

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

John S. Cooper,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 09AP-1078
	:	(C.P.C. No. 08CVH-08-11065)
Tommy's Pizza et al.,	:	
	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	
	:	

D E C I S I O N

Rendered on June 29, 2010

Leeseberg & Valentine, Gerald S. Leeseberg and Susie L. Hahn, for appellant.

Ron O'Brien, Prosecuting Attorney, *A. Paul Thies* and *R. Matthew Colon*, for appellee Jack P. Burns.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} John S. Cooper appeals from a decision of the Franklin County Court of Common Pleas granting summary judgment in favor of Franklin County Sheriff Deputy Jack P. Burns. The incident giving rise to this case occurred on November 3, 2007. Deputy Burns was working special duty at Tommy's Pizza in Upper Arlington where Cooper went to pick up an order of pizzas. The pizzas were not ready on time and, after waiting more than an hour, Cooper made comments to Deputy Burns who then arrested

Cooper for disorderly conduct, a misdemeanor. The charges were later dismissed against Cooper.

{¶2} Cooper then brought claims for false imprisonment and wrongful arrest against Deputy Burns and another deputy, V. Dinardo, as well as Tommy's Pizza, and the Franklin County Prosecuting Attorney. The only remaining defendant, as it pertains to this appeal, is Deputy Burns. Deputy Burns moved for summary judgment on the grounds that he was statutorily immune from suit because he did not act with malice in arresting Cooper. The trial court agreed, and granted the motion for summary judgment. At issue here, is the trial court's determination that reasonable minds could only conclude that Deputy Burns acted without malice.

{¶3} Appellant has assigned two errors for our consideration:

I. THE TRIAL COURT ERRED BY WEIGHING THE EVIDENCE AND ACTING AS THE TRIER OF FACT IN CONCLUDING THAT APPELLEE DID NOT ACT WITH MALICIOUS PURPOSE, IN BAD FAITH, OR IN A WANTON OR RECKLESS MANNER IN HIS ARREST OF APPELLANT.

II. THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER APPELLEE ACTED WITH MALICIOUS PURPOSE, IN BAD FAITH, OR IN A WANTON OR RECKLESS MANNER IN HIS ARREST OF APPELLANT.

{¶4} When a trial court grants summary judgment, we review its decision de novo, using the same standard that the court used below. See, e.g., *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105; *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383. Under this standard of review, we accord no deference to the trial court's decision. See *Hicks v. Leffler* (1997), 119 Ohio App.3d 424, 427 (citing *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.* (1988), 42 Ohio App.3d 6, 8).

{¶5} The summary judgment criteria are set forth in Civ.R. 56(C), which provides that summary judgment may not be granted unless: (1) there are no material facts at issue, or in dispute; (2) the moving party is entitled to judgment as a matter of law; and (3) based on the facts and record, and viewing that evidence and the inferences drawn from it in a light most favorable to the opposing party, reasonable minds can come to only one conclusion—that conclusion being adverse to the nonmoving party. Summary judgment is appropriate only if the movant demonstrates the absence of any genuine issue of material fact. *Hicks* at 427. If reasonable minds can arrive at differing conclusions about the material facts and evidence in the case, the court must overrule the motion for summary judgment. *Hounshell v. American States Ins. Co.* (1981), 67 Ohio St.2d 427, 433.

{¶6} With this standard in mind, we must analyze whether Deputy Burns is entitled to summary judgment on the issue of statutory immunity. The first assignment of error states that the trial court weighed the evidence in favor of Deputy Burns. Our de novo review of the motion for summary judgment renders this assignment of error moot. *Mills v. Best Western Springdale*, 10th Dist. No. 08AP-1022, 2009-Ohio-2901, ¶12.

{¶7} In his second assignment of error, Cooper argues that a genuine issue of material fact exists with regard to malice. The pertinent statute provides that Deputy Burns will be presumed to be immune from civil prosecution unless one of the following applies:

- (a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner [.]

R.C. 2744.03(A)(6).

{¶8} Despite the fact that Deputy Burns was working a "special duty" detail at the pizza shop, there is no issue as to whether he was serving in an official or governmental capacity. See generally *Ingles v. Western Pancake House, Inc.* (Dec. 27, 1977), 10th Dist. No. 77AP-643, 1977 WL 200702, *3 ("The root of the matter is that police officers, by statute, have authority to make arrests regardless of whether they are working regular duty * * *, special duty * * *, or off duty."). Thus, a police officer who is working special duty is still performing "a governmental function." *Id.* (citing *Wooster v. Arbenz* (1927), 116 Ohio St. 281, 284-85.

