

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL GIBSON,

Plaintiff-Appellee,

v

TOTAL PETROLEUM, INC.,

Defendant-Appellant.

UNPUBLISHED

March 13, 2001

No. 215665

Oakland Circuit Court

LC No. 98-004781-NZ

Before: Griffin, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

This appeal arises from the criminal prosecution of plaintiff for the armed robbery of one of defendant's gas stations on November 1, 1995. Defendant's employee, Rosalin Phillips, who was working at the time of the robbery, identified plaintiff as the perpetrator on November 16, 1995. Plaintiff was arrested that day and bound over for trial following a December 8, 1995 preliminary examination, having spent the intervening three weeks in jail unable to post bond. The only evidence presented during the preliminary examination was Phillips' testimony, in which she identified plaintiff as the robber, and two sets of photographs used for comparison, one a group of still frames from the gas station surveillance video that captured the events of the robbery, the second plaintiff's mugshots. On October 9, 1997, the court dismissed the charge by an order of nolle prosequi.

Plaintiff subsequently filed this civil action against defendant, alleging malicious prosecution, defamation, and intentional infliction of emotional distress. Defendant moved for summary disposition, which the trial court denied, and now appeals by leave granted. We affirm.

We review de novo a trial court's decision on a motion for summary disposition. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). Relevant to this appeal are the grounds for denial of defendant's motion to the extent it was brought pursuant to MCR 2.116(C)(7) and (10). Reviewing a motion brought pursuant to MCR 2.116(7), this Court accepts as true a plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Id.* The affidavits, pleadings, depositions, admissions, and documentary evidence are considered in order to determine whether a genuine issue of material fact exists. *Id.* Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

As a preliminary, but ultimately critical matter, we note our agreement with that portion of the trial court's decision denying summary disposition pursuant to MCR 2.116(C)(10) because discovery was not complete. Summary disposition prior to the completion of discovery is premature, unless "further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion." *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). In this case, none of the principal parties or witnesses had been deposed at the time defendant moved for summary disposition and, as discussed below, defendant's entitlement to summary disposition on each of plaintiff's claims turns on Phillips' state of mind, knowledge and motivations in identifying plaintiff as the robber. Because our review of the current record leads us to the conclusion that further discovery may reveal evidence supporting plaintiff's allegation that Phillips provided information known to be false, we conclude that the court's decision not to grant summary disposition at the current stage of the proceedings was appropriate. Defendant may of course renew its motion for summary disposition if additional discovery demonstrates that Phillips was truthful and reasonably believed her identification of plaintiff was correct. MCR 2.116(E)(3).

Defendant first argues that plaintiff's defamation claim should have been dismissed because Phillips' statements to the police are protected by an absolute privilege and her statements to coworkers were made in good faith, and thus are protected by a qualified privilege. The trial court denied summary disposition finding that the claim was predicated on statements Phillips made to third-parties, her coworkers, rather than statements she made to the police, and that summary disposition was premature where discovery was incomplete.

Communications considered absolutely privileged are not actionable. *Kefgen v Davidson*, 241 Mich App 611, 618; 617 NW2d 351 (2000). However, communications protected by a qualified privilege may be actionable on a showing that they were made "with actual malice, i.e., with knowledge of [their] falsity or reckless disregard of the truth." *Prysak v R L Polk Co*, 193 Mich App 1, 15; 483 NW2d 629 (1992). Whether a statement was made with actual malice is generally a question of fact for the jury. *Smith v Fergan*, 181 Mich App 594, 597; 450 NW2d 3 (1989). Here, to the extent that Phillips' statements to her coworkers would be protected by a qualified privilege, the trial court correctly determined that summary disposition was premature where plaintiff had not yet deposed Phillips in the effort to establish whether she acted in good faith or with malice in accusing him of the robbery.

Defendant also argues that the trial court should have dismissed plaintiff's claim of intentional infliction of emotional distress because Phillips' identification of plaintiff was not extreme and outrageous conduct.

A prima facie case of intentional infliction of emotional distress requires that a plaintiff establish "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999). "Liability for such a claim has been found only where the conduct complained of has been 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." *Id.* In *McCahill v Commercial Union Ins Co*, 179 Mich App 761, 769-770; 446 NW2d 579 (1989), this Court concluded that a false accusation of criminal activity in

combination with other conduct created a jury question with regard to whether the defendant's conduct had been extreme and outrageous. As indicated, there is a chance that discovery will reveal evidence in support of plaintiff's claim that Phillips made a knowingly false accusation. With uncertainty regarding other facts that may be elicited during discovery, it is possible the evidence would create a legitimate question for the jury. Accordingly, we again conclude that the trial court properly denied summary disposition on the ground that it was premature.

Next, defendant contests on three grounds the trial court's denial of summary disposition on plaintiff's claim of malicious prosecution. First, defendant contends that plaintiff cannot establish that the criminal proceedings were instituted by defendant. Defendant also contends that the trial court erred in denying summary disposition because probable cause to prosecute plaintiff existed at plaintiff's preliminary examination. Related to this argument, defendant contends that plaintiff was estopped from re-litigating the issue of probable cause under the doctrines of res judicata and collateral estoppel. We find no merit in any of defendant's contentions.

To establish a claim of malicious prosecution, the plaintiff must show:

(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 actions, and (4) that the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice. [*Matthews v Blue Cross & Blue Shield of Mich*, 456 Mich 365, 378; 572 NW2d 603 (1998).]

