[Cite as *Hinton v. Newburgh Hts.*, 2016-Ohio-2727.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103412

KERRY HINTON, ET AL.

PLAINTIFFS-APPELLANTS

vs.

VILLAGE OF NEWBURGH HEIGHTS, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-800878

BEFORE: Boyle, J., Kilbane, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: April 28, 2016

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MARY J. BOYLE, J.:

{¶1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶2} Plaintiffs-appellants, Kerry Hinton and Khalilah Crumpler (collectively "plaintiffs"), appeal from the trial court's decision granting summary judgment in favor of defendants-appellees, village of Newburgh Heights[1] and Officer Brian O'Connell (collectively "defendants") on the plaintiffs' claims for malicious prosecution under state law and a violation of 42 U.S.C. 1983. Finding no merit to the appeal, we affirm.

A. Procedural History and Facts

{¶3} On April 6, 2011, plaintiffs filed a police report with the village of Newburgh Heights, stating that Hinton's 2007 Hummer H2 motor vehicle had been stolen. At that time, O'Connell was employed as a police officer with the village of Newburgh Heights and had been assigned to investigate the report. Based on his investigation, O'Connell concluded that the motor vehicle had not been stolen; instead, he believed that plaintiffs were involved in an illegal scheme to collect insurance proceeds on the vehicle.

{¶4} On December 13, 2011, O'Connell presented sworn testimony to a Cuyahoga County Grand Jury regarding his investigation. Three days later, Hinton and

[1]Although the lower court's case, Cuyahoga C.P. No. CV-13-800878, and the notice of appeal were captioned "city of Newburgh Heights," the appellate briefs were correctly captioned "village of Newburgh Heights," and we will therefore refer to appellee as "village of Newburgh Heights."

Crumpler were each charged in a three-count indictment for insurance fraud, securing writings by deception, and tampering with records in Cuyahoga C.P. No. CR-11-556373. The case, however, was ultimately dismissed without prejudice by the trial court on December 24, 2012.

{¶5} Shortly thereafter, plaintiffs filed the underlying case, asserting several claims against five named defendants, including the village of Newburgh Heights and O'Connell. Relevant to this appeal, plaintiffs asserted a state law malicious prosecution claim and federal malicious prosecution claim under 42 U.S.C. 1983 against O'Connell. Plaintiffs further alleged that the village of Newburgh Heights was vicariously liable under the doctrine of respondeat superior and that the village of Newburgh Heights "failed to adequately train and supervise its officers, including O'Connell, concerning proper police procedure and constitutional limitation relative to investigating and charging individuals with criminal offenses." Plaintiffs additionally sought to recover monetary damages from the village of Newburgh Heights as a result of its "negligence and deliberate indifference to [their] constitutional rights through its inadequate policies and procedures."

{¶6} Following its answer to the complaint, defendants moved for summary judgment, asserting that plaintiffs' claims failed as a matter of law. In support of their motion, defendants attached an affidavit from O'Connell, who detailed his investigation regarding the stolen vehicle. Defendants argued the affidavit established probable cause for an indictment as well as the absence of malice.

{¶7} According to O'Connell's affidavit, Hinton reported that he permitted his friend, Crumpler, to arrange for a test drive of the Hummer with an individual named Ali Ray McCowen for the purpose of selling the vehicle in March 2011. McCowen, however, never returned with the vehicle, and Hinton subsequently reported the vehicle stolen on April 6, 2011. O'Connell further learned that (1) Crumpler had insured the vehicle with Omni Indemnity Company, although Hinton was the titled owner; (2) Crumpler had filed a claim for the stolen vehicle; (3) the title of the vehicle had recently been transferred in Nevada and notarized by Malcolm Blackwell, a notary public located in Las Vegas; (4) Blackwell identified Hinton in a six-person photo lineup as having transferred the title to Ali Ray McCowen in Las Vegas on March 11, 2011; and (5) the Las Vegas Metropolitan Police Department obtained a statement from Blackwell attesting to this transfer between Hinton and McCowen. Defendants additionally attached the photo lineup record utilized by the Las Vegas Metropolitan Police Department and the voluntary statement of Blackwell.

