[Cite as *Woods v. Summertime Sweet Treats, Inc.*, 2009-Ohio-6030.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JONA WOODS,	)	
	)	
PLAINTIFF-APPELLANT,	)	
	)	
VS.	)	CASE NO. 08-MA-169
	)	
SUMMERTIME SWEET TREATS, INC.,	)	OPINION
	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 06CV1959
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellant	Attorney Michael D. Harlan Betras, Maruca, Kopp & Harshman, LLC 6630 Seville Drive Canfield, Ohio 44406
For Defendant-Appellee	Attorney Richard A. Myers, Jr. Hehr & Myers Co., L.P.A. 4401 Rockside Road, Suite 200 Independence, Ohio 44131

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: November 13, 2009

[Cite as *Woods v. Summertime Sweet Treats, Inc.*, 2009-Ohio-6030.]
DONOFRIO, J.

{¶1} Plaintiff-appellant, Jona Woods, appeals from a Mahoning County Common Pleas Court judgment granting summary judgment in favor of defendant-appellee, Summertime Sweet Treats, Inc., on her claims for malicious prosecution, defamation, and negligence.

{¶2} Neapolis Novelty Ice Cream, Inc. operates an ice cream business and owns the premises located at 1335 North Bailey Road, North Jackson, Ohio. Neapolis employed appellant until her discharge in August 2003.

{¶3} Neapolis leased its North Jackson premises along with its fleet of ice cream trucks to appellee. The leased premises included a building with a fenced-in area for security.

{¶4} On the morning of April 29, 2004, appellee's manager, Tracy Tanner, arrived on the premises. At some time that day, he noticed that the steps leading to the building were gone. Tanner contacted the North Jackson Police Department and filed a theft report.

{¶5} Later, the steps were seen in appellant's possession. Appellee contacted the police once again. Appellant admitted removing the steps but claimed an ownership interest in them. The police eventually charged appellant with theft. The matter proceeded to a trial. At the close of the State's case, the trial court granted appellant's Criminal Rule 29 motion for acquittal. Appellant was found not guilty and the case was dismissed.

{¶6} Appellant subsequently filed a complaint against appellee raising claims for malicious prosecution, defamation, and negligence, all as a result of the allegedly false criminal charge.

{¶7} Appellee filed a motion for summary judgment asserting that no genuine issues of material fact existed to support appellant's claims. Appellant filed a response and the matter was heard before a magistrate.

{¶8} The magistrate found that no genuine issues of material fact existed. He found that the police conducted an independent investigation and decided to file a charge against appellant. He further found that appellant presented no evidence that

appellee acted maliciously or presented information to the police that it knew to be false. Therefore, he granted summary judgment on the malicious prosecution claim. The magistrate next found that appellant failed to provide any evidence that appellee acted in any manner other than in good faith when its employee reported the theft and aided in the investigation. So the magistrate granted summary judgment on the defamation claim. Finally, the magistrate found that appellant could not cite to any case law recognizing a claim for "negligent slander." He noted that because defamation and slander claims require a showing of malice or knowledge of falsity this belied appellant's negligence claim. Consequently, the magistrate granted summary judgment on appellant's negligence claim.

{¶9} Appellant filed objections to the magistrate's decision arguing that genuine issues of material fact existed on all three claims. The trial court struck the objections, however, because they were filed beyond the 14-day deadline for filing objections. The court then reviewed the magistrate's decision and found that no error of law appeared on its face. So the court adopted the magistrate's decision and issued a judgment accordingly.

{¶10} Appellant filed a timely notice of appeal on August 25, 2008.

{¶11} We must address a preliminary matter raised by appellee before moving on to appellant's assignment of error.

{¶12} Pursuant to Civ.R. 53(D)(3)(b)(i), a party may file objections to a magistrate's decision within 14 days of the filing of the decision. "Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53 (D)(3)(b)." Civ.R. 53(D)(3)(b)(iv).

{¶13} In this case, the magistrate's decision was filed on May 22, 2008. Appellant filed her objections on June 18, 2008, well past the 14-day time limit. The trial court found that appellant should have filed her objections by June 7, 2008.

However, it went on to find that the clerk of courts failed to serve notice of the magistrate's decision within three days of its filing as is required by the court's order and the Civil Rules. Nonetheless, the court went on to find that even though the clerk failed to honor the court's order and Civ.R. 53, appellant filed her objections one day beyond the 14-day period from the date that the clerk finally issued copies of the magistrate's decision to counsel. Consequently, the trial court struck the objections and did not consider them.

