

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JIN SONG and YONG SONG, husband and wife,)	No. 27195-1-III
)	
Appellants,)	Division Three
)	
v.)	
)	UNPUBLISHED OPINION
J.C. PENNEY COMPANY, INC., a Delaware Corporation,)	
)	
)	
Respondent and Cross-Appellant.)	
)	

Brown, J. — Yong Song and her husband, Jin Song, appeal the summary dismissal of their malicious prosecution claims and the post-trial dismissal of their employment discrimination claim against J.C. Penney Company, Inc. We affirm the trial court’s summary judgment rulings, and reject the Songs’ contention that the trial court erred in admitting Mrs. Song’s confession during the jury trial. Therefore, we do not reach J.C. Penney’s cross-appeal raising alleged error in the trial court’s failure to grant summary dismissal of the discrimination claim and its motion for judgment as a matter of law on that claim at the end of the Songs’ case. Accordingly, we affirm.

FACTS

Mrs. Song, a Korean-American, was employed with J.C. Penney from May 1995 until August 1998. In late 1997, J.C. Penney became suspicious that Mrs. Song was giving unauthorized discounts to customers. J.C. Penney's investigation ran many months. An internal audit revealed an unusually high number of discounts given by Mrs. Song. And, video surveillance showed questionable customer transactions. Finally, J.C. Penney's prevention loss manager, David Netherland, confronted Mrs. Song.

According to Mrs. Song, Mr. Netherland appeared frustrated and raised his voice as he sat across from her during the questioning. Ultimately, Mrs. Song wrote out a statement, confessing, "Since Dec. '97 until July 24th - '98 6 occasions I gave unauthorized price to customers. Total was \$533.59." Clerk's Papers (CP) at 2908. She then wrote that the above statement was "true & complete to the best of my knowledge & recollection" and then signed the statement. *Id.* J.C. Penney terminated Mrs. Song following the interview.

J.C. Penney is located inside the Columbia Center Mall. Per a concerted effort between the mall and the Kennewick Police Department, J.C. Penney forwarded its investigation report to the mall's community resource center, who in turn forwarded it to the Kennewick Police Department. The city attorney concluded that probable cause

No. 27195-1-III
Song v. J.C. Penney

existed to charge Mrs. Song with six counts of third degree theft.

Three theft charges were dismissed. Mrs. Song was acquitted of two theft charges and found guilty of one theft charge. On appeal to the superior court, the conviction was reversed based in part on evidentiary error during trial. Apparently, the reversed theft count was later dismissed on a speedy trial violation.

The Songs then sued J.C. Penney, alleging, inter alia, malicious prosecution and employment discrimination. Over time, J.C. Penney successfully requested summary judgment on all malicious prosecution claims. J.C. Penney unsuccessfully requested summary dismissal of the discrimination claim.

At the Songs' employment discrimination jury trial, they unsuccessfully moved in limine to exclude all evidence concerning Mrs. Song's written statement. Following the Songs' case, J.C. Penney unsuccessfully moved the court for a directed verdict¹ based on the Songs' alleged failure to present sufficient evidence to meet their burden of proof on the discrimination claim.

The jury found for J.C. Penney. Following an unsuccessful new-trial request, the Songs appealed. Hedging against a successful discrimination-verdict appeal, J.C. Penney cross-appealed the trial court's refusal to grant summary judgment on the discrimination claims and the denial of its motion for judgment as a matter of law on the discrimination claim at the close of the Songs' case. We do not need to reach the

¹ Motions for a directed verdict were renamed motions for judgment as a matter of law effective September 17, 1993. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001).

cross-appeal.

ANALYSIS

A. Summary Dismissal of Malicious Prosecution Claims

The issue is whether the trial court erred in summarily dismissing the Songs' six malicious prosecution claims against J.C. Penney.

We review an order on summary judgment de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We view all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is appropriate only if reasonable persons could reach but one conclusion from all the evidence. *Id.*

To maintain an action for malicious prosecution, a plaintiff must prove:

(1) that the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) that there was want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were

No. 27195-1-III
Song v. J.C. Penney

abandoned; and (5) that the plaintiff suffered injury or damage as a result of the prosecution.

Clark v. Baines, 150 Wn.2d 905, 911, 84 P.3d 245 (2004). Although the plaintiff must prove all of these elements, “malice and want of probable cause constitute the gist of a malicious prosecution action.” *Hanson v. City of Snohomish*, 121 Wn.2d 552, 558, 852 P.2d 295 (1993) (citing *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 496-97, 125 P.2d 681 (1942)). Here, the Songs fail to present evidence to create a genuine issue of material fact regarding probable cause.

