

IN THE UTAH COURT OF APPEALS

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Filippo Magistro,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellant,)	
)	Case No. 20100170-CA
v.)	
)	F I L E D
Jordan Day,)	(December 30, 2010)
)	
Defendant and Appellee.)	<div style="border: 1px solid black; padding: 2px;">2010 UT App 397</div>

Fourth District, Provo Department, 090402337
The Honorable Samuel D. McVey

Attorneys: Anthony V. Rippa, Murray, for Appellant
Aaron Alma Nelson, Salt Lake City, for Appellee

Before Judges Davis, Voros, and Christiansen.

DAVIS, Presiding Judge:

Plaintiff Filippo Magistro appeals from the decision of the district court, arguing that the district court erred in granting summary judgment in favor of Defendant Jordan Day. Magistro argues that summary judgment was inappropriate on each of his five claims: malicious prosecution, abuse of process, intentional infliction of emotional distress, defamation, and punitive damages. "The propriety of a grant or denial of summary judgment is a question of law, which we review for correctness. In doing so, we view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Glenn v. Reese, 2009 UT 80, ¶ 6, 225 P.3d 185 (citation and internal quotation marks omitted).

Magistro contests the grant of summary judgment on his malicious prosecution claim.

In order to successfully maintain a claim for malicious prosecution, a party must establish four elements: "(1) A criminal proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the accused; (3) absence of probable cause for the proceeding;

[and] (4) 'malice,' or a primary purpose other than that of bringing an offender to justice." The failure to establish any one of the four elements is fatal to the cause of action.

Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 959 (Utah Ct. App. 1989) (alteration in original) (quoting Callioux v. Progressive Ins. Co., 745 P.2d 838, 843 (Utah Ct. App. 1987)). We agree with the district court that, as a matter of law, Magistro did not meet the second requirement for a malicious prosecution claim, that is, the criminal proceeding did not terminate in Magistro's favor.¹ "A favorable termination of a criminal prosecution occurs, inter alia, when the proceedings against the accused are dismissed by 'the formal abandonment of the proceedings by the public prosecutor'" Hodges v. Gibson Prods. Co., 811 P.2d 151, 161 (Utah 1991) (omission in original) (emphasis omitted) (quoting Restatement (Second) of Torts § 659(c) (1977)). But such did not happen here. Although the prosecutor chose to amend the information and pursue lesser charges, the proceedings were in no way abandoned. Instead, the prosecutor went forward with other charges, and faced with those charges, Magistro entered into a plea bargain. And it is well established that such a compromise does not constitute a favorable termination for purposes of a malicious prosecution analysis. See Puttuck v. Gendron, 2008 UT App 362, ¶ 9, 199 P.3d 971 ("A termination of criminal proceedings in favor of the accused other than by acquittal is not a sufficient termination to meet the requirements of a cause of action for malicious prosecution if . . . the charge is withdrawn or the prosecution abandoned pursuant to an agreement of compromise with the accused

¹Magistro may have also failed to meet other of the malicious prosecution requirements, and any such failure would also be fatal to his claim. For example, in order to show malicious prosecution one must prove malice, that is, that the other party acted with "'a primary purpose other than that of bringing an offender to justice.'" Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 959 (Utah Ct. App. 1989) (quoting Callioux v. Progressive Ins. Co., 745 P.2d 838, 843 (Utah Ct. App. 1987)); see also Gilbert v. Ince, 1999 UT 65, ¶ 18, 981 P.2d 841 ("[M]alicious prosecution applies to the circumstance when a person with improper motive falsely accuses another individual of a crime."). And a party simply cannot report a suspected crime in good faith while at the same time meeting this malice requirement. See generally Webster's New Collegiate Dictionary 527 (9th ed. 1986) (defining good faith as "honesty or lawfulness of purpose"). Nevertheless, we focus our analysis on the deficiency that the district court determined was fatal.

. . . ." (omissions in original) (quoting Restatement (Second) of Torts § 660 (1977))). We therefore affirm the district court's grant of summary judgment on this issue.

