

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ROBERT S. MULLEN,

Plaintiff-Appellant,

v

WAYNE COUNTY, EDWARD F.  
CARRAVALLAH, GEORGE FREIJE and  
ESTATE OF RAYMOND WALSH,

Defendants-Appellees.

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UNPUBLISHED

July 26, 2005

No. 252750

Wayne Circuit Court

LC No. 00-023044-CZ

Before: Neff, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants and dismissing plaintiff's state tort claims and federal civil rights claims. We affirm.

I

This cause of action arises from a longstanding dispute between Burda Brothers, Inc., a fireworks vendor, and defendants. Since the mid-1990's, there have been numerous criminal and civil proceedings between Burda Brothers and defendants relating to the Burda Brothers' business practices and fireworks sales. This appeal originated, in part, from civil claims that arose from a separate criminal action against plaintiff, an attorney who represented Burda Brothers and whose offices were housed in the Burda Brothers fireworks facility at 47725 Michigan Avenue in Canton Township.

In the related criminal case, plaintiff and other agents of Burda Brothers were charged with uttering and publishing and conspiracy to commit uttering and publishing relating to a criminal enterprise involving fireworks. The prosecution alleged that plaintiff participated in a scheme whereby Burda Brothers and its agents would sell otherwise restricted fireworks to buyers through the distribution of nontransferable fireworks display permits.

In the course of the criminal case, the police executed a search warrant for the Michigan Avenue address. In executing the warrant, the police searched plaintiff's legal offices and arrested plaintiff. The prosecution eventually dismissed all criminal charges against plaintiff, and this civil lawsuit ensued.

## II

Plaintiff argues on appeal that the trial court improperly granted defendants' motion for summary disposition because the search warrant was invalid for plaintiff's office. We disagree.

### A

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Our review is limited to the evidence before the trial court at the time the motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), which tests whether a claim is precluded because of immunity granted by law, and MCR 2.116(C)(10), which tests the factual support for a claim. *Patterson v Kleiman*, 447 Mich 429, 431-432; 526 NW2d 879 (1994); *Peña, supra* at 309. Although the trial court did not expressly state the ground on which it granted summary disposition, the trial court's opinion indicates that the decision was based on its finding that there was insufficient evidence of a material factual dispute. Therefore, we review the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10). *Patterson, supra* at 432; *Gibson v Neelis*, 227 Mich App 187, 190; 575 NW2d 313 (1997).

In evaluating a motion under MCR 2.116(C)(10), a reviewing court must consider the whole record in the light most favorable to the nonmoving party, including affidavits, pleadings, depositions, admissions, and other evidence offered by the parties. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Documentary evidence to support a position is required when judgment is sought based on the lack of a material factual dispute. MCR 2.116(G)(3)(b). "When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial that is material to the dispositive legal claims." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 16 n 14; 672 NW2d 351 (2003). While speculation and conjecture are insufficient, a nonmovant is not required to rebut every possible theory that could be supported by the evidence. *Id.* at 17 n 4. When the evidence demonstrates that no genuine issue of material fact exists, the movant is entitled to judgment as a matter of law. *Corley, supra* at 278. Moreover, whether there was probable cause to support issuance of a warrant is a question of law properly determined by the trial court and reviewed de novo by this Court. *Matthews v Blue Cross Blue Shield of Michigan*, 456 Mich 365, 377, 381; 572 NW2d 603 (1998).

### B

Plaintiff first argues that because the police knew the facts underlying the search warrant and that his office was in the building to be searched, their failure to inform the magistrate that they intended to search an attorney's office for papers related to his clients, invalidates the search warrant with respect to plaintiff and his premises regardless of its validity with respect to Burda Brothers and their premises. We are unpersuaded that the search warrant was invalidated with regard to plaintiff's offices on the bases argued.

Both the United States Constitution and the Michigan Constitution “guarantee the right of persons to be secure against unreasonable searches and seizures.” *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000); see US Const, Am IV; Const 1963, art 1, § 11. A search or seizure is deemed unreasonable when it is executed pursuant to an invalid warrant or without a warrant where the actions of the police officer do not satisfy one of the exceptions to the warrant requirement. *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004). Generally, the validity of a search conducted with a warrant requires that the warrant be based on probable cause. *Id.* However, a warrant becomes invalid where there is evidence giving rise to the inference that the police officer knowingly included false facts or omitted material facts in his affidavit without which there could be no conclusion that probable cause existed. *Matthews*, *supra* at 389-390; *People v Williams*, 240 Mich App 316, 319-320; 614 NW2d 647 (2000).

The affidavit supporting the warrant was provided by defendant Carravallah, a Wayne County Sheriff deputy. The affidavit sought a search warrant for the structure and curtilage of 47725 Michigan Avenue, a one-story cinderblock building, commonly known as Burda Brother’s fireworks. The affidavit set forth details of the alleged illegal manner in which restricted fireworks were sold at the Burda Brothers’ building at 47725 Michigan Avenue by selling club memberships in “American Fireworks Users Association” for a nominal charge and providing the club member a membership card with what appeared to be a reduced counterfeit copy of a nontransferable Mussey Township permit for a fireworks display. The affidavit recounted in detail two controlled purchases of restricted fireworks in the alleged illegal manner in which two undercover officers received membership cards. The affidavit identified plaintiff merely by name, implicating him indirectly in the illegal activity by stating:

Affiant has looked at the copies of both “permits” placed on each of the above described membership cards and in his experience both appear to be counterfeit copies of an original.

On information and belief, counterfeit permits were similarly uttered and published to each customer who joined the American Fireworks User’s Association in 1995 and 1996.

Affiant believes that the repetitive counterfeiting of permits to possess, transport and display fireworks, the uttering and publishing of those counterfeit permits as having any significance at all establishes probable cause to believe that a Criminal Enterprise has engaged in a pattern of racketeering activity. M.C.L. 750.159f.

Affiant has uttering and publishing warrant recommendations for the two owners of Burda Brothers Fireworks, Oleg and Efim Burda and for, Robert S. Mullen, the association and corporation.

The affidavit was based on undisputed facts regarding plaintiff’s involvement. Specifically, there was information that plaintiff had represented Burda Brothers on several occasions in both criminal and civil matters since 1995. There was also information that, in 1997 and 1998, plaintiff assisted Burda Brothers in obtaining public fireworks display permits for the AFUA. Defendants had a copy of a letter plaintiff wrote seeking the fireworks display permit in 1998.

Plaintiff complains that defendant Carravallah's affidavit failed to state that his office was in the same building as Burda Brothers, and that acting as an attorney, he had obtained the license for the display of fireworks, which are material omissions that invalidate the warrant with respect to plaintiff and his office. He argues that attorney-client papers are entitled to special protection under the Fourth Amendment, and although exceptions may apply to attorney-suspects, this case is different from most attorney-suspect cases, which generally involve serious felony offenses, not a previously failed misdemeanor prosecution.

Plaintiff cites no authority directly supporting his contentions of material omissions. He relies on *People v Nash*, 418 Mich 196, 217-218; 341 NW2d 439 (1983), for the proposition that the Michigan Supreme Court has expressed "dismay" over the trend toward law office searches and has suggested that a solution should be to appoint a special master to conduct searches of an attorney's office. However, the *Nash* Court was referring to third-party search warrants for the offices of non-suspect attorneys. *Id.* at 218. In the instant case, plaintiff was closely linked with the alleged criminal enterprise, and thus not ostensibly an independent third party.

Even accepting plaintiff's argument of special protections for searches of attorney offices generally, the facts here do not support the application of these protections to invalidate the search warrant. Plaintiff correctly observes that a search warrant involving a multi-unit building must generally specify the sub-unit to be searched unless its multi-unit character is not apparent and the police officers neither knew nor should have known of the separate units. *People v Toodle*, 155 Mich App 539, 545; 400 NW2d 670 (1986). Plaintiff asserts that his office was separate and distinct from Burda Brothers and that he had an outside entrance exclusively for his office, and that the police officers would have known his office was separate from Burda Brother's fireworks. Nonetheless, plaintiff's office was located in the Burda Brothers building and his office address and that of Burda Brothers was one and the same, "47725 Michigan Avenue." Plaintiff's letterhead on which he requested the Mussey Township fireworks permit listed his address simply as "47725 Michigan Avenue" without distinction as a suite or separate unit within the Burda Brothers building. Thus, we find no justification for invalidating the search warrant on the basis that plaintiff's legal office was physically separate and distinct.