With regard to the first element, and defendant's first contention, we agree that a prosecutor's exercise of his independent discretion in initiating and maintaining a prosecution is a complete defense to an action for malicious prosecution against a private individual. *Id.* at 384. However, if a person supplying information to a prosecuting officer knows the information to be false, "an intelligent exercise of the officer's discretion becomes impossible and a prosecution based thereon is procured by the person giving the false information." *Renda v Int'l Union, UAW*, 366 Mich 58, 83; 114 NW2d 343 (1962) quoting 3 Restatement, Torts § 653, pp 386-387. Stated another way, it has been said that unless information furnished by a private individual "was known by the giver to be false and *was the information on which the prosecutor acted*, the private person has not procured the prosecution." *Matthews, supra* at 385 (emphasis included).

The robbery occurred on November 1, 1995. Phillips, at that time, gave police a general description of the robber, then on November 16, 1995, provided the police with information that led them to plaintiff. A police report dated November 16, 1995, details the extent of the police investigation additional to Phillips' statements. Determining plaintiff's identity based on a license plate number Phillips provided, police compared plaintiff's mugshot from a 1991 arrest with the gas station security video which had captured the robbery. The report indicates that officers observed a resemblance between plaintiff and the robber. They subsequently picked plaintiff up at his place of employment and spoke with his employer, discovering that on November 1, 1995, plaintiff had punched-in for work one hour after the time of the robbery. With plaintiff's consent they searched his car, discovering nothing that linked him with the robbery. Also with plaintiff's consent, they took him to the police station for questioning.

Informing plaintiff that he was not under arrest, the police conducted an interview and a polygraph examination. The report states that they advised plaintiff that he "did not pass the polygraph." Plaintiff was arrested at this point.

At plaintiff's preliminary examination, the only testimony presented was that of Phillips. She testified that plaintiff was a regular customer, coming to the gas station with the same companion every day between six and seven in the morning. She testified that she knew plaintiff was the robber on the day of the robbery. She then testified that November 16, 1995 was the first time plaintiff had returned to the gas station since the robbery. Phillips admitted that despite her certainty that the robber was plaintiff, throughout the two-week period between the robbery and November 16, 1995, she had not so informed the police, and had failed to provide any information beyond her original general description. She explained that she had not provided the additional information sooner because she had been scared.

The only other evidence presented at the preliminary examination was photographic, the prosecution introducing plaintiff's mugshots and the video stills of the robber. After submitting the photos for comparison, the prosecution and defense argued the credibility of Phillips' identification and the similarity of the persons in the photos. Though noting that the video photos were "not the most phenomenal and true reproduction," the district court bound plaintiff over finding that the facts on the record established probable cause and that the photos established a question of fact to be presented to a jury.

On this record it can reasonably be concluded that notwithstanding the fact that the police had conducted some independent investigation, plaintiff's prosecution was initiated primarily on the basis of Phillips' identification. Such a conclusion is further supported by the prosecutor's petition to nolle prosequi, in which, moving to dismiss plaintiff's case, the prosecutor cited three grounds: First, that after enhancing the surveillance video images and comparing them to plaintiff's mugshots, it was determined that plaintiff and the robber were not the same person; second, that plaintiff had passed a polygraph examination regarding the crime; and third, that no other evidence implicated plaintiff in the crime. This petition arguably demonstrates that at the times when plaintiff was arrested and bound over, the police were operating on Phillips' information and the absence of contradictory evidence.¹

The record presents a close question, and at this stage of the proceedings we are not convinced that defendant is entitled to be shielded from liability on the charge of malicious prosecution. Plaintiff did spend three weeks in jail, and, able to conduct only a limited cross-examination of Phillips during the preliminary examination, in support of this action plaintiff has understandably submitted additional evidence challenging Phillips' credibility.² Should it be

¹ Though implicit in the main discussion, we note for emphasis that the limited police investigation had discovered no additional evidence to support Phillips' identification of plaintiff. Rather, it had failed to uncover an alibi and to that point in time had failed to conclusively establish plaintiff's innocence. Obviously, the police ultimately did establish plaintiff's innocence when the video stills were enhanced and a second polygraph examination was conducted.

² For example, plaintiff has submitted an affidavit in which he avers that his daily appearance at
(continued...)

shown upon further discovery that Phillips knowingly provided false information to the police, in light of plaintiff's lack of a clear alibi it may be that intelligent exercise of the prosecuting authorities' discretion was impossible. *Renda, supra*. Our resolution of the previous issues already necessitating remand, we conclude that the requisite future proceedings may include further development of this charge also.

With regard to defendant's remaining two contentions, if it is shown that Phillips gave false information or failed to make a full and fair disclosure, the fact that the district judge found probable cause to bind plaintiff over for trial will not permit defendant to escape liability for malicious prosecution. See *Fort Wayne Mortgage Co v Carletos*, 95 Mich App 752, 758; 291 NW2d 193 (1980). Accordingly, despite the finding of probable cause at plaintiff's preliminary examination, the trial court did not err in denying summary disposition.

Lastly, we note that defendant also argues that the trial court erred in denying defendant's motion for summary disposition on plaintiff's negligence claim. Plaintiff, however, responds that he did not allege a claim of negligence, but rather a claim of abuse of process. The meaning and scope of the pleadings are left to the discretion of the trial court. *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992). In light of our conclusions that the trial court properly denied summary disposition with regard to the other issues, and because the trial court did not determine the scope of plaintiff's pleadings, we decline to be the first to attempt interpretation of plaintiff's intent.

Affirmed and remanded for further proceedings consistent with this opinion.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy

(...continued)

the gas station, at his regular morning time, was maintained during the two weeks between the date of the robbery and the date of his identification and arrest.