IN THE COURT OF APPEALS OF IOWA

No. 0-2009 / 98-0467
December 22, 2000

CLARA REECE FULLER,
Plaintiff-Appellant,

vs.

CITY OF CEDAR RAPIDS, STEVE FELDMAN, KEN BRACY, and VON MAUR, INC.,
Defendants-Appellees.

FILED
DEC 22 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, Patrick R. Grady, Judge.

Clara Reece Fuller appeals from a district court order granting the defendants' motions for summary judgment. She contends the court erred in granting the motions. **AFFIRMED.**

Clara Reece Fuller, Cedar Rapids, pro se.

Mohammad H. Sheronick, Cedar Rapids, for appellees-City, Feldman and Bracy (hereinafter City).

Richard A. Davidson of Lane & Waterman, Davenport, for appellee-Von Maur, Inc.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

SACKETT, C.J.

Plaintiff-appellant, Clara Reece Fuller, appeals a district court ruling dismissing on summary judgment her claim for malicious prosecution against defendants-appellees, city of Cedar Rapids, Iowa; Steve Feldman and Ken Bracy, police officers employed by the city; and Von Maur, Inc. Plaintiff contends the motion should not have been granted. We affirm.

Plaintiff was charged with the unauthorized use of a stolen Von Maur credit card belonging to Barbara S. Simmer. Plaintiff charged $1316.18 worth of merchandise to the Simmer account on December 23, 1992 at the Von Maur store at Westdale. Plaintiff went to Von Maur on December 24, 1992 and attempted to use a credit card issued to her fiancé Kenneth Johnson to charge merchandise. Plaintiff was then identified by two store clerks as the person making the unauthorized charges to the Simmer account on December 23. In February of 1993 plaintiff was charged by trial information with the unauthorized use of the card. The information was approved by the district court and plaintiff was arrested by defendants Steve Feldman and Ken Bracy, acting in their capacity as police officers with defendant city of Cedar Rapids. As a result of plaintiff's actions at the time of her arrest she was also charged with interference with official acts. After she was arrested and spent time in jail the State moved to dismiss the charge of unauthorized use of a credit card alleging it did not believe the plaintiff could be found guilty beyond a reasonable doubt. The interference with official acts charge was amended to a charge of disorderly conduct. Plaintiff pled guilty to the amended charge.

Plaintiff then sued all the defendants for false arrest. Motions were filed to dismiss the claim. Plaintiff resisted the motions contending the fact the charges were dismissed against her prior to trial supported her claim. The district court dismissed the claim for false arrest but construed the plaintiff's pro se petition as stating a claim for malicious prosecution. Motions for summary judgment were then filed by defendants. Plaintiff resisted the motions for summary judgment. The district court granted the defendants' motions and dismissed the case. Plaintiff contends that the summary judgment was not warranted.

We review a summary judgment ruling for correction of errors of law. *Shriver v. City of Okoboji*, 567 N.W.2d 397, 400 (Iowa 1997). Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* The moving party has the burden to show the nonexistence of a material fact. *Farm Bureau Mut. Ins. Co. v. Milne*, 424 N.W.2d 422, 423 (Iowa 1988). We will review the record before the district court to determine whether an issue of material fact exists, and if not, whether the district court properly applied the law. *Shriver*, 567 N.W.2d at 400. The record includes the pleadings, motion for summary judgment, resistance, affidavits, and exhibits. *Porter v. Good Eavespouting*, 505 N.W.2d 178, 182 (Iowa 1993). The facts are reviewed in the light most favorable to the nonmoving party. *Shriver*, 567 N.W.2d at 400. A factual dispute precludes summary judgment only when the dispute is over facts that would affect the outcome of the suit. *Id.*

The elements of malicious prosecution are as follows: (1) a previous prosecution; (2) instigation of that prosecution by the defendant; (3) termination

of that prosecution by acquittal or discharge of the plaintiff; (4) want of probable cause; (5) malice on the part of the defendant for bringing the prosecution; and (6) damage to the plaintiff. *Wilson v. Hayes*, 464 N.W.2d 250, 259 (Iowa 1990). The basis of an action for malicious prosecution consists of the wrongful initiation of an unsuccessful civil or criminal proceeding with malice and without probable cause. *Yoch v. City of Cedar Rapids*, 353 N.W.2d 95, 101 (Iowa App. 1984); *Sarvold v. Dodson*, 237 N.W.2d 447, 448 (Iowa 1976).