The fact that plaintiff's legal office was so closely associated with Burda Brothers operation, coupled with his involvement in obtaining the fireworks permit at issue and, additionally, the lack of evidence distinguishing his office and practice from the Burda Brothers premises, convince us that the omissions in the affidavit were not fatal to the warrant. *Id.* at 547-548.

### III

Plaintiff also argues that the trial court improperly granted defendants' motion for summary disposition because defendants arrested plaintiff without an arrest warrant under nonexigent circumstances. We disagree.

A person is constitutionally protected from unreasonable seizures. *Kazmierczak, supra* at 417; see US Const, Am IV; Const 1963, art 1, § 11. Despite the opportunity to obtain an arrest warrant, a police officer is not compelled to secure a warrant where probable cause exists. *People v Dalton*, 155 Mich App 591, 598; 400 NW2d 689 (1986). Probable cause is determined by an objective standard and exists where there are "such reasonable ground[s] of suspicion,

supported by circumstances sufficiently strong in themselves to warrant an ordinarily cautious man in the belief that the person arrested is guilty of the offense charged.” *Matthews, supra* at 387-388, quoting *Wilson v Bowen*, 64 Mich 133, 138; 31 NW 81 (1887).

During the search of the Burda Brother’s building, plaintiff was arrested for uttering and publishing and conspiracy to utter and publish relating to the sale of nontransferable fireworks permits issued to the AFUA. Under Michigan law, it is a misdemeanor for any person or business to use or sell restricted fireworks without first having obtained a nontransferable permit from an approved government entity. MCL 750.243a, 750.243b, and 750.243e; *Stajos v Lansing*, 221 Mich App 223, 227-228; 561 NW2d 116 (1997). The elements of uttering and publishing include: “(1) defendant’s knowledge that the instrument was false, (2) an intent to defraud, and (3) presenting the forged instrument for payment.” *People v Knowles*, 256 Mich App 53, 58; 662 NW2d 824 (2003). The crime of conspiracy is committed when a person “conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner . . . .” *People v Meredith (On Remand)*, 209 Mich App 403, 411-412; 531 NW2d 749 (1995), quoting MCL 750.157a. Therefore, conspiracy to utter and publish can occur where two or more persons consent to or knowingly cooperate in the uttering and publishing of a fireworks permit that is nontransferable. *Meredith, supra* at 412.

At the time of plaintiff’s arrest, the police officers had reason to believe that Burda Brothers was engaging in the sale of nontransferable fireworks permits. At the Burda Brothers’ building location in Canton Township, undercover officers purchased restricted fireworks after applying and paying for a membership card to the AFUA, which contained a reduced copy of a nontransferable permit issued to the AFUA. The police officers were aware that plaintiff assisted Burda Brothers in securing the permits that were copied onto the membership cards and used in the sale of restricted fireworks. In addition, the officers found plaintiff on the premises where they also found evidence of illegal distribution of nontransferable fireworks permits during execution of a valid search warrant. Given the collective information that the police officers knew before plaintiff’s arrest and plaintiff’s presence at the scene, there were reasonable grounds for an ordinarily cautious person to suspect that plaintiff was guilty of uttering and publishing and conspiracy to utter and publish. Accordingly, we conclude that the trial court properly determined that there was probable cause to support plaintiff’s arrest without a warrant.

#### IV

Plaintiff argues that the trial court erred in deciding the issue of probable cause as a matter of law. Plaintiff contends that if a material factual dispute exists concerning search, arrest, and prosecution, probable cause is a jury question in a civil rights case. We find no error.

Contrary to plaintiff’s contention, we conclude that the trial court properly determined the probable cause issue. The lawfulness of an arrest and whether probable cause existed is generally a question of law decided by the trial court. *Matthews, supra* at 381; *Peterson Novelties, supra* at 18. Where the facts pertaining to a probable cause determination are at issue, the factual disputes are properly resolved by the jury. *Matthews, supra* at 381-382.