{¶9} Deputy Burns contends that when he arrested Cooper, he was not acting with malicious purpose, in bad faith, or in a reckless or wanton manner. In this context malice "refers to a willful and intentional design to do injury, or the intention or desire to harm another, through conduct which is unlawful or unjustified." *Johari v. City of Columbus Police Dept.* (2002), 186 F.Supp.2d 821, 831–32, citing *Piro v. Franklin Twp.* (1995), 102 Ohio App.3d 130. Lack of probable cause to arrest may allow an inference that the law enforcement officer acted with malice, but a mere lack of probable cause is not, itself, sufficient to make a determination that the officer acted with malice. See *Johari* at 831-32. To determine whether reasonable persons could differ in concluding Deputy Burns acted without malice in arresting Cooper, we must examine the specific evidence, construing it in Cooper's favor.

{¶10} Tommy's Pizza is a local pizza establishment that operates multiple locations in Central Ohio. One restaurant is located on The Ohio State University campus at the corner of Lane and Neil Avenues and another restaurant is located in the suburban community of Upper Arlington. On the evening in question, the Ohio State football team had just played a home game against conference rival Wisconsin. Cooper watched the game with Kevin Ary, at the Varsity Club, a bar and restaurant which is roughly one block west of the Tommy's Pizza on campus. Cooper acknowledged that he had ingested a beer with lunch before the game and two beers at the Varsity Club. After the game, Cooper invited friends back to his Upper Arlington home and, on the way, he placed an order for four pizzas from Tommy's. Cooper intended to place his order at the Upper Arlington Tommy's location, and called directory assistance for the number, but apparently he was connected to the campus location by mistake. Not knowing he had called the campus Tommy's, Cooper placed his order, at which time the clerk told him that it would be about one hour before his order would be ready. Cooper had another beer at home before going with friends to retrieve the pizzas.

{¶11} When Cooper arrived at the Upper Arlington Tommy's, the restaurant was extremely busy, as it ordinarily is on a Saturday night, especially after a home football game. Security video from the restaurant showed that Cooper and Ary went to the back of the line, waited patiently for approximately ten minutes, and when they got to the front of the line, the clerk told Cooper that they had apparently lost the order. The female clerk apologized and offered to re-place the order, to which Cooper acquiesced. Although the clerk did not give a specific time frame, she implied that they would put a rush on Cooper's order. Cooper and Ary sat on a nearby bench, and waited patiently for about

one-half hour before returning to the counter to check on their order. Cooper politely inquired with the clerk, and after learning that his order was still not ready, he returned to the bench to wait. Unbeknownst to Cooper, an assistant manager had asked Deputy Burns to keep an eye on the pair because they allegedly made rude remarks to the cashier.

{¶12} While Cooper and Ary were waiting, they overheard another customer who was upset because one pizza—out of 20—was missing from his order. Ary then remarked to Cooper something to the effect that that customer should be happy, as he got 19 out of 20 pizzas, which is certainly better than zero out of four. The customer apparently heard the remark, and he told Ary to shut his mouth, to which Ary replied: "You shut up." Profanities were exchanged. There was no physical confrontation; Cooper and Ary remained seated, and the customer left the restaurant without incident. Cooper did not participate or say anything.

{¶13} Just after the customer left the restaurant, Deputy Burns approached Cooper and Ary, and in an intimidating manner, shouted at them "like a drill sergeant": "You two, shut up, shut up right now or you can just leave. Shut up." (Cooper Depo. 55.) Another customer, Cynthia Ackerman, who knew neither Cooper nor Ary, described Deputy Burns' behavior as "out of bounds." In her deposition, she was the only independent witness, described Deputy Burns' behavior as screaming and inappropriate, and his tone was "extremely negative," "provoking," "agitated" and very aggressive." (Ackerman Depo. 14.)

