

Affirmed and Memorandum Opinion filed January 27, 2011.



In The

**Fourteenth Court of Appeals**

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NO. 14-09-00857-CV

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**MARIA C. ARRENDONDO, Appellant**

**V.**

**MARTIN RODRIGUEZ AND LEWIS FOOD TOWN, INC., Appellees**

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**On Appeal from the 190th District Court  
Harris County, Texas  
Trial Court Cause No. 2008-56560**

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**MEMORANDUM OPINION**

The appellant, Maria C. Arrendondo, appeals the trial court's grant of summary judgment in favor of the appellees, Martin Rodriguez and Food Town, Inc., on her malicious-prosecution claim against them. In three issues, she contends the evidence showed that Rodriguez, the manager of Food Town, initiated a criminal prosecution against her knowing she was not involved in any criminal activity, and that he acted without probable cause and with malice. We affirm.

On November 11, 2007, Maria Arrendondo was working as a cashier at Food Town. Around lunch time that day, Arrendondo took a break, and Yuri Mendez, another Food Town employee, covered Arrendondo's cashier station until Arrendondo returned. While Mendez was checking out groceries at Arrendondo's station, a customer, Maria Soto, got in line to check out there. Before Soto reached the check-out area, however, Arrendondo returned to her station. Arrendondo began assisting Soto, but Soto told Arrendondo she did not want all of the items in her cart. Arrendondo then rang up only the items Soto wanted and told Soto to push her cart containing the other items forward, which was contrary to Arrendondo's cashier training and Food Town's check-out protocol. At that point, Arrendondo began assisting the next customer and did not see what became of the cart or its contents.

Another cashier, Yesica Adame, whose station was next to Arrendondo's, saw the transaction with Soto and alerted Food Town management that a customer had checked out at Arrendondo's cashier station, but the majority of her grocery items had not been rung up or even taken out of her grocery cart. Rodriguez, who was in charge of the store that day, obtained a copy of Soto's receipt and reviewed the surveillance video of the area. In the video, Arrendondo appeared to "slide" at least one item over the cashier counter without ringing it up.

Some time after leaving Arrendondo's station, Soto proceeded to get into Mendez's check-out lane where Mendez issued a fraudulent \$50 refund to her, after which Soto headed towards the store exit with her cart. Rodriguez prevented Soto from leaving and asked to see her receipt. Although Soto had nineteen items worth about \$79 in her cart, her Food Town receipt showed that she had paid for only six items worth about \$8 when she checked out at Arrendondo's station. At this point, Rodriguez believed that Arrendondo, Soto, and Mendez were all involved in theft.

Rodriguez questioned Arrendondo, Soto, and Mendez about their actions, but they provided no satisfactory explanation. Rodriguez asked Arrendondo about the unpaid-for

groceries in Soto's cart, but Arrendondo said she did not know anything about them. Believing two crimes had been committed, Rodriguez called the police. Some time after the officers arrived, Rodriguez told the officers to "take them," presumably meaning to arrest Arrendondo, Soto, and Mendez. Ultimately, Arrendondo and Soto were arrested and taken into custody. Mendez was cited for misdemeanor theft and released.

Arrendondo never spoke with either of the two police officers who arrived at the scene, and she did not hear any conversation between Rodriguez and the officers. According to Arrendondo, after she and Soto were put in the patrol car, Soto told her that she and Mendez had planned to commit theft and, when Rodriguez questioned them, they told Rodriguez that Arrendondo was not involved, but Rodriguez told them to incriminate Arrendondo.

Arrendondo and Soto were both charged with theft. Soto later pleaded guilty, but in 2008 Arrendondo was acquitted after a jury trial. At the trial, Soto testified that Arrendondo was innocent. Arrendondo then filed this lawsuit against Rodriguez and Food Town for malicious prosecution.

## II

### A

Actions for malicious prosecution create a tension between the societal interest in punishing crimes and the individual interest in protection from unjustifiable criminal prosecution. *Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 520 (Tex. 1997). There is little room for error in applying the law, as "[e]ven a small departure from the exact prerequisites for liability may threaten the delicate balance between protecting against wrongful prosecution and encouraging reporting of criminal conduct." *Browning-Ferris Indus., Inc. v. Lieck*, 881 S.W.2d 288, 291 (Tex. 1994).

A claim for malicious prosecution requires the plaintiff to prove that (1) a criminal prosecution was commenced against her, (2) the defendants initiated or procured the prosecution, (3) the prosecution terminated in her favor, (4) she is innocent of the charges, (5) the defendants lacked probable cause to initiate the prosecution, (6) the

defendants acted with malice, and (7) she suffered damages. *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 792 n.3 (Tex. 2006); *Richey*, 952 S.W.2d at 517. Rodriguez and Food Town filed a summary-judgment motion on both traditional and no-evidence grounds asserting there was no evidence on the elements of initiating or procuring Arrendondo's prosecution, probable cause, and malice.

## B

After adequate time for discovery, a party may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. Tex. R. Civ. P. 166a(i). Such a no-evidence motion for summary judgment should be denied if the non-movant presents more than a scintilla of probative evidence to raise a genuine issue of material fact on the challenged element(s). *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003). More than a scintilla of evidence exists when reasonable and fair-minded individuals could differ in their conclusions. *Id.* Less than a scintilla of probative evidence exists if the evidence creates no more than a mere surmise or suspicion of fact regarding the challenged element(s). *Id.*

By comparison, a traditional summary-judgment movant bears the burden to show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). Thus, when a defendant moves for traditional summary judgment, it must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). Evidence may be said to have been conclusively established when reasonable people could not differ in their conclusions. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). Once the movant establishes its right to summary judgment, the non-movant must present evidence raising a genuine

issue of material fact to avoid entry of a summary judgment. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

In reviewing either a no-evidence or traditional summary-judgment motion, we must take as true all evidence favorable to the non-movant and draw every reasonable inference and resolve all doubts in favor of the non-movant. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 157 (Tex. 2004); *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004).

### C

Because it is dispositive, we begin with Arrendondo's second issue. Arrendondo contends Rodriguez had no probable cause to have Arrendondo arrested when there was no evidence that Arrendondo had committed or participated in a crime, and Soto and Mendez, the culpable parties, had told Rodriguez that Arrendondo was not involved.<sup>1</sup>

Probable cause is “the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the . . . [complainant], that the person charged was guilty of the crime for which he was prosecuted.” *Richey*, 952 S.W.2d at 517 (quoting *Akin v. Dahl*, 661 S.W.2d 917, 921 (Tex. 1983)). The question is whether a reasonable person would believe that a crime had been committed, given the facts that the complainant, before initiating the criminal proceedings, honestly and reasonably believed to be true. *Id.* There is an initial presumption that the defendant acted reasonably and in good faith and had probable cause to initiate the proceedings. *Id.* That presumption disappears once a plaintiff

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<sup>1</sup> The record shows that this evidence is based on Arrendondo's testimony that Soto told her that Soto and Mendez told Rodriguez that Arrendondo had nothing to do with the crime and that Rodriguez told them to blame Arrendondo. Although the appellees objected below to this evidence as hearsay, the record does not show that they obtained a ruling or that the trial court refused to rule on their objections. See Tex. R. App. P. 33.1(a). Nor is the trial court's order specific enough to indicate an implied ruling on the appellees' objections to evidence. See *U.S. Bank Nat'l Ass'n v. Stanley*, 297 S.W.3d 815, 821 n.8 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Further, the appellees do not contend on appeal that this evidence is hearsay or otherwise incompetent. Therefore, the testimony remains a part of the summary-judgment evidence.

produces evidence that the motives, grounds, beliefs, and other evidence upon which the defendant acted did not constitute probable cause. *Id.* at 518. The burden then shifts to the defendant to offer proof of probable cause. *Id.*

Once a citizen has probable cause to report a crime, there can be no malicious prosecution, even if the subsequent report fails to fully disclose all relevant facts. *First Valley Bank of Los Fresnos v. Martin*, 144 S.W.3d 466, 470 (Tex. 2004). A private citizen has no duty to investigate a suspect’s alibi or explanation before reporting a crime. *Suberu*, 216 S.W.3d at 794. If the acts or omissions necessary to constitute a crime reasonably appear to have been completed, a complainant’s failure to investigate does not negate probable cause. *Id.* Further, although knowingly providing false information to a public official may be relevant to the causation and malice elements of a malicious-prosecution claim, it has no bearing on the element of probable cause. *Richey*, 952 S.W.2d at 519.

Rodriguez testified that Arrendondo was detained both because she allowed Soto through the check-out line with a large volume of unpaid-for goods and also appeared in the surveillance video to “slide” a package of diapers over the counter without ringing it up.<sup>2</sup> Rodriguez also explained the transaction in which Mendez made a fraudulent refund to Soto of \$50:

Q. So, [Soto] went through [Arrendondo’s] line, what happened after that?

A. She went through the line. She left some items in her basket, paid for some, but didn’t pay for everything.

Q. Okay. And how do you know she didn’t pay for everything?

A. We pulled the transaction up on our computer to try to find her receipt and we did. And when she tried to exit the store, we stopped her and asked her for her receipt and it didn’t match up with what she had in her basket.

...

Q. Did you approach [Arrendondo]?

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<sup>2</sup> Rodriguez testified that “sliding” refers to a cashier “ringing out an order but not really scanning everything.

A. Yes, I did.

Q. And what happened when you approached her?

A. We asked her to close her register and come to the manager's office.

Q. Okay. At this point, did you suspect her of theft?

A. Yes.

...

Q. So, other than the sliding of the diapers, you have no knowledge that she actually stole, correct, or slid anything across the conveyor belt, correct?

A. She didn't have the customer take the item out of the basket.

Q. Okay. And did you ever do an investigation or ask her why she didn't have the customer take the items out?

A. We asked her about it after [Soto] tried to leave the store; so, we gathered up everybody and, you know, no one could give us any kind of explanation as to why the merchandise didn't get rung up. So, you know, we called the authorities at that point.

...

Q. Did [Arrendondo] ever do anything like report that she made a mistake to you?

A. No.

...

Q. . . . The time [Soto] went through [Mendez's] line, at that time you made a determination after the voided transaction that she was also in on it, correct?

A. We rounded everybody up, yes.

Q. And it was \$71 split between the three of them, correct?

A. I'm not sure how that works.

Q. How much was the refund for?

A. The refund was a totally different transaction. That was another \$50 on top of the \$71.

Q. Okay. Now, you testified earlier that [Soto] went through with the same basket?

A. Correct.

Q. So, what did she refund?

A. Nothing. It was a bogus refund.

Thus, the appellees presented evidence that they reasonably formed the belief that Arredondo participated in the theft of groceries based on the video, the large number of items that went through unchecked and without explanation, and Soto's involvement in both thefts. Further, Arrendondo provided extensive testimony that Food Town policies

required all items to be taken out of the shopping cart, and it was against Food Town's policies to allow unchecked grocery items to be moved over to the sacker side of the cashier lane or to allow customers to leave the point of sale with unpaid-for groceries:

Q. . . . Ms. Arredondo, as a cashier at Food Town, were you trained in how to do your job?

A. Yes. They gave me training for two days.

...

A. All right. Now, the cashier station, that's what's called the point of sale, the area of sale; correct?

A. Yes.

Q. In other words, it's where the items which belong to Food Town are exchanged for money and then they belong to the customers.

A. Yes.

Q. Okay. Were you trained not to allow customers to leave the point of sale with unpaid items?

A. Yes.

...

Q. As a cashier, were you trained that you're responsible for determining which items are to be bagged and which items are not to be bagged?

A. Yes.

...

Q. Were you also trained that everything that a customer brings through your lane must be taken out of the grocery cart?

A. Yes.

Q. And were you trained that you have to pay special attention to the bottom of the basket - - and this is why you were provided with the mirror and with the see-through glass on the bottom; right?

A. Correct.

...

Q. Okay. Now, were you trained at Food Town that the items which a customer rejected or did not want for whatever reason were not to be sacked, were not to be bagged?

A. Correct.

...

Q. All right. In your training at Food Town, were you instructed that when a customer comes up and you are working with a sacker and a customer does not want certain items, that you are to make sure that the sacker does not bag the rejected items?

A. Yes.

Q. That is a responsibility that you had as a cashier at Food Town; right?



A. Yes.

...

Q. Okay. Now, it's not a sacker's job to ring up the groceries or to figure out which groceries have been rung up or not rung up, correct? It's the cashier's job to tell the sacker that.

A. When we have the sacker, yes.

...

Q. Do you have a recollection, in your training at Food Town, of when a customer rejects some items, to direct the customer to leave those items around your cashier station?

A. Yes.

...

Q. Were you trained that only checked items are allowed to be moved over to the sacker's side at Food Town?

A. Yes.

...

Q. Were you trained that if a customer has some items in their cart that have not been rung up, have not been paid for, and is trying to simply push them over to the other side, that you should prevent that, that you should stop it?

A. Correct.

...

Q. Now, in your training, was one of the things that you were trained not to do was mix checked and unchecked items in the same cart? Do you recall that?

A. If I was trained not to do that?

Q. Correct.

A. Yes.

...

Q. All right. What I asked you earlier is if a customer does end up with what you noticed to be both paid-for and unpaid-for items in their shopping cart and tries to go back into the store with the paid and unpaid items, were you trained to prevent that by taking the items that had not been paid for away or reporting a customer?

A. The customer cannot do that.

Q. They cannot go back into the store with both paid and unpaid items?

A. No. He cannot do that.

By Arrendondo's own admission, her handling of the transaction with Soto at the check-out station was completely contrary to Food Town's policies and the procedures Arrendondo had been taught during cashier training. According to Arrendondo, without

any explanation, Soto refused to go through with the purchase of most of the groceries Soto had selected and placed in her cart; in turn, Arrendondo instructed Soto to push the cart full of unpaid-for items forward to the sacker side. Arrendondo acknowledged that, in doing so, she failed to keep the unpaid-for items separate from the paid-for items, failed to instruct Soto to leave the items, and failed to stop Soto from leaving with the unpaid-for items in her cart:

Q. Okay. What got this whole thing started was Yesica going to the management; right?

A. Correct.

Q. Okay. And what she testified to at trial and what we know today is that she went to the management and she said: A customer just left Maria Arredondo's station with a bunch of her grocery items not even having been taken out of her basket. Right? We know that today; correct?

A. Yes, now we know.

...

Q. Okay. And Yesica Adame reported to management that in fact Maria Soto did leave your cashier station with a vast majority of the grocery items not having been taken out of the cart. We know that today; right?

A. Now we know that, yes.

Q. And that was not inaccurate. That was in fact what happened; right?

A. What?

Q. What Yesica Adame told the management, what we just covered, that Maria Soto had left your station with about \$71 worth of unpaid items.

A. Correct, we know that.

...

Q. All right. Now, today we know that a number of items stayed in Maria Soto's cart; right?

A. Yes. That amount of items, Maria told me that she didn't want them.

...

Q. Okay. So you knew and you could see that there were items in Maria Soto's basket that were never taken out; correct? You knew that.

A. Yes.

...

Q. Now, ultimately, what we know happened is that Maria Soto left your station with both paid and unpaid-for items; correct?

A. Yes.

...

Q. Did you ever ask Maria Soto to take those items and put them on the right side of your cashier station?

A. My station?

Q. Yes.

A. No. I just told her to push them forward.

...

Q. I'd just like you to answer my question if you can. Do you have a recollection of doing anything specific that you can point me to on that day when Maria Soto was leaving your cashier station to make sure that the paid and unpaid items were kept separate?

A. No, I don't recall.

Q. Regardless of what items may have been bagged that day and what items were not bagged that day, do you recall doing anything specific that day to make sure that the sacker who showed up to your station did not bag the rejected items; such as telling him not to do that, or doing anything else that you can remember?

A. What happened is that when Maria said good-bye, I did not check what the sacker had done, because I started taking care of the next customer.

...

Q. When Maria Soto was leaving your station, was it your belief that she had left the unpaid-for items somewhere other than taking them with her?

A. Correct. That she had left the basket there.

Q. Did you ever look around to ensure that in fact she did leave the portion of her unwanted groceries somewhere around your station?

A. No. I'm not checking where people leave the items. I'm at my station, my cashier, taking care of my customers.

...

Q. Okay. Now, do you have any recollection what happened to the unpaid items that remained in her basket? Do you recall whether the sacker bagged those or not? Do you have a recollection one way or another?

A. No, I don't recall. I did not see.

Soto testified that the unpaid items were not only left in her cart, but also were bagged up at Arrendondo's station:

Q. What did you do with the basket?

A. I put it over there and somebody pulled it close to the wall on opposite her side.

Q. And did the basket still have items in it?

A. The bagger approached and he began bagging the items that I didn't want, the ones I had with Maria Arrendondo. And neither she nor I did we notice that the bagger was bagging the items that I did not want. So, I only noticed when he bagged the W.I.C. items and I got the basket and went to the taqueria.

When Soto attempted to leave with the unpaid-for groceries, the appellees had a firm basis to form a reasonable belief—based on the quantity of goods and disregard of store protocol—that Arredondo had assisted in the theft of the groceries in Soto’s cart. Moreover, Rodriguez questioned Arredondo regarding the unpaid-for groceries, but she provided no explanation, and stated only that she knew nothing about the situation. Arredondo also testified that she did not know what Rodriguez said to the police officers who arrived at the store and the officers did not question her there:

Q. All right. Now, you’re saying there were - - there were two officers from the Sheriff’s Department there?

A. Yes.

Q. All right. One was already in the office and you’re saying the other one was just coming in?

A. Yes.

...

