee appellate court decision ruling on such a case. Id., 72 Ohio St.3d at 524.

{¶ 51} The court cited *Bowman v. Breeden* (Dec. 20, 1988), Tenn.App. No. 1206, unreported, 1988 WL 136640 and described the decision as "a case strikingly similar" to the facts presented in *Ash v. Ash.* Id., 72 Ohio St.3d at 524. In *Bowman v. Breeden*, the prosecution moved to dismiss criminal larceny charges conditioned upon the accused's agreement to pay court costs. Id. The Tennessee court of appeals held that such an agreement amounted to a "dismissal of the criminal charges pursuant to * * * settlement" and that such a dismissal was not sufficient to constitute a termination of the criminal case in favor of the accused to support a claim for malicious prosecution. Id.

{¶ 52} In *Clark v. Marc Glassman, Inc.*, 8th Dist. No. 86190, 2006-Ohio-1335, the Eighth District Court of Appeals considered a case where criminal charges were dismissed upon an agreement of the accused to pay court costs alone. The court of appeals, citing *Ash v. Ash*, held that such a dismissal represented dismissal upon settlement or agreement[2] and that the dismissal did not constitute a termination of criminal proceedings in favor of the accused for purposes of maintaining an action for malicious prosecution. *Clark v. Marc Glassman, Inc.*, at ¶ 19.

{¶ 53} The Ohio Supreme Court has recognized that actions for malicious prosecution are not favored in Ohio:

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[2]The court of appeals stated in its opinion that courts cost could only be assessed against a defendant upon either as a result of a conviction or by agreement. *Clark v. Marc Glassman, Inc.*, at ¶ 17.

{¶ 54} "[C]laims for malicious prosecution are not favored at law because they 'act as a restraint upon the right to resort to the courts for lawful redress.' *Guy v. McCartney*, 7th Dist. No. 00 JE 7, 2002-Ohio-3035, 2002 WL 1376235, ¶ 18. Public policy supports this position in order that criminal investigations are not discouraged and that those who cooperate with law enforcement are protected." *Froehlich v. Ohio Dept. of Mental Health*, 114 Ohio St.3d 286, 2007-Ohio-4161, ¶ 9.

{¶ 55} Given what may be considered as dicta in *Ash v. Ash* in discussing this issue and the public policy in Ohio disfavoring malicious prosecution claims, we conclude that a dismissal of criminal proceedings conditioned alone upon payment of court costs by the accused does not constitute a termination in favor of the accused for purposes of supporting an action for malicious prosecution. Accordingly, we conclude that the trial court did not err in granting the motion of Noel and Windle Properties for summary judgment on the malicious prosecution claim based upon an inability to prove the third element of the tort, termination of the prosecution in appellant's favor.

{¶ 56} We find appellant's Assignment of Error No. 2 is not well-taken.

{¶ 57} The court finds that substantial justice has been done the party complaining. The judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay costs pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____

JUDGE

Arlene Singer, J. _____

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Thomas J. Osowik, J. _____ JUDGE
CONCUR.

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JUDGE