

[Cite as *Ficklin v. Home Depot U.S.A. Inc.*, 2010-Ohio-5601.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94458

CHARLES FICKLIN, ET AL.

PLAINTIFFS-APPELLANTS

VS.

HOME DEPOT U.S.A. INC., ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-676771

BEFORE: Rocco, P.J., Dyke, J., and Stewart, J.

RELEASED AND JOURNALIZED: November 18, 2010

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KENNETH A. ROCCO, P.J.:

{¶ 1} Plaintiff-appellant Charles Ficklin appeals from the trial court order that granted summary judgment to defendant-appellee Home Depot, U.S.A., Inc. on his complaint alleging false arrest and false imprisonment.

{¶ 2} Ficklin presents two assignments of error. He argues the trial court acted improperly both in denying his request for leave to file his own motion for summary judgment and in granting summary judgment to Home Depot on his

claim.

{¶ 3} Ficklin's first assignment of error will not be addressed, since he neither specified in his notice of appeal that he challenged the trial court's denial of his request for leave nor argues it separately as required by App.R. 16(A)(7). Upon a review of the record, moreover, the trial court appropriately granted Home Depot's motion for summary judgment. The trial court's order, therefore, is affirmed.

{¶ 4} According to the evidence presented to the trial court, this case results from two separate incidents that occurred in July and August 2008 at the Home Depot store located in Highland Heights, Ohio. The first occurred on July 15, 2008.

{¶ 5} A woman, subsequently identified as Dottie Colon, obtained a temporary store charge account in the name of "Evon Fischer," and used the account to purchase over eight thousand dollars worth of merchandise. This merchandise included three "tankless" hot water heater units; each unit was valued at nearly a thousand dollars.

{¶ 6} Keri Vidmar, the store's loss prevention specialist, became suspicious of Colon, so Vidmar observed the woman as she shopped. During Colon's visit, Vidmar ascertained that she was accompanied by three men and one woman. Vidmar later identified one of these men as Ficklin; the other woman ultimately was identified as Angelique Bankston. Bankston and one of

the men requested assistance from store associate Deborah Shea in loading the “tankless” units onto a pallet for transport. Such a large purchase thus was a memorable event for Shea.

{¶ 7} Vidmar watched Colon and her companions take Colon’s purchases from the store and load the items into three separate vehicles. One of the vehicles was a Ford F-250 pickup truck with a license plate number that began with the letters “EHX”; Ficklin drove such a vehicle.

{¶ 8} A few hours after Colon and her companions left, Vidmar discovered that Colon had obtained the charge account under false pretenses. Vidmar reported the incident to the Highland Heights Police Department, and since the actions of Colon and her companions on that date were recorded by store surveillance cameras, Vidmar showed the videotapes to the responding officer, who made out a report and forwarded the information he obtained to a detective.

{¶ 9} A month later, on August 16, 2008, Shea noticed Bankston again in the store. Colon, too, was present, applying for yet another temporary store charge account, this time in the name of “Sandra Weidler.” Shea went to the store manager, August Schill, to inform him of Bankston’s presence. Another store associate attempted to “stall” Colon.

{¶ 10} Colon noticed the attention. She abruptly left the store without completing any purchase; she was accompanied by two men. The two men entered a white van parked in the store lot.

{¶ 11} At that same time, a Highland Heights patrol officer was in the store parking lot investigating a complaint of a dog left in a closed car. Schill approached the officer and informed him that “subjects from a possible theft ring were leaving the Home Depot parking lot.” Schill pointed out the white van to the officer.

{¶ 12} The officer radioed for assistance and stopped the white van. Several other officers quickly arrived at the store; they, too, began to detain persons whom the employees indicated might be involved in the “theft ring.”

{¶ 13} According to the police report of the second incident, a store cashier told one officer that she watched Bankston “get on her cell phone and say ‘code red,’ [while another employee] observed two black males in white t-shirts that had carpet on a cart answer their phones. * * *

{¶ 14} “Shortly afterward the two black males then exited Home Depot w/o the carpet.”

{¶ 15} The police report further states that the two men were detained in the parking lot for questioning, and although they had been with “the other subjects,” the store employees could not determine whether these particular men “were involved with the incident on July 15th [, 2008].” However, while officers were speaking with the two men, who denied they had been “with anyone else,” Ficklin “exited Home Depot with several carts of carpet,” and “asked [the two men] what was going on?”