{¶14} About one-half hour after Deputy Burns' admonition, Cooper's order was ready. While Ary paid the clerk for the pizzas, Cooper walked over to Deputy Burns, and

told the deputy he did not appreciate Deputy Burns' lack of professionalism, and indicated he would not patronize Tommy's Pizza in the future because of Deputy Burns' behavior. Cooper did not raise his voice or threaten Deputy Burns, stating, "I'm never coming back here again." (Cooper Depo. 69.) Deputy Burns responded by yelling, placing Cooper under arrest, and charging him with disorderly conduct under R.C. 2917.11(B)(2), which provides that "[n]o person, while voluntarily intoxicated, shall * * * [e]ngage in conduct or create a condition that presents a risk of physical harm to the offender or another[.] R.C. 2917.11(B)(2); (Burns Depo. 23–24). A violation of R.C. 2917.11(B)(2) is a minor misdemeanor and generally an offense for which an arrest may be made. If "[t]he offender persists in disorderly conduct after reasonable warning or request to desist," then under R.C. 2917.22(E)(3), the offense is a misdemeanor of the fourth degree. R.C. 2917.11(E)(3)(a). Deputy Burns charged Cooper with persistent disorderly conduct.

{¶15} Cooper was taken to the Franklin County jail and was held there until he was able to post bail. After Cooper spent a night in jail and retained an attorney, the charge against Cooper was ultimately dismissed with prejudice at the request of the prosecuting attorney.

{¶16} From these facts, we must determine whether there is any genuine issue of fact as to whether Deputy Burns acted with malice in arresting Cooper on November 3, 2007.

{¶17} As stated above, malice is the "willful and intentional design to do injury, or the intention or desire to harm another, through conduct which is unlawful or unjustified." *Johari* at 831–32. In fact, for the purposes of malicious prosecution, the Supreme Court of Ohio has held that when the conduct complained of is either wanton or reckless, malice

is not necessarily required. See *Rogers v. Barbera* (1960), 170 Ohio St. 241, 244. Malice not only includes intentional acts, "but also encompasses [any] conduct evidenced by callous and conscious disregard of the rights of another." *Buckeye Union Ins. Co. v. New England Ins. Co.* (1999), 87 Ohio St.3d 280, 286.

{¶18} Malice refers to any "improper purpose, or any purpose other than legitimate interest of bringing [an] offender to justice." *Criss v. Springfield Twp.* (1990), 56 Ohio St.3d 82, 84 (citing Black's Law Dictionary (6th ed.1990) 956). It turns directly on "the state of mind under which a person intentionally does a wrongful act without a reasonable lawful excuse." *Id.* at 85. In such circumstances, "the law will infer an evil intent." See *id.*; see also *Preston v. Murty* (1987), 32 Ohio St.3d 334, syllabus ("Actual malice" * * * is (1) that state of mind under which a person's conduct is characterized by hatred, ill will[,], or a spirit of revenge[;] or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm."). This is a question for the finder of fact. See *Criss* at 85 (holding that finding malice for the purposes of malicious prosecution is a question for the finder of fact). "If the basis for prosecution cannot be shown, those who made the decision will appear to have acted with no basis—that is, maliciously." *Id.*

{¶19} The facts, construed in Cooper's favor, demonstrate a genuine issue of material fact about whether Deputy Burns acted with malice. First, although not alone dispositive, the evidence raises an issue about whether Deputy Burns lacked probable cause to arrest Cooper. Independent eyewitness testimony, Cooper's own denial, and the video surveillance evidence suggest that Cooper was not visibly intoxicated and did not pose a threat to himself or anyone at the restaurant.

{¶20} Moreover, according to Cooper, he did nothing that created a risk of harm to the person or property of another. Cooper said he sat quietly while he waited for the pizzas he ordered. Cooper stated he said nothing argumentative or threatening to anyone, including the patron who picked up 20 pizzas; only Ary spoke to him. Burns responded in a manner Cynthia Ackerman described as "very aggressive," "extremely negative," "provoking," and in a manner likened to a military "drill sergeant." After obtaining the pizzas he ordered, Cooper walked over to Deputy Burns and, in a non-threatening manner, informed him the deputy's conduct convinced Cooper to not patronize Tommy's in the future. In response, Deputy Burns cuffed Cooper and arrested him. To such evidence must be added the additional factor that the prosecution, apparently because probable cause was uncertain, dismissed the charges. All such evidence suggesting a lack of probable cause gives rise to an inference of malice.

