

plaintiff's automobile in exchange for plaintiff's help in preparing their business and personal tax returns. Plaintiff testified that he worked for EMI as well and that at times he performed some fieldwork as an installer, but that his main duties included data entry, tracking costs, and installing computer software. Plaintiff insisted he did not have authority to sign checks, to enter into contracts, or to make financial decisions for EMI. According to plaintiff, he was paid by check, received both a W-2 and a 1099 form, and was not responsible for remitting his own tax withholdings to defendant.

{¶4} The auto repair business was sold to Richard Jones in 1995. Plaintiff acknowledged that he negotiated the sales agreement for the Vaughters and prepared the contract. As part of the agreement, Sherrie Vaughters was promised a salaried position as a tow truck dispatcher for a period of two years. It is undisputed that subsequent to the sale, Sherrie never worked as a dispatcher. According to plaintiff, Sherrie's salary represented her share of the sale of the business. Plaintiff maintained that a large portion of Sherrie's salary was withheld for payment of Ohio taxes; that this was arranged so that Sherrie would receive a substantial refund from defendant; and that she intended to use the lump sum to pay down some of her debt owed to the Internal Revenue Service (IRS).

{¶5} After the business was sold, plaintiff continued to perform accounting services for Jones, including data input, tracking costs, and maintaining payroll journals. Plaintiff related that Jones operated the business on a cash basis. According to plaintiff, Jones had not filed any personal income tax returns for several years and he asked plaintiff to help him reconstruct the paperwork. After Jones advised him to hire an assistant to help with the data input, plaintiff hired Carol Pritchett. Plaintiff testified he believed that Jones paid Carol in cash and that it was delivered to her in plain white envelopes with a small note attached. Plaintiff stated that he was paid by Jones in a similar manner; that Jones paid him approximately \$30,000 per year; and that Jones was responsible for submitting plaintiff's withholding tax to defendant. In addition, plaintiff stated that while he took direction from Jones, he had no authority either to deposit or withdraw funds from any business accounts or to sign checks for Jones.

{¶6} Plaintiff admitted that he assisted several employees at both businesses in completing their individual tax returns but he insisted that he did not function as a preparer; he did not accept any money for his services; and he did not sign the individual returns as a preparer.

{¶7} In addition, plaintiff testified that he appeared at defendant's office in March 1997, requesting his refund as well as inquiring about the returns he had submitted for the other employees. Plaintiff explained that when he inquired about the status of the returns, he held power of attorney for the individuals; that they had granted him authority to discuss the returns with defendant; but that his authority was limited such that he could not endorse the refund checks. Plaintiff recalled that he was told by defendant's employees that the returns were being processed and his refund would be forthcoming.

{¶8} Defendant maintains that plaintiff conceived a scheme whereby inflated amounts of withholding would be reported by several individuals in order that they would receive substantial lump sum refunds from defendant. Defendant posits that plaintiff obtained the cooperation of various employees of the businesses by offering to submit all of their returns in exchange for a portion of the refund amounts. Defendant contends that plaintiff persuaded these individuals to sign blank returns, that he prepared the returns, and that he notified defendant that the refunds were to be mailed to a common post office box under plaintiff's control. Due to the unusually high percentage of earnings withheld, and the fact that the same return address was requested for all of the submissions, the returns were singled out by defendant for further review. Defendant subsequently determined that neither business remitted any withholding tax to the state of Ohio for plaintiff or the other employees requesting tax refunds.

{¶9} Once defendant suspected plaintiff had engaged in perpetrating a fraud, an investigation commenced and Agents Shirk and Dunkle were assigned to the case. Plaintiff testified that his home was searched by agents for ODT, the IRS, and the Drug Enforcement Agency (DEA) in May 1997. The agents, operating pursuant to a valid search warrant, removed several boxes of papers, as well as computers, and computer software. Plaintiff stated that he was not permitted to prepare an inventory of the specific items taken

and that some of his property has never been returned. After he hired an attorney, plaintiff learned that the DEA agents suspected Jones of using the auto repair business to disperse monies from drug trafficking; that when they searched plaintiff's home they were primarily interested in ascertaining the extent of plaintiff's connection to the purported criminal wrongdoings committed by Jones; and that they were unable to locate any evidence linking plaintiff to Jones' alleged misconduct. Eventually, the IRS and DEA mailed notices to plaintiff indicating that he was no longer being investigated.