{¶ 16} The report indicates the officer “asked [Ficklin] if he [was] with [the two men], and he stated yes.” The report further states that “Ficklin was identified by Home Depot personnel as being one of the subjects that was on scene on July 15th.” Ficklin was arrested at that time “for invest[igation],” although he “provided officers with a receipt for the carpet.” The officer released the two men, who took the carpet with them when they left.

{¶ 17} Ficklin was jailed for a time, but ultimately secured his release without being charged for any crime. He eventually filed this action, together with another man and Bankston, against Home Depot. The plaintiffs claimed that Home Depot had them “arrested and restrained by the Highland Heights Police Department and accused [them] of theft,” and had them imprisoned “without reasonable cause.” During the course of the action, Bankston and the other man voluntarily dismissed their claims.

{¶ 18} After filing deposition transcripts, Home Depot filed a motion for summary judgment on Ficklin’s claim. Home Depot asserted in its brief that Ficklin could not establish the elements of his claim for false arrest and imprisonment.

{¶ 19} Home Depot attached several exhibits to its brief. These included, inter alia, the affidavits of a detective assigned to the case and Vidmar, and copies of police reports pertaining to the investigations into the July 2008 theft and the August 2008 attempted theft from the store.

{¶ 20} The record reflects Ficklin filed a request for an extension of time in which to reply to Home Depot's motion. The trial court granted Ficklin's request, allowing him until October 23, 2009 to respond.

{¶ 21} On October 23, 2009, Ficklin filed a second request for an extension of time. He informed the trial court that he needed "an additional five (5) days to complete the Response * * *."

{¶ 22} Ficklin did not file his response, however, until October 30, 2009. It was captioned, "Response to Defendant's Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment."

{¶ 23} Therein, Ficklin argued that, because it was "undisputed" that he was arrested because Home Depot employees "instructed the Highland Hts. Police Department to arrest him," and it was further undisputed that he was not "involved in any unlawful act of any kind on August 16," he was entitled to summary judgment on his complaint, and Home Depot's motion should be denied. Ficklin attached to his motion many of the same documents already submitted by Home Depot.

{¶ 24} He also attached his affidavit, in which he stated, in pertinent part, that "the only reason [he] was arrested and jailed was due to the false allegations of the Home Depo[t] employees." Ficklin further reiterated that he had not been involved in any illegal activity on August 16, 2008.

{¶ 25} Home Depot filed a reply brief, requesting the trial court to strike

Ficklin’s motion for summary judgment, since he had not requested leave to file the motion. On December 4, 2009 the trial court granted Home Depot’s motion to strike.

{¶ 26} That same day, in a separate order, the trial court also granted Home Depot’s motion for summary judgment on Ficklin’s claim. The trial court stated that Ficklin could not establish Home Depot’s liability because “there [wa]s no evidence that [he] was detain[ed] by Home Depot on the date in question”; rather, he was stopped and detained by the police department.

{¶ 27} The trial court further stated that “the evidence establishes Home Depot had probable cause to detain [him] based on the events that occurred on July 15, 2008,” because “there [wa]s undisputed evidence that [he] was a part of [a] theft ring,” and the fact that he paid for his merchandise on August 16, 2008 did not negate proof “of his participation in the theft that occurred at Home Depot on July 15, 2008.”

{¶ 28} Ficklin filed his notice of appeal from the foregoing order. He presents the following two assignments of error.

“I. That the original Trial [Judge] erred in denying Plaintiff/Appellant’s Leave to File Motion for Summary Judgment and Granting Defendant/Appellee’s Motion for Summary Judgment.

“II. That the Trial Court [Judge] erred in FINDING AS A FACT THAT ‘SUMMARY JUDGMENT IS STILL APPROPRIATE EVEN IF MR.

FICKLIN WAS [sic] ABLE TO ESTABLISH THAT HOME DEPOT DETAINED HIM. THE EVIDENCE ESTABLISHES THAT HOME DEPOT HAD PROBABLE CAUSE TO DETAIN MR. FICKLIN BASED ON THE EVENTS THAT OCCURRED ON JULY 15, 2008. ON THAT DATE, THERE IS UNDISPUTED EVIDENCE THAT MR. FICKLIN WAS A PART OF A THEFT RING. THE FACT THAT MR. FICKLIN PURCHASED ROLLS OF CARPET ON AUGUST 16, 2008 DOES NOT DISPUTE THE EVIDENCE OF HIS PARTICIPATION IN THE THEFT THAT OCCURRED ON JULY 15, 200[8].’”

