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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

365

Filed February 26, 1985

4-508
83-1545

RONALD G. SISLER and DARLENE SISLER,

Plaintiffs-Appellants,

vs.

CITY OF CENTERVILLE, IOWA: DENNIS WEST, JOSEPH B. TRELOAR, and RICK HACKERT,

Defendants-Appellees.

Appeal from the Iowa District Court for Monroe County - Richard J. Vogel, Judge.

Plaintiffs appeal from the trial court's refusal to allow them to amend their petition and from a judgment sustaining defendant's motion for directed verdict in a malicious prosecution and abuse of process action. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Marvin V. Colton, Albia, for plaintiffs-appellants.

Charles K. Pettit, Bloomfield, for defendants-appellees.

Considered by Schlegel, P.J., and Hayden and Sackett, JJ.

This action all started because a coon dog named Ralph disappeared. Ralph had been purchased by defendant Rick Hackert. Hackert returned home after being away for several days to find Ralph wasn't there. Hackert ran an ad in the local paper trying to locate Ralph. A man named Clark came to Hackert's home and told him Ralph was at the home of plaintiffs Ronald and Darlene Sisler. Hackert went to Sisler's home, claimed he saw Ralph there, and asked Ronald Sisler for Ralph. Ronald told Hackert he had purchased the dog alleged to be Ralph at an auction and refused to give the alleged Ralph to Hackert.

Hackert then talked to the county attorney and Centerville police about getting Ralph back. Defendants Dennis West and Joseph Treloar were on the Centerville police force. They talked to Clark and Hackert. They requested that a policeman go by the Sisler house and get a picture of the dog. The policeman reported he did not see the dog at Sislers. Defendant Treloar then filed a complaint and affidavit in Appanoose County District Court accusing Plaintiff Ronald Sisler of the crime of theft in the second degree in violation of Iowa Code §712.2(2) (1979), claiming that Plaintiff Ronald Sisler took possession of the property of another in the Pamida parking lot in Centerville with the intent to deprive the other thereof. The affidavit contained the following facts. Hackert told Treloar his dog was missing, and Clark told him it was at Sisler's residence. Hackert told Treloar he saw the dog at Sisler's, and Sisler told Hackert he bought it at an auction. Clark told Treloar he saw Sisler's son catch the dog at the Pamida parking lot and the dog later was seen tied to Sisler's trailer. Hackert told Treloar the dog was worth $1,000.

Treloar also filed an application for search warrant stating that the dog had been obtained in violation of the law, that possession of it was unlawful and that the dog was evidence in a criminal prosecution. An arrest warrant and a search warrant were signed by the magistrate.

Sisler's house was searched and he was arrested. Ralph was not found on Sisler's premises. Ralph was returned to Hackert the day after the arrest by another party. The charges were dismissed by the county attorney.

Ronald Sisler and his wife subsequently filed a petition against the City of Centerville, Dennis West, Joseph B. Treloar and Rick Hackert, claiming malicious prosecution and abuse of process. The Sislers also filed in the United States District Court a civil rights action pursuant to 42 U.S.C. §1983 against the same defendants. The defendants filed a motion asking the federal court to dismiss the cause. The United States District Court, Southern District of Iowa, dismissed the action based on the abstention doctrine holding in part:

> ". . . The two lawsuits [referring to the case at bar and the §1983 action] contain identical issues of fact and plaintiffs seek money damages in both actions. In their state court action plaintiffs assert only state law theories of liability and in the instant action they assert only a 42 U.S.C. §1983 theory of liability. The only fact that would have to be proved to support the section 1983 theory that would not have to be proved to support the state law theories is that defendants acted under color of state law. . . The state court has jurisdiction to entertain plaintiffs' section 1983 theory. . . ."

Sisler v. West, Civ. No. 82-618-D, slip op. at 2 (S.D. Iowa Feb. 23, 1983), aff'd, No. 83-1405, slip. op. at 2 (8th Cir. Sept. 2, 1983).