Here, there was no factual dispute regarding Burda Brothers’ business practice of selling membership cards containing reduced copies of permits issued to the AFUA to enable unlicensed customers to purchase restricted fireworks. There was also no factual dispute that plaintiff was

aware of Burda Brothers' business practices and secured the original permits on behalf of the business. The disputed matter was actually a question of law regarding the legality of this particular business practice. Because the facts were undisputed that the business practice existed and that plaintiff was somehow involved, probable cause was properly decided by the trial court. *Peterson Novelties, supra* at 18-19.

## V

Plaintiff next asserts that the trial court erred in dismissing his state tort claims of malicious prosecution, abuse of process, false light invasion of privacy, and intentional interference with economic relations. We disagree.

## A

A malicious prosecution claim is often difficult to maintain as it requires a plaintiff to prove the following: "(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, supra* at 377-378. As previously determined, there was probable cause to believe that plaintiff was guilty of the crimes of uttering and publishing and conspiracy to utter and publish. Because the absence of probable cause is an essential element of a malicious prosecution claim, plaintiff's malicious prosecution claim was properly dismissed pursuant to MCR 2.116(C)(10).

## B

To establish an abuse of process claim, a plaintiff must demonstrate "(1) an ulterior purpose, and (2) an act in the use of process that is improper in the regular prosecution of the proceeding." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). Such a claim addresses whether the defendant used a proper procedure for a purpose other than that intended. *Id.* An abuse of process claim cannot be established by bad motive alone; it requires proof of an "ulterior purpose" through "some corroborating act." *Id.*

Contrary to plaintiff's argument that the trial courts had condoned Burda Brothers' business practices, there was no outstanding injunction providing general approval of the company's business practices. While an injunction was in effect at the time of the search, the injunction protected Burda Brothers' seasonal sale and display of fireworks. It specifically did not "restrain or enjoin the Defendant or its agents from engaging in law enforcement activities, or the initiation of criminal complaints or the initiation and processing of criminal prosecutions for any violation of the Michigan Fireworks Law or any other criminal statute against the Plaintiffs Burda Brothers, Inc., and the American Fireworks Users Association, Inc., or its agents, officers and employees."

Whether Burda Brothers' business practices were illegal had been at issue for several years. Defendants were aware of plaintiff's involvement with Burda Brothers before the search on July 2, 1998. Defendants had information that plaintiff secured permits that enabled Burda Brothers to implement their business plan of selling nontransferable fireworks permits, and it

was undisputed that the permits were in furtherance of the business practices in connection with the AFUA. Therefore, this is not a situation in which plaintiff was merely an attorney with no knowledge of the business practices at issue or the challenges concerning their legality.

Even assuming defendants erroneously concluded that particular business practices were illegal, they nevertheless were using the prosecution process to enforce the law. Plaintiff failed to provide evidence that defendants intended to arrest him for the purpose of coercing him to turn against his client and to implicate Burda Brothers in a criminal enterprise. Because there was no showing of ulterior or improper motive, we conclude that the state tort claim of abuse of process was properly dismissed pursuant to MCR 2.116(C)(10).

### C

To establish an action for false light invasion of privacy, a plaintiff must demonstrate that “the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position.” *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 385; 689 NW2d 145 (2004) (citations omitted). Further, the defendant must have known of or acted in reckless disregard of the falsity of the information and the false light in which the plaintiff would be perceived. *Detroit Free Press, Inc v Oakland Co Sheriff*, 164 Mich App 656, 666; 418 NW2d 124 (1987).

We find no error in the trial court’s conclusion that plaintiff failed to show a material factual dispute concerning whether defendants acted knowingly or with reckless disregard of the falsity of the matter. On the contrary, there was evidence that defendants had information that plaintiff was involved to some extent in the Burda Brothers’ business practice of selling nontransferable fireworks permits. We conclude that the claim of false light invasion of privacy was properly dismissed under MCR 2.116(C)(10).