{¶8} Plaintiffs opposed the motion for summary judgment, arguing that Hinton never traveled to Nevada in March 2011 and that he was in Ohio at work "during the time frame given by O'Connell for the delivery of the vehicle to Nevada." Plaintiffs further argued that O'Connell falsely misled the grand jury by failing to disclose that Hinton had reported being at work and that his employer provided a "verbal statement" that "they believe he was there." Plaintiffs further attached Hinton's affidavit and a copy of Hinton's employment time sheet, which purports to show Hinton at work on the

following days: March 10, 2011, March 12, 2011, March 15, 2011, March 17, 2011, and March 19, 2011.

{¶9} In a detailed opinion, the trial court ultimately found in defendants' favor and granted their motion for summary judgment. Plaintiffs appeal, raising the following single assignment of error:

> The trial court erred when it granted the defendants-appellees' motion for summary judgment.

B. Standard of Review

{¶10} An appellate court reviews a trial court's decision to grant summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). De novo review means that this court "uses the same standard that the trial court should have used, and we examine the evidence to determine if as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997), citing *Dupler v. Mansfield Journal*, 64 Ohio St.2d 116, 119-120, 413 N.E.2d 1187 (1980). In other words, we review the trial court's decision without according the trial court any deference. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

{¶11} Under Civ.R. 56(C), summary judgment is properly granted when (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46

(1976). If the moving party fails to satisfy its initial burden, "the motion for summary judgment must be denied." *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). But if the moving party satisfies "its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Id.*

{¶12} In this appeal, plaintiffs challenge the trial court's granting of summary judgment on their malicious prosecution claim and their 42 U.S.C. 1983 claim against O'Connell. We will address each claim in turn.

C. Malicious Prosecution: Existence of Probable Cause

{¶13} "The tort of malicious prosecution in a criminal setting, requires proof of three essential elements: '(1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused.'" *Froehlich v. Ohio Dept. of Mental Health*, 114 Ohio St.3d 286, 2007-Ohio-4161, 871 N.E.2d 1159, ¶ 10, quoting *Trussell v. Gen. Motors Corp.*, 53 Ohio St.3d 142, 146, 559 N.E.2d 732 (1990). The existence of probable cause, therefore, defeats any claim for malicious prosecution. *Petty v. Kroger Food & Pharmacy*, 10th Dist. Franklin No. 07AP-92, 2007-Ohio-5098, ¶ 20. Indeed, if probable cause exists, "no action for malicious prosecution will lie, even if the plaintiff can demonstrate actual malice." *Id.*, citing *Waller v. Foxx*, 1st Dist. Hamilton No. C-810568, 1982 Ohio App. LEXIS 12857 (Oct. 6, 1984).

{¶14} In the context of a malicious prosecution action, probable cause has been defined as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in the belief that the accused is guilty of the offense" as charged. *Baron v. Andolsek*, 11th Dist. Lake No. 2003-L-005, 2004-Ohio-1159, ¶ 17. While a police officer need not have evidence sufficient to ensure a conviction, the officer is required "to have evidence sufficient to justify an honest belief of the accused's guilt." *Petty* at ¶ 21.

{¶15} "The determination of whether a criminal prosecution was undertaken in the absence of probable cause entails an inquiry into the facts and circumstances actually known to or reasonably within the contemplation of the defendant police officers at the time of the instigation of criminal proceedings." *Mayes v. Columbus*, 105 Ohio App.3d 728, 737, 664 N.E.2d 1340 (10th Dist.1995), citing *McFinley v. Bethesda Oak Hosp.*, 79 Ohio App.3d 613, 616-617, 607 N.E.2d 936 (1st Dist.1992). Although the issue of probable cause is ordinarily a factual question to be resolved at trial, the trial court may resolve the issue as a matter of law where the record allows for only one reasonable conclusion. *McFinley* at 617; *see also Baron* at ¶ 16.

{¶16} The return of an indictment by the grand jury creates a presumption of probable cause. *Deoma v. Shaker Hts.*, 68 Ohio App.3d 72, 77, 587 N.E.2d 425 (8th Dist.1990). To overcome the presumption, the plaintiff has the burden of producing substantial evidence to establish lack of probable cause — "evidence to the effect that the

return of the indictment resulted from perjured testimony or that the grand jury proceedings were otherwise significantly irregular." *Id.*

{¶17} Plaintiffs argue that the trial court erred in finding that probable cause existed to support the prosecution. Although plaintiffs acknowledge that an indictment creates a presumption of probable cause, they claim that the record demonstrates "significant irregularities or perjury committed during the grand jury proceeding," which rebuts the presumption of probable cause. They argue that O'Connell's grand jury testimony was misleading or false, thereby rebutting the presumption of probable cause. The record, however, does not support plaintiffs' claim.