{¶ 29} Ficklin apparently initially argues that the trial court erred in denying him leave to file his own motion for summary judgment. This assignment of error, however, will not be addressed for two reasons.

{¶ 30} First, Ficklin filed his notice of appeal only from the order that granted Home Depot’s motion for summary judgment; therefore, this court lacks jurisdiction to consider his argument. *Schloss v. McGuiness* (1984), 16 Ohio App. 96, 474 N.E.2d 666.

{¶ 31} Second, Ficklin fails to separately argue this assignment of error in his appellate brief as required by App.R. 16(A)(7). Therefore, this court would, at any event, decline to address it. *Park v. Ambrose* (1993), 85 Ohio App.3d 179, 619 N.E.2d 469; App.R. 12(A)(2).

{¶ 32} In his second assignment of error, Ficklin apparently argues that

summary judgment for Home Depot on his claim was inappropriate.¹ This court disagrees.

{¶ 33} Appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can conclude only that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46; Civ.R. 56(C).

{¶ 34} A false arrest and false imprisonment claim is made by establishing two elements: 1) the intentional detention of the person; and, 2) the unlawfulness of the detention. *Barnes v. Meijer Dept. Store*, Butler App. No. CA2003-09-246, 2004-Ohio-1716, ¶15; *Harvey v. Republic Svcs. of Ohio*, Stark App. No. 2007 CA 00278, 2009-Ohio-1343, ¶40. A cause of action for false arrest can be brought only against either the persons making the arrest or their employers. *Id.*

{¶ 35} However, private citizens who call upon assistance from law enforcement officers are insulated from tort liability if their request for *assistance* does not amount to a request for *arrest*. *White v. Standard Oil Co.* (1984), 16

¹Ficklin supports his argument, in part, with attachments to his brief that this court cannot consider, since they are not part of the trial court's record. *Middletown v. Allen* (1989), 63 Ohio App.3d 443, 579 N.E.2d 254.

Ohio App.3d 21, 474 N.E.2d 366. Where a private citizen merely summons an officer for assistance because of a disturbance and neither *specifically* requests that the person be arrested nor supplies *false* information to the police that causes the arrest, the citizen is not liable. *Id.*, at 22-23.

{¶ 36} Thus, in order to impose liability on either a private citizen or his employer for a wrongful arrest, the arrest of the plaintiff by the officer must be so induced or instigated by the defendant that the arrest is made by the officer, not of his own volition, but to carry out the request of the defendant. *Harvey*, citing *Beverly v. The Lawson Co.* (Aug. 18, 1983), Cuyahoga App. No. 45119.

{¶ 37} Ficklin argued that Home Depot was not entitled to summary judgment on his claim because the evidence demonstrated he made a legitimate purchase from the store on August 16, 2008. His purchase on that date, however, was not the issue. The issue to be resolved on Home Depot's motion was whether its employees "instigated" Ficklin's arrest so as to create liability for false arrest and false imprisonment. *Harvey*, ¶41, 65. The trial court correctly concluded Home Depot's employees did not.

{¶ 38} According to the evidence presented to the trial court, Ficklin brought *himself* to the officers' attention by speaking to the men the officers had detained.

The police reports indicate Ficklin was detained after *he* stated he was "with" the men stopped in the parking lot. It was only at that point that an employee told the officers that Ficklin was one of the "subjects on scene" during the July 15,

2008 incident. Nothing in the evidence Ficklin submitted contradicted these facts.

{¶ 39} Furthermore, the police reports indicate that the officers did not arrest Ficklin for committing any crime on August 16, 2008, but, rather, for purposes

{¶ 40} of further investigation of his possible involvement in the store theft perpetrated on July 15, 2008. The reports also indicate that the officers made this decision on their own, not solely at Home Depot's behest. *Barnes*, ¶18; cf., *Niessel v. Meijer, Inc.*, Warren App. No. CA2001-04-027, 2001-Ohio-8645. As the trial court correctly pointed out, Ficklin presented no evidence that he was *not* present at the store on July 15, 2008.²

{¶ 41} Since the trial court properly granted summary judgment to Home Depot on Ficklin's claim, his second assignment of error also is overruled.

{¶ 42} The trial court's order is affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

²Indeed, the fact that Ficklin joined Bankston as his co-plaintiff suggests he did have some association with the perpetrators of the July 15, 2008 theft.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, PRESIDING JUDGE

ANN DYKE, J., CONCURS
MELODY J. STEWART, J., CONCURS
IN JUDGMENT ONLY