### D

To bring a claim of tortious interference with a business relationship, a plaintiff must show “the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff.” *Mino v Clio School Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003) (citation omitted). To establish the defendant’s malice and lack of justification with respect to a lawful act, the plaintiff must show specific, affirmative conduct by the defendant corroborating the improper motive. *Id.*

Plaintiff contends that defendants primarily sought to interfere with his business relationship with Burda Brothers by attempting to induce him to give information incriminating his client and putting Burda Brothers “at odds” with him. However, given plaintiff’s involvement with Burda Brothers, discussed above, and the shared premises, plaintiff failed to show the requisite malice or lack of justification. Furthermore, although plaintiff asserted that he was forced to move offices and lost Burda Brothers’ business as a result of defendants’ actions, plaintiff apparently never revealed information against his client’s interests. We previously opined that there was probable cause to support the search warrant and plaintiff’s arrest without a

warrant. Therefore, plaintiff failed to establish that defendants acted with improper motive and without justification, and we conclude that the claim of intentional interference with business relations was properly dismissed pursuant to MCR 2.116(C)(10).

## VI

Plaintiff's final contention on appeal is that the trial court erred in dismissing his federal civil rights claims actionable under 42 USC 1983. We disagree.

Plaintiff agrees with the trial court that the legal principals applicable to his state law claims apply generally to his federal civil rights claims. For the reasons discussed above, we find no error in the trial court's dismissal of these claims.<sup>1</sup>

## A

The trial court noted that plaintiff's § 1983 claims were in part based on alleged search and seizure violations under the Fourth and Fourteenth amendments. "Section 1983 provides a federal remedy against any person who, under color of state law or custom having the force of law, deprives another of rights protected by the constitution or laws of the United States." *Payton v Detroit*, 211 Mich App 375, 398; 536 NW2d 233 (1995). With regard to plaintiff's constitutional claim of unreasonable search and seizure, such a claim requires proof that there was no probable cause for the arrest. In a claim under § 1983, probable cause is a jury question unless only one reasonable determination is possible. *Diamond v Howd*, 288 F3d 932, 937 (CA 6, 2002).

In this case, the parties did not dispute the material events surrounding plaintiff's arrest. Additionally, there was evidence that the police officers had information that Burda Brothers was selling AFUA membership cards containing nontransferable fireworks permits to enable customers to purchase restricted fireworks. It was undisputed that plaintiff assisted in securing the original permits on behalf of Burda Brothers. The trial court concluded that probable cause existed for the search and seizures in this case, and our de novo review compels us to reach the same conclusion, given plaintiff's involvement and shared premises with Burda Brothers, as discussed above. *Pyles v Raisor*, 60 F3d 1211, 1215 (CA 6, 1995); see also *Peterson*, *supra* at 22-24 (concluding that the plaintiffs' federal claims of malicious prosecution and Fourth Amendment violations were properly dismissed where the plaintiffs could not show the absence of probable cause).

## B

Plaintiff also claimed retaliation in violation of § 1983 based on his First Amendment rights protecting his representation of Burda Brothers against defendants. Plaintiff's retaliation claim required a showing that defendants acted with an ulterior motive, i.e., that the adverse action was motivated by plaintiff's protected conduct. *Crawford-El v Britton*, 523 US 574, 588-

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<sup>1</sup> Defendants sought summary disposition on the grounds that plaintiff failed to establish a violation of § 1983 and that defendants were otherwise entitled to immunity.



589; 118 S Ct 1584; 140 L Ed 2d 759 (1998); *Thaddeus-X v Blatter*, 175 F3d 378, 394, 399 (en banc) (CA 6, 1999).

As previously determined, there was probable cause to arrest plaintiff for uttering and publishing and conspiracy, which supports the trial court's grant of summary disposition. *Mozzochi v Borden*, 959 F2d 1174, 1179-1180 (CA 2, 1992). Plaintiff's legal representation of the Burda Brothers and its agents in civil and criminal proceedings does not insulate plaintiff from arrest and prosecution for charged illegal actions. Moreover, the evidence did not support the alleged ulterior or improper motive by defendants in bringing this action, particularly in light of defendants' obvious tenacity in enforcing the Michigan fireworks statute.

Affirmed.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Michael J. Talbot