Next, although the district court failed to specifically address Magistro's claim of abuse of process, we determine that Magistro's abuse of process claim fails as a matter of law. In his argument on this issue, Magistro simply reiterates contentions advanced under his malicious prosecution argument. But the requirements of the two causes of action are quite different:

[I]n an action for abuse of process, it is not necessary to show either malice or want of probable cause, nor that the proceeding had terminated, and it is immaterial whether such proceeding was baseless or not. Rather, to establish a claim for abuse of process, a claimant must demonstrate first, an ulterior purpose; [and] second, an act in the use of process not proper in the regular prosecution of the proceedings. Thus, in a claim for abuse of process, the allegations must describe not just misuse of process, but misuse for some wrongful and unlawful object, or ulterior purpose.

Id. ¶ 13 (second alteration in original) (citations and internal quotation marks omitted). We have previously determined that an intention to intimidate or embarrass does not alone satisfy the ulterior purpose requirement of an abuse of process claim. See id. ¶ 16. And Magistro alleges no other ulterior purposes behind Day's actions. Thus, this claim fails as a matter of law and we affirm on this issue.

Magistro also contests the grant of summary judgment on his claim of intentional infliction of emotional distress.

To state a claim for intentional infliction of emotional distress, a party must plead facts indicating that the defendant "intentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality."

Anderson Dev. Co. v. Tobias, 2005 UT 36, ¶ 55, 116 P.3d 323 (quoting Bennett v. Jones, Waldo, Holbrook & McDonough, 2003 UT 9, ¶ 58, 70 P.3d 17). The conduct that Magistro argues supports his intentional infliction of emotional distress claim is Day's report to the police. The Utah Supreme Court has established, however, that "[a] mere 'allegation of improper filing of a lawsuit or the use of legal process against an individual' does not state a claim for outrageous or intolerable conduct and, as such, 'is not redressable by a cause of action for intentional infliction of emotional distress.'" Id. (quoting Bennett, 2003 UT 9, ¶ 66). Thus, we also affirm summary judgment on this issue.

Next, Magistro argues that the district court should not have granted summary judgment on his defamation claim. "To establish a claim for defamation, a plaintiff must demonstrate that '(1) the defendant published the statements [in print or orally]; (2) the statements were false; (3) the statements were not subject to privilege; (4) the statements were published with the requisite degree of fault; and (5) the statements resulted in damages.'" Oman v. Davis Sch. Dist., 2008 UT 70, ¶ 68, 194 P.3d 956 (alteration in original) (quoting DeBry v. Godbe, 1999 UT 111, ¶ 8, 992 P.2d 979). Thus, "truth is an absolute defense to an action for defamation." Brehany v. Nordstrom, Inc., 812 P.2d 49, 57 (Utah 1991). And even when statements are not totally or literally true, the fact that statements are "substantially true" is a valid defense. See Jensen v. Sawyers, 2005 UT 81, ¶ 89, 130 P.3d 325. "That statements which may be infected with inaccuracy, innuendo, and outright falsity and still not be actionable so long as their 'gist' or 'sting' rings true is but one of countless ways the law defers to the commanding presence of free expression among our liberties." Id. Here, we agree with the district court that Day's statements were at least substantially true. Magistro ultimately admitted that the physical contact alleged by Day did occur; he argues only that the contact was consensual and that he did not use force during the encounter. Although Day stated that he had not wanted the physical contact to occur, he never stated that Magistro used any sort of actual force during the encounter. And as to the conflicting positions regarding several details, including whether there were one or two hugs, who "initiated" the hug(s), and whether Magistro "took" instead of "grabbed" Day's hand, we do not see that Day's version of these events "would have a different effect on the mind of the [listener] from that which [Magistro's version] would have produced," see Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991) (internal quotation marks omitted) (explaining statements that are considered false). We therefore affirm the district court's grant of summary judgment on this issue.

Finally, we address the summary judgment granted on Magistro's claim for punitive damages. The Utah Code provides that a necessary condition for a punitive damages award is that "compensatory or general damages are awarded." Utah Code Ann. § 78B-8-201(1)(a) (Supp. 2010). In light of our affirmance of the district court's grant of summary judgment on each of Magistro's other claims, it is certain that there will be no award of compensatory or general damages, and we therefore must affirm summary judgment in favor of Day on this issue as well.

Affirmed.

James Z. Davis,
Presiding Judge

WE CONCUR:

J. Frederic Voros Jr., Judge

Michele M. Christiansen, Judge