

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



ATTORNEY FOR APPELLANTS

Robert B. Turner
Indianapolis, Indiana

ATTORNEY FOR APPELLEES

Christine L. Bartlett
Ferguson Law
Bloomington, Indiana

IN THE COURT OF APPEALS OF INDIANA

Philipp Espique, Jose Espique,
and Janet Espique,
Appellants-Defendants,

v.

City of Southport and Jay
Thomas,
Appellees-Plaintiffs.

October 31, 2023

Court of Appeals Case No.
23A-CT-1479

Appeal from the Marion Superior
Court

The Honorable Gary Miller, Judge

Trial Court Cause No.
49D03-2202-CT-6366

Memorandum Decision by Judge Riley.
Judges Crone and Mathias concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellants-Plaintiffs, Philipp Espique (Philipp), Jose Espique (Jose), and Janet Espique (Janet) (collectively, the Espiques), appeal the trial court's grant of summary judgment to Appellees-Defendants, City of Southport (City) and Jay Thomas (Thomas) (collectively, Southport), on the Espiques' tort Complaint.

[2] We affirm.

ISSUE

[3] The Espiques present this court with four issues which we consolidate and address as the following single issue: Whether genuine issues of material fact exist precluding summary judgment on their tort claims.

FACTS AND PROCEDURAL HISTORY

[4] Philipp is a member of the National Guard who customarily wears tactical clothing and a holstered weapon, even when he is not on his National Guard base. Philipp also works as a security guard and provides funeral escort services. In furtherance of this work, Philipp drives a vehicle equipped with a red and white light bar and a siren.

[5] On May 29, 2019, Philipp was arrested by officers of the Southport Police Department (SPD) after an incident involving Mark Whitaker (Whitaker). On June 4, 2019, the Marion County Prosecutor's Office (MCPO) filed an Information, charging Philipp with Level 6 felony impersonation of a public

servant for the incident involving Whitaker. On September 17, 2019, the MCPO dismissed the charge.

[6] On March 1, 2020, Philipp was driving his funeral escort vehicle southbound on East Street in Indianapolis when he had an encounter with an off-duty member of the SPD, Jay Thomas (Thomas), who was also driving southbound on East Street. On April 6, 2020, Detective Bradley Ryan (Detective Ryan) filed a probable cause affidavit detailing Thomas' version of the March 1, 2020, incident involving Philipp. Thomas reported that Philipp had driven up behind him on East Street at a high rate of speed, pulled up beside him, blew the air horn on his vehicle, and turned on his vehicle's siren for approximately one second, which Thomas believed was Philipp's attempt to direct him to pull over. While this occurred, Thomas was on the phone with on-duty SPD officer, Sergeant Dawn Asbury (Sergeant Asbury), to whom he provided Philipp's license plate number. Philipp then cut in front of Thomas as Thomas attempted to merge into the left lane to make a turn. Once in front of Thomas, Philipp stopped and exited his vehicle while it was in the roadway. Philipp walked toward Thomas' vehicle and had his hand on the handle of his weapon, which he was wearing at his waist. Thomas also exited his vehicle and asked Philipp if Philipp's vehicle was a police car. Philipp did not definitively answer that question and eventually returned to his vehicle, made a U-turn, and drove away northbound on East Street. According to the probable cause affidavit, Sergeant Asbury then arrived on the scene, ran Philipp's license plate number on her departmental computer and pulled up Philipp's BMV records which

contained Philipp's photograph. Thomas reported that he then identified Philipp as the person who he had encountered on East Street.