{¶10} However, in September 1997 plaintiff was indicted by a local grand jury for nine counts of filing false or fraudulent state income tax returns. Plaintiff related that the charges were based on statements made to the agents by several witnesses including Sherrie Vaughters, Mary Emrich, and Carol Pritchett, who allegedly outlined the scheme as presented to them by plaintiff and who then conceded that because they were not knowledgeable about tax matters as such, they relied on plaintiff to advise them. According to plaintiff, the initial charges were dismissed when the witnesses subpoenaed by the prosecution failed to appear at trial. A few months later, plaintiff received notice of a second indictment on three related charges. Once again, the case came on for trial and the charges were dismissed because the witnesses were either uncooperative or failed to appear at trial.

{¶11} Plaintiff filed the instant action against defendant seeking damages for malicious prosecution and abuse of process. Plaintiff alleges that the criminal charges were filed against him with malice and without probable cause and that defendant pursued the charges in an attempt to harass and intimidate him. Defendant has denied liability and argues that the investigation was conducted based upon a good faith belief that misconduct had occurred. In addition, defendant maintains that the legal proceedings were initiated against plaintiff upon the sole discretion or advice of the prosecuting attorney. Defendant specifically denies that there was an ulterior motive or other hidden reason for seeking the prosecutor's involvement.

{¶12} The tort of malicious prosecution allows a plaintiff to be compensated for injury to his reputation and dignity caused by false accusations of a crime. *Trussell v.*

General Motors Corp. (1990), 53 Ohio St.3d 142, 144-145. The elements of the tort of malicious prosecution are: 1) malice in instituting or continuing the prosecution; 2) lack of probable cause; and, 3) termination of the prosecution in favor of the accused. *Id.*

{¶13} “Malice,” as that term is used in the context of malicious prosecution actions, refers to “an improper purpose, or any purpose other than the legitimate interest of bringing an offender to justice.” *Criss v. Springfield Township* (1990), 56 Ohio St.3d 82, 85. Although malice may be inferred from the absence of probable cause, probable cause may be present even though no crime has been committed. *McFinley v. Bethesda Oak Hosp.* (1992), 79 Ohio App.3d 613, 617. Probable cause exists when the facts and circumstances are such that a reasonably cautious individual would be warranted in the belief that the person accused is guilty of the offense for which that person is charged. *Portis v. TransOhio Savings Bank* (1988), 46 Ohio App.3d 69, 70. Probable cause should be measured in light of the facts and circumstances which the complainant knew or reasonably should have known at the time the criminal complaint was filed. *Id.* There is no requirement that defendant must have evidence that will ensure a conviction. *Epling v. Express Co.* (1977), 55 Ohio App.2d 59, 62.

{¶14} Plaintiff has established the third element of his malicious prosecution claim, since all the pending charges were dismissed after each indictment was procured. However, the court finds that plaintiff has failed to prove the first and second elements of malice and lack of probable cause. To the contrary, the facts and circumstances ascertained by Agents Shirk and Dunkle were sufficient to lead a reasonably cautious person to conclude that plaintiff had engaged in wrongdoing. The agents testified that although they supplied the prosecutor with the investigatory evidence, the prosecutor made the decision to present the case to the grand jury. The grand jury returned indictments against plaintiff for multiple counts of filing false or fraudulent returns.

{¶15} The Restatement of the Law of Torts, Second, Section 666 entitled “Effect of Advice of Counsel,” provides as follows: “(1) The advice of an attorney at law admitted to practice and practicing in the state in which the proceedings are brought, whom the client has no reason to believe to have a personal interest in obtaining a conviction, is

conclusive of the existence of probable cause for initiating criminal proceedings in reliance upon the advice if it is (a) sought in good faith, and (b) given after a full disclosure of the facts within the accuser's knowledge and information."

{¶16} In Comment a, the drafters state that "Under the rule stated in this Section the advice of counsel establishes the existence of probable cause only when the person consulted is an attorney admitted to practice either in the state where the proceedings are brought or in another state under the conditions stated in Subsection (2). *This includes a prosecuting attorney.*" (Emphasis added.) Comment b explains that the "advice of counsel is chiefly important in cases in which the criminal proceedings are initiated in the mistaken belief that the conduct of which the accuser reasonably believes the accused to have been guilty constitutes, as a matter of law, the crime charged in the proceedings."

{¶17} In *Adamson v. May Co.* (1982), 8 Ohio App.3d 266, the court held that a grand jury indictment creates a rebuttable presumption of probable cause. Consequently, the plaintiff who files a subsequent malicious prosecution action must present probative evidence that the indictments were based on perjured testimony or came about as the result of some irregularity in the proceedings. Otherwise, the courts will defer to the grand jury's determination since its panel members were able to weigh credibility and observe the demeanor of the witnesses who testified.