Trial of the case at bar had been set for September 27, 1983, and on September 1, 1983, a pretrial conference had been held. On September 27, 1983, plaintiffs filed a motion for leave to amend and a copy of a proposed amended petition which added the §1983 action previously filed in federal court and increased the amount of plaintiffs' prayer. The trial court refused to allow the amendment.

I.

Plaintiffs claim the trial court abused its discretion in failing to allow the amendment. When a responsive pleading has been filed, leave of court is required

for amendments. The purpose is to give the adverse party a right to object to amendments which might affect trial prepration. The decision is a matter for exercise of trial court discretion. Johnson v. Percy Const., Inc., 258 N.W.2d 366, 370 (Iowa 1977). A trial court has broad discretion in permitting or denying amendments and unless the discretion is abused we will not interfere. To allow an amendment is the rule, not the exception. However, an amendment should not be permitted under Iowa R. Civ. P. 88 if it materially changes the issues involved. Townsend v. Mid-America Pipeline Company, 168 N.W.2d 30, 37 (Iowa 1969). In Townsend the court was not persuaded that an amendment to increase damages claimed from $29,000 to $125,000 substantially changed the issues. Id. However, in Johnston v. Percy Const. Inc., 258 N.W.2d 366, 371 (Iowa 1977) the court held in exceptional situations denial of an amendment may constitute an abuse of fair discretion. The court in Johnston made the following factual finding:

> 1. The nature of plaintiffs' amendment could not have surprised the defendant.
> 2. The amendment did not substantially change the issue or theory of recovery.

Id.

The Johnston court then determined the court's ruling denying leave to amend lacked a sound legal basis and the trial court abused its discretion in overruling the motion for leave to amend. Id. at 371-72.

The court in Moser v. Thorp Sales Corp., 312 N.W.2d 881, 896 (Iowa 1981) found the facts of Johnston supported the conclusion that the trial court did not abuse its discretion when it allowed plaintiff to file supplemental pleadings, and noted, in passing, that it is generally preferable to allow supplemental pleadings and amendments rather than deny them.

An amendment on the eve of trial should be denied as untimely if it materially changes the issue involved. Farmers Insurance Group v. Merryweather, 214 N.W.2d 184, 188 (Iowa 1974).

> [I]n exceptional situations denial of an amendment may constitute an abuse of fair discretion. The time of the amendment is not the determining factor in reviewing the trial court's ruling. More important is whether it substantially changes the issues. Moreover, the discretion lodged in the trial court is a legal discretion, to be exercised . . . in a particular case. Therefore, the bounds of fair discretion are exceeded if the ruling lacks a sound legal basis.

Johnston v. Percy Const., Inc., 258 N.W.2d 366, 371 (Iowa 1977)(emphasis added) (citations omitted).

In Kellar v. Peoples Natural Gas Co., 352 N.W.2d 688, 692 (Iowa Ct. App. 1984), where the amendments appeared to do little more than amplify Kellar's seven original negligence allegations, the record sustained the trial court's conclusion that, due to discovery proceedings which had already taken place, defendant had adequate notice of the nature of the additional claims of negligence to justify granting plaintiff's application to amend.

We determine (1) that the nature of the amendment could not have in any way surprised the defendants. They were parties to the action in federal court. An examination of the federal court rulings indicate that similarity of issues and prior discovery on the issues were two reasons why the federal court dismissed the cause. (2) We also find that the amendment did not substantially change the issues or theory of recovery. We consider strongly the holding of the federal court that the two suits involved identical issues of fact and the only additional fact to be proven to support the section 1983 theory is that defendants acted under color of state law.

We consider too that this case presents unusual circumstances because of the fact that the defendants who resisted the amendment adding a §1983 claim in state court were the parties who requested the §1983 claim be transferred to state court. We determine the trial court's ruling lacks a sound legal basis. We reverse its ruling and determine the amendment should be allowed.