[7] On April 6, 2020, the MCPO filed an Information, charging Philipp with Level 6 felony impersonation of a public servant, Level 6 felony criminal confinement, Level 6 felony intimidation, and Class C misdemeanor reckless driving. Based upon Detective Ryan's probable cause affidavit, a judge issued a warrant for Philipp's arrest. On April 21, 2020, Philipp filed a motion to recall the arrest warrant in which he averred that he was on active military duty as part of the response to the COVID-19 pandemic and that he would surrender himself when he was available. On April 22, 2020, SPD officers arrested Philipp. That same day, the SPD served a search warrant for Philipp's vehicle at the home of Philipp's parents, Jose and Janet. On March 22, 2021, under a separate cause, the MCPO refiled the Level 6 felony impersonation of a public servant charge for the 2019 incident involving Whitaker. Philipp successfully moved to have the two causes joined for trial.

[8] On February 28, 2022, the Espiques filed their Complaint against the City and Thomas, who they named in both his personal and professional capacity. The Espiques amended their Complaint twice, seeking damages pursuant to Indiana Code section 34-13-3 and the "Indiana Constitution, Article 1." (Appellants' App. Vol. II, p. 35). The Complaint contained the following key factual allegations: (1) Whitaker and his mother, who was a former SPD employee and friend of the SPD Chief, had made false accusations in 2019 against Philipp when he had gone to Whitaker's mother's house at Whitaker's request so that

Whitaker could repay money he owed Philipp; (2) during the March 1, 2020, incident with Thomas, it had been Thomas and his car club, named The Predators, driving as a group which had harassed Philipp by bumping his vehicle, brake checking him, and surrounding his vehicle with theirs, all of which necessitated that Philipp make defense driving maneuvers to evade them; and (3) on April 22, 2020, as SPD officers arrived at Janet and Jose's home in search of Philipp's vehicle which Janet had told them was at the home she shared with Jose, Jose was driving the car out of the garage where it had been parked, drawing the attention of the SPD officers, who then displayed their cruisers' lights and horns, pulled their weapons on Jose, and threatened to arrest Janet for obstruction of justice. As a result, the Espiques alleged that Thomas and other members of the SPD had conspired to damage Philipp's character, reputation, and property and that they had harassed Jose and Janet at their home. The Espiques further alleged that "as a result of the harassment, bad faith, illegality, and wrongful arrest based on fabricated probable cause" by Thomas and the SPD, they had suffered damages. (Appellants' App. Vol. II, p. 43).

[9] On July 21, 2022, Philip's jury trial on the charges stemming from the May 29, 2019, Whitaker incident and the March 1, 2020, Thomas incident concluded. The jury found Philip not guilty of all the charges except for the Class C misdemeanor reckless driving charge.

[10] On September 22, 2022, Southport filed its Motion for Summary Judgment with memorandum of law and designation of evidence in support. Southport

argued that any of the Espiques' claims based on his allegedly wrongful arrest for the March 1, 2020, Thomas incident were barred by his conviction on the reckless driving charge. Southport further argued that any remaining claims brought by the Espiques were barred by the statutory immunity granted to government entities and employees acting within the scope of their employment.

[11] On February 17, 2023, the Espiques filed their memorandum in opposition to summary judgment with designation of evidence. The Espiques organized their memorandum under the categories of Philipp's original 2019 arrest for impersonation of a public servant stemming from the Whitaker incident, which they referred to as "Wrongful Arrest 1"; Philipp's April 4, 2020, arrest for the Thomas incident, which they referred to as "Wrongful Arrest 2"; and the 2021 refiling of 2019 impersonation of a public official servant as "Wrongful Arrest 3". (Appellants' App. Vol. II, pp. 63, 64, 70). The Espiques also provided a more detailed factual basis for their version of events, but they did not designate any affidavits in opposition to summary judgment. In addition, the Espiques did not designate evidence pertaining to any search warrants issued for Philipp's vehicle on April 20, 2020, in relation to his arrest on the Thomas incident charges.