{¶14} Given the untimely filing of appellant's objections and the fact that the trial court struck them, pursuant to Civ.R. 53(D)(3)(b)(iv), appellant has waived these issues for review on appeal, absent plain error. The issues in her objections are the same issues she now raises on appeal. This court has clearly recognized that, "[a] party is not permitted to assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party timely objected to that finding." *Harrison v. Faseyitan*, 159 Ohio App.3d 325, 2004-Ohio-6808, at ¶17, citing Civ.R. 53.

{¶15} And even if we were to consider the issues raised by appellant, the result would be the same because summary judgment in favor of appellee was proper.

{¶16} Appellant raises a single assignment of error, which states:

{¶17} "THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT."

{¶18} In reviewing an award of summary judgment, appellate courts apply a de novo standard of review. *Cole v. Am. Industries & Resources Corp.* (1998), 128 Ohio App.3d 546, 552, 715 N.E.2d 1179. Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper. Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Flemming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377. A "material fact" depends on the substantive

law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.* (1995), 104 Ohio App.3d 598, 603, 662 N.E.2d 1088, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202.

{¶19} Appellant breaks her assignment of error down into three issues, one dealing with each of her three claims.

Malicious Prosecution

{¶20} Appellant argues that the police only filed the charge against her due to pressure from appellee. She further points to her answers to interrogatories where she stated that appellee "knowingly filed multiple false reports and gave false written statements to the Jackson Police Department falsely accusing Plaintiff of stealing concrete steps." Appellant states that appellee alleged the steps appellant returned were not the same steps taken while appellant alleged that they were the same steps. Appellant asserts that this resulted in appellee providing false statements to the police.

{¶21} In order to prove a case of malicious prosecution, the plaintiff must prove three elements: (1) malice in instituting or continuing the prosecution; (2) a lack of probable cause; and (3) a termination of the criminal proceedings in favor of the accused. *Trussell v. Gen. Motors Corp.* (1990), 53 Ohio St.3d 142, 146.

{¶22} Whether an action was instituted with malice usually depends on whether the charge was based on probable cause. *Melanowski v. Judy* (1921), 102 Ohio St. 153, at the syllabus. The existence of probable cause is commonly a factual question. *Guy v. McCartney*, 7th Dist. No. 00-JE-7, 2002-Ohio-3035, at ¶21. However, the trial court may properly resolve this issue where the evidence is such that reasonable minds could come to but one conclusion. Id.

{¶23} No evidence exists in the record that appellee acted with malice in instituting or continuing the prosecution here. In support of her claim that a genuine issue of material fact exists as to the malice and probable cause elements, the only evidence appellant cites is one of her own answers to an interrogatory. Appellant was asked to state with specificity the basis on which appellee was involved in filing

the criminal charge against her. Appellee answered: "Knowingly filed multiple false reports and gave false written statements to the Jackson Police Department falsely accusing Plaintiff of stealing concrete steps." (Plaintiff's Interrogatory 8).

{¶24} The Ohio Supreme Court set out the law governing malicious prosecution some time ago:

{¶25} "'A private person who gives to a public official information of another's supposed criminal misconduct, of which the official is ignorant, obviously causes the institution of such subsequent proceedings as the official may begin on his own initiative, but giving such information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer if it is left entirely to his discretion to initiate the proceedings or not. Where a private person gives to a prosecuting officer information which he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this section even though the information proves to be false and his belief therein was one which a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.'" *Archer v. Cachat* (1956), 165 Ohio St. 286, 287-88, quoting 3 Restatement of the Law of Torts, page 386; See also, *Al-Quaadir v. Budget Rent a Car, Inc.*, 9th Dist. No. 23790, 2008-Ohio-780, and *Cloud v. Insurance Crime Prevention Institute* (Nov 23, 1983), 8th Dist. No. 46717.

{¶26} Appellant needs more evidence to create a genuine issue of material fact other than her own self-serving statement that appellee "knowingly" filed false reports with police and "knowingly" made a false accusation against her by accusing her of stealing the steps. If this was all that was required to create a genuine issue of material fact, a plaintiff would always be able to defeat a summary judgment motion on a case of malicious prosecution by simply stating that the defendant knowingly reported false information accusing them of a crime to the police. Some other

evidence is necessary in order for this type of claim to withstand summary judgment.

{¶27} Furthermore, appellant has not offered any evidence to rebut appellee's evidence that it was the police who initiated the criminal charge against her. The evidence demonstrates that appellee relayed information of the theft of the steps to the police. The police then conducted an independent investigation and decided to charge appellee. Notably, none of appellee's representatives signed the complaint.

{¶28} Accordingly, the trial court properly granted summary judgment in favor of appellee on the malicious prosecution claim.

Defamation

{¶29} A defamation cause of action, such as slander, consists of five elements: "(1) a false and defamatory statement, (2) about plaintiff, (3) published without privilege to a third party, (4) with fault of at least negligence on the part of the defendant, and (5) that was either defamatory *per se* or caused special harm to the plaintiff." *Gosden v. Louis* (1996), 116 Ohio App.3d 195, 206.