A prima facie case of lack of probable cause is established where criminal proceedings are dismissed or terminated in a malicious prosecution in the plaintiff’s favor. *Banks v. Nordstrom, Inc.*, 57 Wn. App. 251, 259-60, 787 P.2d 953 (1990). But, probable cause may be established as a matter of law where unrefuted evidence shows that before instituting criminal proceedings, a full and fair disclosure was made of all known material facts, and the prosecutor thereupon filed a charge. *Bender v. City of Seattle*, 99 Wn.2d 582, 593, 664 P.2d 492 (1983). This is the case here.

J.C. Penney presented to the city attorney its investigative report, which contained information compiled over several months regarding unauthorized discounts, video surveillance, and an internal audit revealing an unusually high number of discounts associated with Mrs. Song. The report also included a written confession (the admissibility of which is discussed below). Nothing in the record casts doubt on J.C. Penney’s loss prevention personnel’s truthfulness or motivation. The city attorney

reasonably concluded from the evidence that probable cause existed to believe Mrs. Song engaged in theft while employed at J.C. Penney.

Probable cause to prosecute is a complete defense. The trial court did not err in dismissing the malicious prosecution claims.

B. Confession Evidence

The issue is whether, considering relevancy and prejudicial effect, the trial court erred by abusing its discretion in admitting Mrs. Song's written confession.²

Initially, J.C. Penney contends the Songs waived objection to the confession by listing it as an exhibit prior to trial under ER 904. ER 904 addresses the admissibility of certain documents and requires a party to notify the opposing party of those documents to be admitted under the rule no less than 30 days before trial. "The purpose of ER 904 is to expedite the admission of documentary evidence." *Hendrickson v. King County*, 101 Wn. App. 258, 268, 2 P.3d 1006 (2000). ER 904 designation creates an "expectation of admission." *Id.* (quoting *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 260, 944 P.2d 1005 (1997)).

The rule expressly provides that "objection on the grounds of relevancy need not be made until trial." ER 904(c)(2). But, this section addresses objections made by the

² The Songs mention in their briefs that Mrs. Song's confession was coerced. But, they fail to support their contention with legal argument or authority. Therefore, we do not address this contention, except to note that the jury was properly left to resolve any factual disputes regarding the weight given the confession.

No. 27195-1-III
Song v. J.C. Penney

“other party” not the party designating the document in question. ER 904(c) (emphasis added). Nevertheless, assuming without deciding that the Songs did not waive their objection, the trial court did not abuse its discretion in admitting the confession.

A trial court has broad discretion in ruling on the admissibility of evidence, including motions in limine. *Salas v. Hi-Tech Erectors*, 143 Wn. App. 373, 378, 177 P.3d 769 (2008). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Olver v. Fowler*, 161 Wn.2d 655, 663, 168 P.3d 348 (2007).

To be admissible, evidence must be relevant. ER 402. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence. ER 401. Even if relevant, however, evidence may still be excluded if its probative value is substantially outweighed by the likelihood it will mislead the jury. ER 403. A trial court has wide discretion in determining whether evidence will mislead the jury. *State v. Luvene*, 127 Wn.2d 690, 707, 903 P.2d 960 (1995).

The Washington Law Against Discrimination, chapter 49.60 RCW, prohibits an employer from discharging any employee on the basis of, among other things, race or national origin. RCW 49.60.180(2). The termination is discriminatory if the employee (1) belongs in a protected class; (2) was discharged; (3) was doing satisfactory work when the termination decision was made; and (4) was replaced by someone not in the protected class. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct.

No. 27195-1-III
Song v. J.C. Penney

1817, 36 L. Ed. 2d 668 (1973). Once the employee presents a prima facie case, a presumption of discrimination exists and the employer must produce evidence of legitimate, nondiscriminatory reasons for the termination. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 363-64, 753 P.2d 517 (1988).

The confession tended to make the existence of a fact of consequence more probable or less probable than it would be without the evidence. Specifically, the confession went to whether J.C. Penney had a legitimate, nondiscriminatory reason for the termination. Thus, the confession was relevant. Moreover, the confession would unlikely mislead the jury since the Songs presented evidence regarding the circumstances of the confession to the jury. The weight of evidence is within the exclusive province of the trier of fact. *Affordable Cabs, Inc. v. Employment Sec. Dep't*, 124 Wn. App. 361, 367, 101 P.3d 440 (2004). Thus, the confession's probative value outweighed the likelihood it would mislead the jury.

Given all, the trial court did not abuse its discretion in admitting the confession under ER 401 and ER 403. Likewise, the trial court did not err in denying the Songs' request for a new trial based on the confession's admittance.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

No. 27195-1-III
Song v. J.C. Penney

WE CONCUR:

Kulik, A.C.J.

Sweeney, J.