II. 370

Plaintiffs next claim the court erred in directing a verdict for all defendants. At the close of the evidence defendants made a motion for directed verdict claiming there was insufficient evidence to submit the issue of abuse of process or malicious prosecution to the jury. The court sustained the motions for directed verdicts. Plaintiff claims the trial court erred in doing so. Our review is made more difficult because the same attorney represents all defendants on appeal and represented all defendants but Hackert in the trial court. The defendants have different liabilities, but their case is argued as though they all had the same liability. We will therefore discuss the issues generally and then make our determination of the position of each defendant separately.

Malicious Prosecution

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. While this is the essence of the tort, the Iowa courts recognize six distinct elements of the cause of action: "(1) a previous prosecution, (2) instigation or procurement thereof by defendant, (3) termination thereof by an acquittal or discharge of plaintiff, (4) want of probable cause, (5) malice in bringing the prosecution on the part of the defendant and (6) damage to the plaintiff." See Mills County State Bank v. Roure, 291 N.W.2d 1, 3 (Iowa 1980). The trial court determined it should direct a verdict on the malicious prosecution issue on several grounds; the first was that there was insufficient evidence from which the jury could find that the criminal proceedings initiated against Sisler were terminated favorably to him.

> Criminal proceedings are terminated in favor of the accused by (a) discharge by a magistrate at a preliminary hearing, or (b) the refusal of a grand jury to indict, or (c) the formal abandonment of the proceedings by the public prosecutor, or (d) the quashing of an indictment or information, or (e) an acquittal, or (f) a final order in favor of the accused by a trial or appellate court.

Restatement (Second) of Torts §659 (1977) (emphasis added).

It is without dispute in this cause that the charges against Sisler were dismissed by the county attorney. The trial court held, however, that there was no evidence of a favorable termination, apparently because it determined the charges were dismissed for an incorrect reason. The alleged incorrect reason concerns the fact that Ralph was not a licensed dog and he was over six months of age. Iowa Code §351.25 (1979) provides that all dogs under six months of age, and all dogs over said age and bearing a collar with a valid license attached thereto, shall be deemed property. Dogs not so provided with license tag shall not be deemed property. The county attorney testified that in this trial, he considered §351.25 in dismissing the charge.

The trial court determined that the charge was dismissed erroneously because the county attorney determined that a dog over six months old and not licensed is not property when in fact Iowa Code §702 (1979) defines property as being that which is of value and provides the definition in §702 is the definition to be followed for the purpose of the criminal code.

Under common law, dogs were recognized as property but fewer legal rights and protections were extended to them than to other domestic animals, and they were not the subject of larceny. Later however, many states, including Iowa, viewed dogs as property and as chattels, subject to larceny. See Mendenhall v. Struck, 207 Iowa 1094, 1098, 224 N.W. 95, 97 (1929).

In Hamby v. Samson, 104 Iowa 112, 115, 74 N.W. 918, 919 (1898), the court held dogs were comprehended within the term "chattels" as used in the statute defining larceny and determined that a dog is the subject of larceny.

Iowa Code §702.1 (1979) provides whenever a term, word or phrase is defined in the criminal code, such meaning shall be given whenever it appears in the Code, unless it is being specially defined for a special purpose. Iowa Code §702.14 (1979) defines property:

> Property is anything of value, whether publicly or privately owned. The term includes both tangible and intangible property, labor or services. The term includes all that is included in the term "real property" and personal property.

We therefore agree with the trial court that an unlicensed dog over six months of age can be considered property under the criminal code despite the provision of §351.25. We do not however agree with the trial court that because of this finding there is no evidence to submit to the jury on the issue of favorable termination of the criminal proceeding. Our discussion on the probable cause issue also bears on our decision here.

Probable Cause

The trial court further determined that a jury could not find that any of the defendants acted without probable cause nor could a jury find that any of the defendants acted with malice.