{¶21} Finally, the evidence, construed in Cooper's favor, also suggests Deputy Burns derived some enjoyment from the events at Tommy's. The security video shows him filling out his arrest report after taking Cooper into custody. He is seen standing at the counter across from the female clerk, who was also writing a statement. While completing the paperwork, Deputy Burns is laughing, as he and the clerk appear to be comparing notes. Several months later, Deputy Burns again appeared to be laughing while Cooper was recounting the embarrassment of being arrested in his own neighborhood, led out of a local restaurant in handcuffs, and forced to spend a night in jail while he waited for his wife to come and post bond. (See Cooper Depo. 93.) Although the evidence may have an explanation unrelated to the Cooper incident, such evidence, construed in Cooper's

favor, suggests Deputy Burns derived some sort of pleasure or amusement from the circumstances Deputy Burns brought to bear on Cooper.

{¶22} Given the conflicting testimony concerning the events that transpired at Tommy's Pizza, it is not possible to determine Deputy Burns' state of mind by means of summary judgment. When the underlying facts and assertions by the parties are so completely divergent, as they are in this case, the issue needs to be decided by a jury. Because we find that reasonable minds could come to different conclusions about whether Deputy Burns acted with a malicious purpose in arresting Cooper, we sustain the second assignment of error. As noted above, the first assignment of error is rendered moot because of our de novo standard of review. Based on the foregoing, we reverse the trial court's decision, and remand this case for further proceedings consistent with this decision.

Judgment reversed; cause remanded.

BRYANT, J., concurs.
FRENCH, J., dissents

FRENCH, J., dissenting.

{¶23} Deputy Burns moved for summary judgment on the grounds that he was statutorily immune from suit. The trial court held that there remained a question of fact as to whether Burns had probable cause to arrest Cooper. The trial court went on to hold, however, that there was no question of fact as to whether Burns had acted with malice and granted summary judgment in favor of Burns on these grounds.

{¶24} Viewing, as we must, the evidence in a light most favorable to Cooper, we assume that Cooper's version of the facts is true. According to Cooper, he did nothing to

provoke Burns' demand, while pointing and shouting like a "drill sergeant," that he and Ary, " 'shut up, shut up right now or you can just leave.' " (Cooper Depo. 55.) Cooper made no disparaging remarks to the cashier, and he made no threats to other customers.

{¶25} According to Cooper, he also did nothing to provoke his arrest, when he walked toward Burns in the hallway and said, without making a threat or using profanity, " 'I'm never coming back here again,' " and " 'it's because of you.' " (Cooper Depo. 71.) Burns did not issue a warning to Cooper that he would be arrested if he did not leave. Instead, Burns immediately placed Cooper under arrest and escorted him outside, where he placed Cooper in handcuffs, and they waited for 30 minutes for another officer. Ary testified that Burns pushed Cooper "a little aggressively down the hallway" and out the door. (Ary Depo. 66.)

{¶26} Cooper claims no physical injuries as a result of Burns' actions. Instead, he claims to have suffered emotional pain.

{¶27} Cooper also offers the testimony of Cynthia Ackerman. Ackerman testified that Burns' tone toward Cooper and Ary "was extremely negative. Very aggressive. His body language was aggressive, his tone was aggressive, and very provoking." (Ackerman Depo. 14.)

{¶28} While Burns disputes these facts, we do not consider Burns' version of the disputed evidence on summary judgment. We do consider, however, Burns' testimony that the restaurant manager asked Burns to "keep an eye on" Cooper and Ary because they were "making rude comments" to the cashier. (Burns Depo. 38.) While Cooper denied making rude comments to the cashier, he provided no evidence to dispute Burns'

testimony that the manager had asked him to watch the two men, so we properly consider that evidence at this stage.

{¶29} In my view, the evidence does not create a question of fact as to whether Burns acted with malice. The evidence shows that Burns yelled at Cooper and Ary to either shut up or leave, he acted aggressively, he was provoking, and he may not have had probable cause to make the arrest. The evidence does not, however, indicate that Burns acted out of ill will toward Cooper or wanted to harm him, physically or emotionally. Cf. *Piro v. Franklin Twp.* (1995), 102 Ohio App.3d 130, 140 (question of fact as to malice arose from evidence that the officer called the plaintiff derogatory names and said that criminal charges would prevent the plaintiff from becoming an attorney); *Strongsville v. Terry Dev. Co.* (May 27, 1993), 8th Dist. No. 62057 (official's "slanderous remarks" about the plaintiff's family "was sufficient probative evidence of malice, bad faith and recklessness" and trial court erred by excluding it). Therefore, I agree with the trial court's grant of summary judgment in favor of Burns on grounds of immunity. Because the majority concludes otherwise, I respectfully dissent.