[12] On February 23, 2022, before Southport could file its reply, the trial court denied its motion for summary judgment.¹ That same day, Southport filed its reply in support of summary judgment, and on February 24, 2022, the trial court again denied Southport summary judgment. On March 23, 2023, Southport filed a motion to reconsider the denial of summary judgment, which the Espiques opposed. On March 31, 2023, the trial court reversed itself, granted Southport’s motion to reconsider, and granted summary judgment to Southport. The Espiques pursued a motion to correct error in which, for the first time, they designated copies of search warrants they contended were issued on April 20, 2020, for Philipp’s vehicle. Southport opposed the Espiques’ motion to correct error. On June 12, 2023, the trial court denied the Espiques’ motion to correct error.

[13] The Espiques now appeal. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

[14] The Espiques challenge the trial court’s grant of summary judgment to Southport. Our supreme court recently reiterated our standard of review of a trial court’s summary judgment thusly:

We review the trial court’s summary judgment decision de novo. [The moving party] is entitled to summary judgment if the

¹ The trial court initially made a clerical error and issued an order granting summary judgment to Southport, an error which it corrected by entering the February 23, 2022, order.

designated evidence shows there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. A genuine issue of material fact exists when there is contrary evidence showing differing accounts of the truth, or when conflicting reasonable inferences may be drawn from the parties' consistent accounts and resolution of that conflict will affect the outcome of a claim. To the extent we have any doubts concerning the existence of a genuine issue of material fact, we must resolve those doubts in favor of the nonmoving party.

Z.D. v. Com. Health Net., Inc., 217 N.E.3d 527, 531 (Ind. 2023) (citations and internal quotes omitted). The party moving for summary judgment bears the initial burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Sargent v. State*, 27 N.E.3d 729, 731 (Ind. 2015). “Summary judgment is improper if the movant fails to carry its burden, but if it succeeds, then the nonmoving party must come forward with evidence establishing the existence of a genuine issue of material fact.” *Id.* at 731-32. The nonmoving party against whom summary judgment was entered has the burden on appeal to persuade us that the trial court’s ‘s grant of summary judgment was in error, but we will scrutinize the trial court’s decision to ensure that the nonmovant is not improperly denied his day in court. *Gochenour v. CSX Transp., Inc.*, 44 N.E.3d 794, 799 (Ind. Ct. App. 2015), *trans. denied*.

[15] Here, the trial court entered no findings and conclusions in support of its ruling, so we have no insight into the trial court’s rationale for granting summary judgment. *See Fields v. Gaw*, 213 N.E.3d 1028, 1031 (Ind. Ct. App. 2023) (holding that, while special findings and conclusions entered on summary

judgment facilitate our review, they are not required and are not binding upon us on appeal), *trans. denied*. Nevertheless, we may affirm the trial court's summary judgment ruling on any basis supported by the record. *MLS Enters., LLC v. Norman*, 209 N.E.3d 30, 35 (Ind. Ct. App. 2023).

II. *Wrongful Arrests*

[16] The gravamen of the Espiques' Complaint and their opposition to summary judgment is that Philipp was subjected to three wrongful arrests unsupported by probable cause, namely, his 2019 arrest for impersonation of a public servant after the Whitaker incident, his 2020 arrest on four charges following the Thomas incident, and the 2020 refiling of the 2019 impersonation of a public servant charge. We address each of these in turn.

i. *2019 Arrest – Whitaker Incident*

[17] Philipp was arrested on June 4, 2019, for impersonation of a public servant for the Whitaker incident. The two-year statute of limitations for actions for injury to person or character applies to claims of false arrest, and such actions accrue on the date of the arrest. *See Stone v. Wright*, 133 N.E.3d 210, 215-16 (Ind. Ct. App. 2019) (concluding that Stone's claim of wrongful arrest based on a May 2014 arrest was time barred because her complaint for damages was not filed until October 2016, relying on *Johnson v. Blackwell*, 885 N.E.2d 25, 30 (Ind. Ct. App. 2008)). Here, the Espiques did not file their Complaint until February 28, 2022, and, therefore, any claim of wrongful arrest based on the June 4, 2019, arrest was time barred. *See id.*

[18] However, even if this claim were not time barred, we would still affirm the trial court's grant of summary judgment because the Espiques failed to counter Southport's summary judgment motion with designated evidence showing that there were factual issues relevant to the 2019 arrest to be determined at trial. Indiana Trial Rule 56 provides as follows:

At the time of filing the motion or response, a party shall designate to the court all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion. A party opposing the motion shall also designate to the court each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto.