Q. . . . Okay, Ms. Arredondo, I was asking you about conversations that you overheard Martin Rodriguez having with other people. Do you recall anything that was said specifically between Martin and anybody else in that office?

A. No, I don’t recall.

...

Q. You never had any conversations, as best as you can recall, never exchanged any words with any of the police officers there; is that correct?

A. No.

Q. Is that a true statement?

A. I don’t know.

A. It’s a bad question. I’m sorry. What I said earlier about you not talking to the police, was that correct?

A. It’s correct.

Likewise, in her trial testimony, Arredondo testified that she neither talked with the police nor provided any explanation about this incident:

Q. And did the police officer talk to you?

A. Not at all.

Q. Did the police officer speak Spanish?

A. Neither one of them did.

Q. Did they ever ask you for your side of the story?

A. When I go to the office where [Soto] and [Mendez] were, I was asked what happened to those products. And I told them that I didn't know anything about it.

Arrendondo also admitted that when appellees called the police she did not believe that they were motivated by anything other than a reasonable belief that crimes had been committed on the premises:

Q. Okay. Based on your involvement in the case, your involvement in your criminal trial and all the testimony in it, based on the documentation that you've seen in this case, do you believe that Food Town employees called out the police for some other reason than the fact that they believed that two crimes had occurred on the premises?

A. No.

And based on your involvement in this case and the underlying prosecution and all the documents that you've seen so far, do you believe that Martin Rodriguez detained you for some other reason than honestly believing that you may have been involved in a crime?

A. No.

On appeal, however, Arrendondo contends that Rodriguez lacked probable cause because he allegedly failed to inform the police that Mendez was at Arrendondo's cashier station when Soto got in line to check out there, and Soto and Mendez told Rodriguez that Arrendondo was innocent. Accepting these contentions as true, they do not negate the existence of probable cause to report the suspected criminal activity. *See Suberu*, 216 S.W.3d at 795; *Martin*, 144 S.W.3d at 470.<sup>3</sup> Whether Soto had planned to commit a theft with Mendez when she got in Arrendondo's check-out line is irrelevant because Soto did, in fact, check out with Arrendondo, who admits she allowed Soto to go through the line without paying for the majority of the items she had placed in her cart. And, although Soto and Mendez may have maintained to Rodriguez that Arrendondo was not involved, Rodriguez had independent, objective evidence that would lead a reasonable person to

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<sup>3</sup> Further, Arrendondo's contention that Rodriguez acted with malice when he allegedly told Soto and Mendez to blame Arrendondo is not relevant to the existence of probable cause. *See Martin*, 144 S.W.3d at 470; *Richey*, 952 S.W.2d at 519.

believe that Arrendondo was complicit in the thefts, regardless of the statements Soto and Mendez made when they were questioned, and Rodriguez had no duty to investigate or inquire further into Arrendondo's state of mind before reporting the suspected criminal activity. *See Richey*, 952 S.W.2d at 518 (holding that, even if intent cannot be presumed, probable cause exists when the objective elements of a crime reasonably appear to have been completed).

Thus, the undisputed evidence conclusively shows that appellees had probable cause to initiate or procure the prosecution of Arrendondo: (1) Food Town employees saw Arrendondo allow Soto to pass through her check-out line without paying for most of the items in her cart in a manner that was completely contrary to Arrendondo's training and store policy; (2) Arrendondo admitted that she knew Soto had not paid for all the items in her cart when she passed through to exit Arrendondo's check-out line; and (3) Arrendondo agreed that Rodriguez and Food Town reasonably believed that she may have been involved in a crime. Therefore, the appellees were entitled to summary judgment on Arrendondo's malicious-prosecution claim. *See Richey*, 952 S.W.2d at 518–20, *see also Summerville v. Allied Barton Sec. Servs.*, 248 S.W.3d 333, 339 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (affirming summary judgment for store when appellant contended his arrest was motivated by racial profiling but undisputed evidence showed that he committed trespass).

We overrule Arrendondo's second issue and do not reach her first or third issues.

\* \* \*

The trial court's judgment is affirmed.

/s/ Jeffrey V. Brown  
Justice

Panel consists of Justices Anderson, Frost, and Brown.