{¶18} The court finds that plaintiff has failed to prove by a preponderance of the evidence that the indictments resulted from perjured testimony or that the grand jury proceedings were in some way irregular. The court is particularly persuaded that the procedure was not tainted inasmuch as the second set of indictments was levied by a grand jury composed of new members who did not participate in earlier hearings. The court also is satisfied that Agents Shirk and Dunkle consulted with the prosecuting attorney who twice took the case before a grand jury. The prosecutor testified that after reviewing the results of defendant's investigation and after speaking with the Vaughters, Mary Emrich, and Carol Pritchett, he was satisfied that there were grounds to pursue criminal charges.

{¶19} In the final analysis, the court finds the testimony of defendant's agents to be credible and specifically notes that the court did not find plaintiff to be particularly credible. Moreover, the court is convinced that the original statements completed by the witnesses were more accurate and compelling as opposed to the altered recollections presented at trial. The court further believes that the employees signed blank tax returns pursuant to plaintiff's direction and that the resulting circumstances could easily have been avoided if plaintiff had performed his duties in accordance with generally accepted accounting practices and principles. Indeed, the court finds that at the time criminal indictments were sought or filed against plaintiff, the facts known to defendant were more than sufficient to convince a reasonably cautious person that plaintiff had engaged in wrongdoing. Thus, plaintiff's malicious prosecution claim must fail for lack of proof on the essential element of the absence of probable cause.

{¶20} The three elements of the tort of abuse of process are: 1) that a legal proceeding has commenced in proper form and with probable cause; 2) that the proceeding has been corrupted to facilitate an ulterior purpose for which it was not originally designed; and, 3) that direct harm has resulted from the wrongful use of process. *Thompson v. R&K Serv. Sys.* (June 19, 1997), Franklin App. Nos. 96APE10-1277 and 96APE10-1278, citing *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 1994-Ohio-503. "The distinguishing factor is the existence of probable cause." *Id.* As stated in *Yaklevich at 300*, the "key consideration in an abuse of process action is whether an improper purpose was sought to be achieved by the use of a lawfully brought previous action."

{¶21} The court is satisfied that, based on the testimony and evidence, Agents Shirk and Dunkle honestly believed that plaintiff had violated the applicable sections of the tax code when they initiated the investigation. There has been no persuasive evidence presented that Agents Shirk and Dunkle harbored any malice toward plaintiff or that their actions were prompted by some secret or ulterior motive. Similarly, the evidence in this case established that Agents Shirk and Dunkle reasonably believed that there was probable cause to charge plaintiff. For the foregoing reasons, the court finds that plaintiff's

malicious prosecution and abuse of process claims are without merit and judgment will be rendered in favor of defendant.

{¶22}

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intiff's complaint also alleges a claim for intentional infliction of emotional distress. Under Ohio law, a plaintiff claiming the tort of intentional infliction of emotional distress must show: "(1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff, (2) that the actor's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community, (3) that the actor's actions were the proximate cause of the plaintiff's psychic injury, and (4) that the mental anguish suffered by the plaintiff is serious and of a nature that no reasonable man could be expected to endure it." *Burkes v. Stidham* (1995), 107 Ohio App.3d 363, 375. Further, "[s]erious emotional distress requires an emotional injury which is both severe and debilitating." *Id.* (Citations omitted.) The Tenth District Court of Appeals has also addressed this issue and held that "to constitute extreme and outrageous behavior, the actions must go beyond all possible bounds of decency and can be considered as utterly intolerable in a civilized community." *Perry v. Speedway SuperAmerica, L.L.C.*, Franklin App. No. 01AP-908, 2002-Ohio-1260.

{¶23} Upon review of all the testimony and evidence submitted, the court finds that plaintiff has failed to show extreme and outrageous conduct on the part of defendant. As noted above, the record indicates that defendant, through its agents, performed its investigatory function by collecting evidence, by interviewing witnesses and co-workers, and by direct surveillance. The agents testified that they did not attempt to threaten or intimidate any witnesses. The court concludes that defendant did not act unreasonably under the circumstances and certainly did not engage in outrageous behavior. In addition, the court finds that plaintiff has not demonstrated that he suffered extreme and severe emotional distress. For the foregoing reasons, the court finds that plaintiff has failed to prove any of his claims and, accordingly, judgment shall be rendered in favor of defendant.

{¶24} This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

FRED J. SHOEMAKER
Judge

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