[19] Ind. Trial Rule 56(C). If the party moving for summary judgment meets its burden to show no existence of genuine, material factual disputes, the nonmovant “may not rest on his pleadings, but must set forth specific facts, using supporting materials contemplated by Trial Rule 56, which demonstrate that summary judgment is not appropriate.” *Anonymous Doctor A v. Foreman*, 127 N.E.3d 1273, 1277 (Ind. Ct. App. 2019). In determining if summary judgment is appropriate, a court may only rely upon properly designated evidence. *Ford v. Jawaid*, 52 N.E.3d 874, 877 (Ind. Ct. App. 2016). For purposes of designating evidence in support or in opposition to summary judgment, “[u]nsworn statements and unverified exhibits do not qualify as proper Rule 56 evidence.” *Stafford v. Szymanowski*, 31 N.E.3d 959, 964 (Ind. 2015) (quoting *Indiana University Medical Center v. Logan*, 728 N.E.2d 855, 858 (Ind. 2000), which held that copies of internet articles, uncertified records, and

unsworn witness statements attached to an affidavit were inadmissible for purposes of summary judgment motion); *see also Nu-Sash of Indpls., Inc. v. Carter*, 887 N.E.2d 92, 96 (Ind. 2008) (observing that a party “does not ‘demonstrate’ anything to a court by filing an unsworn allegation”).

[20] The Espiques did not contend below, nor do they contend here on appeal, that Southport failed to make a prima facie case for summary judgment. The Espiques’ response to Southport’s motion for summary judgment was an expansion and enforcement of their argument that the 2019 arrest for impersonation of a public servant lacked probable cause. The Espiques’ argument that probable cause was lacking was based upon their version of events, which included allegations that Whitaker’s mother essentially had him subjected to a false arrest by using her influence with the SPD and by making an untruthful report to the SPD. However, in their opposition to summary judgment, the Espiques did not file any sworn affidavits and failed to otherwise designate any evidence to support these factual contentions. Rather, they proceeded on summary judgment based on the allegations of their unverified Complaint and additional unsworn, unverified statements contained in their memorandum in opposition to summary judgment, neither of which was sufficient to create an issue of fact to preclude summary judgment. *See Anonymous Doctor A*, 127 N.E.3d at 1277; *Stafford*, 31 N.E.3d at 964. Accordingly, the Espiques failed to meet their burden in opposition to summary judgment, rendering summary judgment appropriate. *Sargent*, 27 N.E.3d at 731.

ii. 2020 Arrest – Thomas Incident

[21] Philipp also alleged in his Complaint that his 2020 arrest following the Thomas incident lacked probable cause. In its motion for summary judgment Southport argued that Philipp’s conviction on the Class C misdemeanor barred this claim. We agree.

[22] Where plaintiffs claim a false arrest, they must demonstrate the absence of probable cause to make the arrest. *Ali v. Alliance Home Health Care, LLC*, 53 N.E.3d 420, 432 (Ind. Ct. App. 2016); *see also Row v. Holt*, 864 N.E.2d 1011, 1016 (Ind. 2007) (“A false arrest requires absence of probable cause.”). However, this court has acknowledged that a conviction for a criminal offense is deemed to have retroactively established probable cause, and, thus, the conviction bars recovery for wrongful or false arrest. *See Drake v. Lawrence*, 524 N.E.2d 337, 340 n.3 (Ind. Ct. App. 1988) (citing *Cameron v. Fogarty*, 806 F.2d 380, 386-87 (2nd Cir. 1986)), *trans. denied*. It is of no moment that a defendant was acquitted after trial on other charges stemming from the same arrest. *See Holmes v. Village of Hoffman Estate*, 511 F.3d 673, 682 (7th Cir. 2007) (observing that “probable cause to believe that a person has committed any crime will preclude a false arrest claim, even if the person was arrested on additional or different charges for which there was no probable cause[.]” citing *Devenpeck v. Alford*, 543 U.S. 146, 153, 125 S.Ct. 588, 593-94, 160 L.E.2d 537 (2004)).

