

STATE OF MICHIGAN
COURT OF APPEALS

RUSSELL WHIPPLE and
DENNIS WHIPPLE,

UNPUBLISHED
July 26, 2011

Plaintiffs-Appellants,

V

No. 298837
Ingham Circuit Court
LC No. 08-001583-NI

MASON POLICE OFFICER RICK GIRARD,
MASON POLICE SERGEANT DONALD
HANSON, and MASON POLICE OFFICER
CARRIE NETTLES,

Defendants-Appellees,

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

PER CURIAM.

Plaintiffs appeal the decision of the circuit court granting summary disposition for defendants under MCR 2.116(C)(7) (governmental immunity). We affirm.

Plaintiffs turned themselves in after warrants were issued for their arrests following an altercation at a bar on December 8, 2006. Plaintiffs were acquitted following a jury trial. Plaintiffs filed a complaint on December 5, 2008, alleging false arrest, false imprisonment, malicious prosecution, and intentional infliction of emotional distress based on the actions of the officers involved in investigating the December 8, 2006 altercation. Defendants filed a motion for summary disposition, claiming that plaintiffs' claims against defendants were barred by governmental immunity. The circuit court agreed, and plaintiffs' claims were summarily dismissed.

This Court reviews de novo rulings on summary disposition motions. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). "In reviewing a motion under MCR 2.116(C)(7), this Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. We must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists." *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000).

A civil plaintiff bringing a claim of false arrest has the burden to establish that (1) he was arrested by the defendant(s), (2) he was aware of his arrest, (3) the arrest was against his will, (4)

the defendant(s) acted intentionally, and (5) the arrest was illegal. M Civ JI 116.20. “The elements of false imprisonment are [1] an act committed with the intention of confining another, [2] the act directly or indirectly results in such confinement, and [3] the person confined is conscious of his confinement.” *Moore v Detroit*, 252 Mich App 384, 387; 652 NW2d 688 (2002) (citation and internal quotation marks omitted); see also M Civ JI 116.21. “To prevail on a claim of false arrest or false imprisonment, a plaintiff must show that the arrest was not legal, i.e., the arrest was not based on probable cause.” *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 18; 672 NW2d 351 (2003). In order to prove a claim of malicious prosecution, plaintiffs must show “that prior proceedings terminated in favor of the present plaintiff, that there was an absence of probable cause for the proceedings, that malice, defined as a purpose other than that of securing the proper adjudication of the claim, existed and that a special injury flowed directly from the prior proceeding.” *Young v Barker*, 158 Mich App 709, 721; 405 NW2d 397 (1987), citing *Young v Motor City Apartments*, 133 Mich App 671, 675; 350 NW2d 790 (1984).

Section 7, part of the Governmental Tort Liability Act, MCL 691.1401 *et seq.*, governs governmental immunity from tort liability, and provides in pertinent part as follows:

(2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer’s, employee’s, member’s, or volunteer’s conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

(3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.

Where a plaintiff pleads an intentional tort, a police officer is immune from liability if

(a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,

(b) the acts were undertaken in good faith, or were not undertaken with malice, and

(c) the acts were discretionary, as opposed to ministerial. [*Odom v Wayne Co*, 482 Mich 459, 480; 716 NW2d 351 (2003).]

Plaintiffs' argument focuses on the second of these three prongs. Plaintiffs assert that because the actions of defendant officers were neither undertaken in good faith¹ or without malice, they are not entitled to immunity. Their argument rests on their assertion that they were wrongfully "arrested" because defendants lacked the requisite "probable cause."

This Court has defined probable cause as "a reasonable ground of suspicion, supported by circumstances strong [in themselves] to warrant a cautious person in the belief that the accused is guilty of the offense charged." *People v Woods*, 200 Mich App 283, 288; 504 NW2d 24 (1993). Given the conflicting statements of the individuals involved in the December 8 incident, a "reasonable ground of suspicion" existed that plaintiffs were criminally liable for their actions.

More fundamentally, however, plaintiffs' argument is predicated on a misconception of the process by which they were charged. It is undisputed that plaintiffs were not arrested on December 8, 2006. Instead, after the incident was investigated, a "Warrant Request & Disposition Form" was filled out for both plaintiffs and forwarded on to the prosecutor's office for review one week later. The prosecutor's office then reviewed the request and authorized the warrants. In fact, in both instances the prosecutor's office authorized warrants for charges other than requested. Thus, the determination of probable cause was made not by defendants, but by the prosecutor's office.²

Additionally, "the only situation in which an action for malicious prosecution would properly lie is where a police officer knowingly swears to false facts in a complaint, without which there is no probable cause." *Payton v Detroit*, 211 Mich App 375, 394-395; 536 NW2d 233 (1995), quoting *King v Arbic*, 159 Mich App 452, 466; 406 NW2d 852 (1987) (quoting *Belt v Ritter*, 18 Mich App 495, 503; 171 NW2d 581 (1969)). While plaintiffs assert on appeal that defendants failed to properly investigate the December 8 incident and claimed below that defendants "made up facts in police reports," they do not claim that defendants swore to false facts in order to mislead the prosecutor and the court.

In sum, plaintiffs' argument rests on the assertion that defendants lacked probable cause to initiate proceedings against them. However, the determination of probable cause and the charges to be brought was made by the prosecutor's office. It was that entity, not a party to this lawsuit, which initiated the proceedings.

¹ The Michigan Supreme Court "has described a lack of good faith as 'malicious intent, capricious action, or corrupt conduct.'" *Odom*, 482 Mich at 474, quoting *Veldman v Grand Rapids*, 275 Mich 100, 113; 265 NW 790 (1936).

² There is no claim that the warrants issued were not valid on their face. M Civ JI 116.07.

Affirmed.

/s/ Jane M. Beckering
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens