

{¶4} In response to Divjak's radio call for assistance, Trooper Foltz and local law enforcement officers arrived at the scene. Although plaintiff initially refused Foltz's request to inspect the cargo, he eventually allowed Divjak to perform an inspection. However, plaintiff continued to be uncooperative, and when he refused Foltz's requests to view the truck log, Foltz placed him under arrest for obstructing official business in violation of R.C. 2921.31(A). Plaintiff's truck was subsequently weighed, and as a result, he was also cited for operating his vehicle while it was 42,700 pounds over the eighty thousand pound weight limit. The charges against plaintiff were dismissed by the Napoleon Municipal Court in Henry County upon plaintiff's motion to suppress which asserted that the stop by Divjak was not valid.

{¶5} The second incident involving plaintiff occurred on July 20, 1999. At approximately 5:45 a.m. that morning, Divjak had just begun his assignment in Williams County when he observed a commercial truck traveling northbound on SR 49, a two-lane roadway. Divjak had decided to inspect the first truck he encountered that morning and he activated his overhead lights to signal the driver to stop. The truck was approximately two hundred feet south of Divjak's vehicle when he activated the overhead lights. It was dark when Divjak decided to make the stop and he was unable to identify either the truck or its driver. Plaintiff did not slow his truck and continued northbound as he passed Divjak's vehicle. Divjak followed the truck with his lights and siren activated and when it became apparent that plaintiff did not intend to stop, Divjak decided to pass plaintiff and slow his vehicle in front of the truck. As Divjak slowed his car, plaintiff drove the truck left of the solid yellow centerline and passed Divjak's car. Divjak continued to follow plaintiff as he drove north for several miles to the Ohio/Michigan state line. Plaintiff stopped his truck approximately fifty feet north of the state line and Divjak remained in his vehicle in Ohio.

{¶6} Divjak radioed for assistance and a dispatcher directed law enforcement officers to respond. Before the officers arrived, plaintiff exited his truck, approached Divjak's vehicle and used obscenities to berate Divjak for stopping him. Eventually,

Trooper Foltz, a trooper from the Michigan State police and two Michigan county deputies arrived at the scene. The Michigan authorities completed an inspection of plaintiff's truck.

{¶7} Foltz took a report from Divjak and discussed the July 20, 1999, incident with his supervisor and the Williams County Prosecutor to determine whether any charges should be filed against plaintiff. As a result of the prosecutor's advice, Foltz filed a charge, pursuant to R.C. 2921.331(A), for failure to comply with an order or signal of a police officer. On October 18, 1999, the prosecutor's motion to dismiss the charge against plaintiff was granted by the Bryan Municipal Court.

{¶8} Plaintiff alleges that Divjak and Foltz acted maliciously, in bad faith and manifestly outside the authority of their respective positions by instigating the prosecution of plaintiff based upon an unlawful stop of his truck. The court must first determine whether Divjak and Foltz are entitled to personal immunity pursuant to R.C. 2743.02(F) and 9.86.

{¶9} R.C. 2743.02(F) reads, in part:

{¶10} "A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer, or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. ***"

{¶11} R.C. 9.86 states, in part:

{¶12} "**** [n]o officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damages or injury caused in the performance of his duties, unless the officer's or employee's actions were *manifestly outside the scope of his employment or official responsibilities* or unless the officer or employee acted with

*malicious purpose, in bad faith, or in a wanton or reckless manner. ***** (Emphasis added.)

{¶13} In determining the immunity of state employees pursuant to R.C. 9.86, a wrongful act by an employee, even if unnecessary, unjustified, excessive or improper, is not automatically outside the scope of employment. *Elliott v. Ohio Dept. of Rehab. & Corr.* (1994), 92 Ohio App.3d 772, 775. To be found outside the scope of employment, an act must be so divergent as to sever the employer-employee relationship. *Id.* Applying this standard to the testimony and evidence, the court finds that Divjak's and Foltz's actions involving plaintiff were all made within the course and scope of their employment.

{¶14} With respect to Divjak, the evidence presented at trial revealed that he was following the policy of his employer, the Ohio State Highway Patrol, when he attempted to stop plaintiff's truck to perform a vehicle inspection. Although plaintiff contends that Divjak did not possess the authority to stop commercial vehicles, the court finds that Divjak reasonably relied on defendant's written policy that instructed him to perform such stops. Specifically, defendant's "MCEI No Pursuit Policy," OSP-201.10, advised that "[R.C.] 5503.34 gives the MCEI the authority to stop commercial motor vehicles for the exclusive purpose of inspecting the vehicle for enforcement of Motor Carrier regulations." R.C. 5503.34 provides, in pertinent part:

{¶15} "There is hereby created in the department of public safety, division of state highway patrol, a commercial motor vehicle safety enforcement unit, to be administered by the superintendent of the state highway patrol. This unit shall be responsible for enforcement of commercial motor vehicle transportation safety, economic, and hazardous materials requirements.

{¶16} ****

{¶17} *"Uniformed employees of the commercial motor vehicle safety enforcement unit may stop commercial motor vehicles for the exclusive purpose of inspecting such*

vehicles to enforce compliance with orders and rules of the public utilities commission as required by division (F) of section 5502.01 of the Revised Code.”¹ (Emphasis added.)

{¶18} The State Highway Patrol’s policy also sets forth the “responsibilities of the MCEI” during a pursuit as follows:

{¶19} “When the MCEI determines a suspect is fleeing or failing to comply with the order to stop the following information shall be immediately communicated to the nearest post or district:

{¶20} “a. location of non compliance

{¶21} “b. direction of travel

{¶22} “c. estimated speed of the suspect

{¶23} “d. description, including the license number of the commercial vehicle

{¶24} “e. reason for stopping the vehicle”

{¶25} All of plaintiff’s claims arise from Divjak’s attempts to stop plaintiff for the purpose of conducting a commercial vehicle inspection. Divjak testified that he decided to stop the first truck he encountered on July 20, 1999. The court finds Divjak’s testimony regarding the incident to be credible. Divjak testified that he did not recognize plaintiff or his truck until it was apparent that plaintiff did not intend to stop. In addition, Divjak’s statements to Trooper Foltz were within the scope of his employment, as they were made in accordance with defendant’s policy.

{¶26} Similarly, the evidence presented at trial supports a finding that Foltz acted within the scope of his employment. For both the 1998 and 1999 incidents, Foltz was directed by his supervisor to respond to Divjak’s calls for assistance. Foltz also relied on defendant’s written policy, OSP-201.10 (D)(3), which states: “An operator of a commercial

¹Pursuant to R.C. 5502.01(F), the Department of Public Safety (DPS) was given authority to enforce compliance with Public Utilities Commission (PUCO) rules “and applicable laws in accordance with Chapters 4919, 4921, and 4923 of the Revised Code regarding commercial motor vehicle transportation safety, economic, and hazardous materials requirements.” Employees of the Enforcement Division of the Transportation Department of PUCO were transferred to DPS. *State v. Landrum* (2000), 137 Ohio App.3d 718; Sub. S.B. No. 162.

motor vehicle who refuses to stop after receiving an audible or visible signal from a MCEI unit would be in violation of ORC Section 2921.331 - Failure to comply with any lawful order or direction of a police officer.” As noted above, Foltz and his supervisor decided to confer with the local prosecutor before charges were filed against plaintiff in Williams County. Foltz testified that he fully informed the prosecutor about the facts of the incident and that he followed the prosecutor’s advice when he charged plaintiff with a violation of R.C. 2921.331. Regardless of the fact that the charges against plaintiff were eventually dismissed, the court concludes that there is no evidence that either Divjak or Foltz acted with malicious purpose, in bad faith, or in a wanton or reckless manner. Therefore, the court finds that Divjak and Foltz are entitled to personal immunity pursuant to R.C. 2743.02(F) and 9.86.

{¶27} Turning to the claim for malicious prosecution, plaintiff must establish that there existed: “*** (1) [M]alice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused. ***” *Durbin v. State Highway Patrol* (1992), 83 Ohio App.3d 693, quoting *Trussell v. Gen. Motors Corp.* (1990), 53 Ohio St.3d 142. “Malice,” as the term is used in a claim of malicious prosecution, refers to:

{¶28} “[t]he state of mind under which a person intentionally does a wrongful act without a reasonable lawful excuse and with the intent to inflict injury or under circumstances from which the law will infer an evil intent. *** For purposes of malicious prosecution it means an improper purpose, or any purpose other than the legitimate interest of bringing an offender to justice. ***” *Criss v. Springfield Twp.* (1990), 56 Ohio St.3d 82, 85.

{¶29} The absence of probable cause may give rise to an inference of malice. *Sikora v. Gibbs* (1999) 132 Ohio App.3d 770; *Melanowski v. Judy* (1921), 102 Ohio St. 153, paragraph one of the syllabus. Probable cause may be present though no crime has actually been committed; it exists when the facts and circumstances are such that a cautious individual would be warranted in the belief that the person accused is guilty of the

offense with which he or she is charged. *McFinley v. Bethesda Oak Hosp.* (1992), 79 Ohio App.3d 613, 617.

{¶30} Although plaintiff has established the third element of his malicious prosecution claim because the “failure to comply” charge arising from the July 20, 1999, incident was dismissed by the Bryan Municipal Court, this court finds that plaintiff has failed to prove the first and second elements: malice and lack of probable cause. As stated above, plaintiff failed to prove that either Divjak or Foltz acted in bad faith or with malicious purpose in instituting or continuing the criminal proceedings against plaintiff. Divjak was following defendant’s policy when he initiated the stop for the purpose of a vehicle inspection. Foltz was also following defendant’s written procedures during his investigation and acting upon the advice of his supervisor and the local prosecutor when he charged plaintiff. The court finds that both Divjak and Foltz reasonably believed that plaintiff disregarded a lawful command to submit to an inspection and that Foltz was warranted in his belief that plaintiff had failed to comply with his investigation and orders. Accordingly, the court finds that plaintiff’s malicious prosecution claim is without merit.

{¶31} In his fourth amended complaint, plaintiff added an alternative claim that Divjak and Foltz negligently performed their duties based upon the same facts that were alleged in the malicious prosecution claim. However, upon review of the substance and subject matter of the acts giving rise to the complaint, the court finds that plaintiff has failed to state a claim for negligence. Although plaintiff has pleaded an additional action in negligence, the essential character of plaintiff’s allegations is one of malicious prosecution.

{¶32} Furthermore, a claim that defendant negligently implemented its policies would involve the type of decision-making with respect to public policy and planning that is characterized by a high degree of discretion and judgment. “*** The state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. ***” *Reynolds v. State* (1984), 14 Ohio St.3d 68, paragraph one of the syllabus. Moreover, any allegations that defendant

misinterpreted the law as it relates to its policies or that defendant's policies are implemented in an unlawful manner could have been raised in the underlying criminal case.

{¶33} For the foregoing reasons, judgment shall be rendered in favor of defendant.

J. WARREN BETTIS
Judge

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