[23] Here, Philipp was arrested on April 22, 2020, on charges of Level 6 felony impersonation of a public servant, Level 6 felony criminal confinement, Level 6 felony intimidation, and Class C misdemeanor reckless driving, and he was

convicted of reckless driving after trial. Philipp's conviction for reckless driving barred any recovery for his purportedly wrongful arrest on April 22, 2020, and therefore summary judgment was merited on this claim. *Drake*, 524 N.E.2d at 340 n.3.

[24] On appeal, the Espiques argue that in its summary judgment filings Southport somehow misled the trial court that Philipp had only been subject to one arrest, an argument that we would find unpersuasive even if it were true, as our review is de novo, and we have the benefit of the record and the Espiques' appellate arguments. The Espiques do not counter Southport's appellate contentions on this point with any legal authority. Instead, they assert that Philipp's conviction on the reckless driving charge could not have barred all their claims as to the 2019 arrest, the 2020 arrest, and the 2020 refiling of the 2019 charge. While we agree with the Espiques that Philipp's conviction for reckless driving did not bar all their claims, we conclude that it did bar their claim of wrongful arrest based on the 2020 arrest for the Thomas incident and that their other claims were properly subject to summary judgment for other reasons, as we explain herein.

iii. *2020 Refiling of the 2019 Charge*

[25] The Espiques also contend that summary judgment was inappropriate in light of the genuine issues of material fact they contend exist surrounding the lack of probable cause for the refiling of the 2019 impersonation of a public servant charge. In their memorandum in opposition to summary judgment, the Espiques made several factual allegations, including that the deputy prosecutor knew that the 2019 charge had been filed based on fabricated probable cause

and that the deputy prosecutor had told the Espiques' counsel that she was considering refiling the 2019 charge if Philipp did not plead guilty to the 2020 Thomas incident charges.

[26] However, we agree with Southport that the refiling of a criminal charge does not constitute a new arrest. *Compare* Ind. Code § 35-34-1-1(b) (providing that prosecutions are commenced by the filing of an information by the prosecuting attorney) *with* I.C. § 35-33-1-5 (providing that an 'arrest' is "the taking of a person into custody, that he may be held to answer for a crime"). On appeal, the Espiques do not provide us with any pertinent legal authority indicating that the refiling of a criminal charge after it had been previously dismissed is treated as a new arrest for purposes of a tort suit alleging false or wrongful arrest, and we are aware of none. In addition, we observe that the MCPO refiled the 2019 charge in 2020, the Espiques did not name the MCPO as a party to their Complaint, and that the Espiques failed to support this claim with anything apart from unverified statements contained in their memorandum, which, as we have already explained, did not constitute properly designated evidence. Therefore, we conclude that Southport was also entitled to summary judgment based on this claim.

III. *Claims Involving Jose and Janet*

[27] Apart from the allegations stemming from Philipp's purportedly wrongful arrests, the only other allegations raised by the Espiques in their Complaint related to their contentions that SPD officers had harassed Jose and Janet at their home on April 22, 2020, when they executed a search warrant for

Philipp's vehicle at Jose and Janet's home in relation to the 2020 Thomas incident charges.² In their Complaint, the Espiques essentially argued that SPD officers acted outside the scope of their employment when serving a search warrant for Philipp's vehicle because the search warrant they had obtained when they arrived at Jose and Janet's home had Philipp's address listed on it, not Jose and Janet's. They also contended that SPD officers drew their weapons on Jose, created unnecessary noise to embarrass Jose and Janet, and threatened Janet with arrest.