{¶18} We initially note that plaintiffs have failed to provide this court with a copy of the grand jury proceedings as well as a complete copy of O'Connell's deposition. Although plaintiffs apparently rely on these proceedings in support of their assignment of error, they have failed to make them a part of the record on appeal. *See Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980) (holding it is appellant's burden to ensure all necessary parts of the record are before the appellate court, and when a piece of the record necessary to determine an assignment of error is missing, an appellate court has no choice but to presume the validity of the proceedings below and affirm). But based on the excerpts of the grand jury proceedings and deposition testimony provided by the parties, we still find that their argument fails.

{¶19} Plaintiffs argue that O'Connell failed to inform the grand jury that Hinton's employer had indicated that Hinton was at work at the time of the "purported title

transfer" on March 11, 2011. But there is no evidence in the record that establishes that Hinton was at work on March 11, 2011. In fact, his own time sheets show that he was not. And while Hinton's employer provided a "verbal statement" that "they believe he was there," O'Connell received no confirmation that Hinton was there. Notably, plaintiffs fail to point to any testimony during the grand jury proceedings evidencing false or misleading testimony by O'Connell as to Hinton's employment. We likewise cannot say that the grand jury proceedings were compromised simply because O'Connell did not advance Hinton's stated alibi — an alibi that O'Connell clearly did not believe. *See, e.g., Criss v. Kent*, 867 F.2d 259, 263 (6th Cir.1988) (recognizing that a policeman "is under no obligation to give any credence to a suspect's story"). And based on O'Connell's investigation, which included Blackwell positively identifying Hinton as the person that transferred title of the Hummer in Las Vegas, we cannot say that O'Connell acted unreasonable in disbelieving Hinton's stated alibi.[2]

{¶20} Plaintiffs further assert that O'Connell falsely reported that Hinton drove the Hummer to Nevada from Ohio in March 2011. They contend that O'Connell had to know that this statement was false because Hinton told him that he was at work during that time. But as stated above, O'Connell was free to disbelieve Hinton's stated alibi, especially given that O'Connell's investigation contradicted the alibi.

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[2] We note that plaintiffs have not disputed the facts pertaining to the information gathered in O'Connell's investigation, including Blackwell's identification. While they obviously contend that Blackwell misidentified Hinton, they have presented no evidence to rebut the information gathered by O'Connell in his investigation.

{¶21} Finally, as for plaintiffs' claim that O'Connell gave "misleading/false" testimony regarding the insurance proceeds, we find that the excerpts of the grand jury testimony quoted in the trial court's opinion belie this claim. While plaintiffs quote a single excerpt in the proceeding in support of their argument, they fail to include all of O'Connell's testimony on the subject. While O'Connell initially indicated that the plaintiffs received insurance proceeds, he later clarified that "Omni Insurance started to pay it and they put the fraud alert." We cannot agree that this testimony evidences a significant irregularity that compromises the grand jury's finding of probable cause.

{¶22} Based on the evidence in the record, we find that there are no genuine issues of material fact and that the trial court properly granted summary judgment in favor of O'Connell on plaintiffs' malicious prosecution claim. The existence of probable cause defeats the plaintiffs' malicious prosecution claim as a matter of law. And having found that plaintiffs' malicious prosecution claim fails as a matter of law, we need not reach the issue of immunity.

D. Claims Under 42 U.S.C. 1983

{¶23} Having found that the plaintiffs' state law claim for malicious prosecution fails as a matter of law, we likewise find that the trial court properly granted summary judgment on plaintiffs' remaining purported claims under 42 U.S.C. 1983. Indeed, plaintiffs cannot prove that defendants have deprived them of a federally protected constitutional or statutory right, which is an essential element to an action under 42 U.S.C. 1983. *See 1946 St. Clair Corp. v. Cleveland*, 49 Ohio St.3d 33, 34, 550 N.E.2d

456 (1990), citing *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Moreover, the existence of probable cause negates any purported federal Section 1983 claim based on malicious prosecution. *See, e.g., Broadnax v. Green Credit Serv.*, 118 Ohio App.3d 881, 889, 694 N.E.2d 167 (2d Dist.1997), citing *Coogan v. Wixom*, 820 F.2d 170 (6th Cir.1987).

{¶24} Accordingly, plaintiffs' sole assignment of error is overruled.

{¶25} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
ANITA LASTER MAYS, J., CONCUR