{¶30} In this case, appellant alleged that appellee's statements were slanderous per se. That is, she alleges that the slander was "accomplished by the very words spoken." *McCartney v. Oblates of St. Francis de Sales* (1992), 80 Ohio App.3d 345, 353. In order for an oral statement to be considered slander per se, it must consist of words concerning, among other things, an indictable criminal offense involving moral turpitude. Id.

{¶31} Appellant argues once again that she offered evidence that she returned the steps to appellee but that appellee refused the steps and pressured police to charge her with theft. And again she relies on her own statement in her response to interrogatory number eight that appellee "knowingly filed multiple false reports" accusing her of stealing the steps. She contends that reasonable minds could conclude that she returned the steps to appellee and appellee, instead of accepting the steps, lied to police stating that they were not the same steps. Appellant contends that these false statements resulted in her being charged with petty theft, a crime of moral turpitude.

{¶32} Appellee claimed a qualified privilege. A qualified privilege exists when the defendant makes the alleged defamatory statement in a reasonable manner and for a proper purpose. *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 243. "A qualified privilege protecting the making of defamatory statements is exceeded when the statements are made with 'actual malice,' that is, with knowledge that the statements are false or with reckless disregard of whether they were false or not." Id. at paragraph two of the syllabus.

{¶33} In order for a qualified privilege to protect the defendant, the defendant must prove five elements: (1) good faith; (2) an interest to be upheld; (3) a statement limited in its scope to this purpose; (4) a proper occasion; and (5) publication in a proper manner and to proper parties only. Id. at 246 citing *West v. Peoples Banking & Trust Co.* (1967), 14 Ohio App.2d 69, 72.

{¶34} In this case, appellee is protected by a qualified privilege. The alleged slanderous statement that appellee made was that appellant had stolen the steps from appellee's place of business. However, the evidence clearly demonstrates that when appellee made this statement it did so in the course of a police investigation. A defendant may invoke the affirmative defense of qualified privilege when he made the statement at issue to a police department. *McCoy v. Maxwell*, 11th Dist. No. 2001-P-0132, 2002-Ohio-7157, at ¶27. Appellee acted in good faith and had an interest to be upheld because it wanted to recover the steps for its business. Its statement was limited to stating that the steps were observed in appellant's possession. Appellee made the statement during a proper occasion, which was the investigation of what happened to the steps. And there is no indication anywhere that appellee made the statement to anyone other than the police, which would be the proper party to report a believed theft to.

{¶35} Consequently, the trial court properly granted summary judgment to appellee on appellant's defamation claim.

Negligence

{¶36} Appellant argues that appellee had a duty to provide truthful, accurate information to the police and that she breached this duty by knowingly filing false reports accusing her of stealing the steps.

{¶37} While the magistrate found that no tort cause of action exists for claims that are covered by defamation, case law indicates otherwise. See *Barilla v. Patella* (2001), 144 Ohio App.3d 524 (the Eighth District, although finding it inapplicable in its particular case, recognized that a cause of action exists when someone is negligently identified as having committed a crime and suffers injury as a result); *Wigfall v. Soc. Natl. Bank* (1995), 107 Ohio App.3d 667, 673 (Sixth District reversed summary judgment on the plaintiff's negligence claim finding "there is a tort cause of action, separate from defamation, which exists in Ohio for persons who are negligently improperly identified as being responsible for committing a violation of the law, and who suffer injury as a result of the wrongful identification."); *Walls v. Columbus* (1983), 10 Ohio App.3d 180 (Tenth District held that even though there may be no initial duty to furnish information, once one decides to furnish information to another about a third person, there is a common-law duty to be reasonably accurate with respect to the information furnished).

{¶38} But just because a negligence cause of action can exist in a case such as this, does not mean that summary judgment was improper. The case law cited above establishes that a duty did exist. Once appellee decided to report information to the police about appellant, it owed a duty to appellant to be truthful in its reporting. But no evidence exists to suggest that appellee negligently breached this duty. Appellee simply informed the police that the missing steps were seen in appellant's possession. As was the case with appellant's other causes of action, the only evidence that appellee provided false information to the police is appellant's self-serving statement that appellee did so. She provided no factual evidence in support of her statement.

{¶39} Thus, even though the court erred in finding that no tort cause of action existed, summary judgment on appellant's negligence claim nonetheless was proper.

{¶40} In sum, even though appellant did not preserve her issues for appeal, had she filed timely objections the result would be same. This is so because the trial court properly granted summary judgment on each of appellant's claims.

{¶41} Accordingly, appellant's sole assignment of error is without merit.

{¶42} For the reasons stated above, the trial court's judgment is hereby affirmed.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.