[28] Southport argued below, and it argues here on appeal, that Southport was entitled to summary judgment on these claims on an immunity theory pursuant to Indiana Code section 34-13-3-3(8), which provides as follows:

A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from . . . [t]he adoption and enforcement of or failure to adopt or enforce . . . a law (including rules and regulations) . . . unless the act of enforcement constitutes false arrest or false imprisonment.

[29] On appeal, the Espiques do not contend that Southport failed to make a prima facie case related to statutory immunity. In addition, the Espiques did not

² In their Complaint, the Espiques alleged that Southport engaged in a pattern of harassment of Philipp based on the purportedly wrongful arrests, the manner in which the arrest warrant on the 2020 Thomas incident charges was executed, and the SPD's issuance of a press release on the 2020 Thomas incident charges. Because these additional claims are merely derivative of the wrongful arrest claim which we have already held was properly subject to summary judgment, we do not address them further. In their Complaint, the Espiques also implied that Philipp's credit card had been stolen and misused by the SPD while he was in custody for the 2020 charges. However, they do not address this claim on appeal, and, therefore, they have waived any argument that summary judgment was precluded on this issue. *See* Ind. Appellate Rule 46(A)(8)(a); *Martin v. Hunt*, 130 N.E.3d 135, 137 (Ind. Ct. App. 2019) (noting that the "[f]ailure to present a cogent argument results in waiver of the issue on appeal").

designate any proper Rule 56 evidence to create factual issues on their contentions because they did not designate any copies of search warrants in their initial opposition to summary judgment. While they did attach what appear to be copies of search warrants to their motion to correct error filed after the trial court had entered summary judgment for Southport, those materials were not properly designated to the trial court, and we are not allowed to consider them. *See Babinchak v. Town of Chesterton*, 598 N.E.2d 1099, 1101-02 (Ind. Ct. App. 1992) (observing that “[e]rror generally may not be predicated upon evidence which was not before the trial court at the time of summary judgement” and that we may not ground our review of summary judgment on material that was not designated to the trial court); *see also Johnson v. Rutoskey*, 472 N.E.2d 620, 623 (Ind. Ct. App. 1984) (holding that the trial court did not err in refusing to consider matters presented for the first time by affidavit in support of a motion to correct error following entry of summary judgment, where the affidavit did not assert that the matters were newly discovered). In any event, the copies of the search warrants attached to the Espiques’ motion to correct error were not certified, and they did not request that the trial court take judicial notice of their documents. *See Ind. Univ. Med. Ctr.*, 728 N.E.2d at 858 (uncertified copies of records are not Rule 56 evidence).

[30] The Espiques also failed to support their factual allegations that SPD officers drew weapons on Jose, made unnecessary noise, and threatened Janet with arrest with any sworn affidavits or any other admissible evidence, and the unsworn statements contained within their summary judgment filings and on

appeal failed to create any factual issues pertaining to those actions being outside the officers' scope of employment. *See Stafford*, 31 N.E.3d at 964; *Shenmei Yuan v. Wells Fargo Bank, N.A.*, 162 N.E.3d 481, 487 (Ind. Ct. App. 2020) (holding that Shenmei Yuan's unsworn statements on appeal referring to factual matters not designated to the trial court did not constitute properly-designated evidence in opposition to summary judgment). Therefore, we conclude that the Espiques failed to meet their burden to oppose summary judgment on these claims as well. *See Anonymous Doctor A*, 127 N.E.3d at 1277.

CONCLUSION

- [31] Based on the foregoing, we conclude that the Espiques have not demonstrated the existence of any genuine issues precluding summary judgment and, therefore, that Southport is entitled to summary judgment as a matter of law.
- [32] Affirmed.
- [33] Crone, J. and Mathias, J. concur