Plaintiff alleged in her resistance to initial motions to dismiss that, "Von Maur must satisfy a reasonableness test as to whether or not they had probable cause to make a complaint to the police about Plaintiff." She also alleged in her resistance, "[t]hus if probable cause can be implied from the fact that the charge was dropped prior to trial, and malice can be inferred from the lack of probable cause, Plaintiff may be able to fulfill all six elements."

To succeed on her claim against defendant Von Maur plaintiff must show, among other things, the prosecution was procured or instigated by the defendant. *Minard v. Boss Hotels Co.*, 241 Iowa 606, 611, 40 N.W.2d 276, 278 (1949). The undisputed facts are that Von Maur employees reported the facts to the police department but did nothing more. The mere giving of information or the making of an accusation alone does not constitute a procurement of the proceedings where it is left to the uncontrolled choice of another to bring or not bring the proceedings. *See Lukecart v. Swift & Co.*, 256 Iowa 1268, 1281, 130 N.W.2d 716, 723-24 (1964). The Linn county attorney filed the complaint against plaintiff and a magistrate determined there was probable cause plaintiff had committed the offense. It is undisputed that the decision to file the charge was solely that of

the county attorney. The district court correctly dismissed the claim against Von Maur.

To succeed on her claim against the city and its officers plaintiff must show that defendant city of Cedar Rapids and police officers Feldman and Bracy acted without probable cause in filing the charges.

In the context of a civil action for malicious prosecution the existence of probable cause is determined under the following standard:

> One who initiates or continues criminal proceedings against another has probable cause for doing so if [the accuser] correctly or reasonably believes:
>
> a) that the person [accused] has acted or failed to act in a particular manner, and
>
> b) that those acts or omissions constitute the offense that [the accuser] charges against the accused, and
>
> c) that [the accuser] is sufficiently informed as to the law and facts to justify [the accuser] in initiating or continuing the prosecution.

Sisler v. City of Centerville, 372 N.W.2d 248, 251 (Iowa 1985); *Restatement (Second) of Torts* § 662 at 423 (1977).

The undisputed facts are the officers received information from two Von Maur employees that a person meeting plaintiff's description had used the Simmer credit card. They further determined from Simmer that the use was unauthorized and that the card was lost or taken from her. There was probable cause to make the complaint.

Furthermore, plaintiff failed to establish an issue of material fact as to whether the city of Cedar Rapids and Feldman and Bracy acted with "actual malice". What showing must be made to establish malice in an action for

malicious prosecution depends on the status of the defendants. *Yoch*, 353 N.W.2d at 102; *Vander Linden v. Crews*, 231 N.W.2d 904, 906 (Iowa 1975). The element of actual malice essential to an action for malicious prosecution involving a defendant who is a public official cannot simply be inferred from a lack of probable cause, but must be the subject of an affirmative showing. *Yoch*, 353 N.W.2d at 102. It must be shown that defendant's instigation of criminal proceedings against plaintiff was primarily inspired by ill will, hatred or other wrongful motives. *Id.* This rule required the showing of actual malice in order for a public official to be held liable for malicious prosecution also applies to peace officers. *Id.*; *Moser v. County of Black Hawk*, 300 N.W.2d 150, 153 (Iowa 1981).

Defendant's Feldman and Bracy were police officers employed by the city of Cedar Rapids. The officers' actions were motivated by their duty to investigate allegations brought to them by Von Maur. Plaintiff has failed to present any material facts showing that the officers acted with actual malice. The district court properly dismissed the claim against the city and the police officers.

AFFIRMED.