The complaint filed by Treloar charged Ronald Sisler with theft in the second degree in violation of Iowa Code §712.2(2) (1979). There is no §712.2(2) and §712.2 is an arson statute.[1] Theft in the second degree is in violation of 714.2(2). An element of theft, as defined in §714.1(1) occurs when a person: 1. Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.

We look to the information available at such time as the complaint was filed to determine if probable cause exists. Probable cause exists where "[T]he facts and circumstances within [one"s] . . . knowledge, and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to the belief that an offense has been or is being committed." Children v. Burton, 331 N.W.2d 673, 679 (Iowa 1983) (quoting Brinegar v. United States, 338 U.S. 160, 175-76 (1948)).

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[1] The fact that Sisler was charged under the wrong statute has not been raised by either party and has no bearing on our decision.

In Shaul v. Brown, 28 Iowa 37, 46 (1869), the Iowa court discussing probable cause for a malicious prosecution said:

> "No man's liberties or rights can be measured by even the honest belief of another. The honest belief of a person commencing a criminal prosecution against another, in the guilt of the accused, is an essential element or fact for him in showing probable cause or in disproving the want of it; but he must also show such reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in that belief, before his belief can become his vindication or shield. . . ."

It is important to note too that the complaint alleged that the taking occurred in the Pamida parking lot. We find no fact to be available to Treloar at the time of the filing of the complaint which would support a finding of a taking of Ralph by Ronald Sisler in the Pamida lot as the complaint charges. In making that determination we look at the facts known to Treloar at that time.

> 1. A dog "Ralph" had gotten loose from Hackert and had been gone for more than several days.
> 2. Clark saw the dog in the Pamida lot. The dog was running at large. He saw Sisler's son catch the dog and lead it around the lot.
> 3. The dog was tied to Sisler's trailer in the parking lot.
> 4. Hackert thought he saw Ralph in Sisler's yard. Hackert asked Sisler for it and Sisler said he bought it at an auction.

Defendant claims this is reasonable gounds to believe a crime was committed by Sisler at 2 p.m. in the Pamida parking lot. We determine that a jury could find from these facts that probable cause did not exist. In fact, there is no evidence that Sisler did on October 26, at the Pamida parking lot, take possession or control of the property of another with intent to deprive another of it. Ralph got loose and was missing. Ralph was not licensed, and he wore no identifying tags or markers. Ralph was seen running at large at the point of the alleged theft, and then was seen tied to Sisler's truck. The charge was dismissed by the county attorney. For the trial court to find from these facts there was insufficient evidence to find the criminal proceedings were terminated favorably to Sisler and there was no probable cause is error. We refuse to hold as a matter of law, as the defendants would ask us to do, that evidence that a person has given shelter to an

unrestrained and unmarked animal and refuses to immediately give the animal to a person who comes to his door, some time after the alleged crime was committed, supports a finding, as a matter of law, that there is probable cause to charge the person harboring the dog with theft. There is sufficient evidence to submit to a jury the issue of probable cause. Lack of probable cause for the initiation of criminal proceedings, insofar as it tends to show accuser did not believe in the guilt of the accused, is evidence that he did not initiate the proceedings for a proper purpose. Restatement (Second) of Torts §669 (1977).

Malice

The trial court next determined there was no evidence to support the submission of the issue of malice. Malice may be inferred from a reckless disregard of the rights of others, such as evidences an evil intent or from the absence of just cause or excuse for the doing of an act which had caused damage to another. Similarly, the law will presume malice in some instances from a lack of probable cause. 52 Am. Jur. 2d Malice §5 (1970).

In Yoch v. City of Cedar Rapids, 353 N.W.2d 95, 102 (Iowa App. 1984) we discussed the fact that the showing to be made to establish malice in an action for malicious prosecution depends on the status of the defendants. If the defendant is not a public official, malice can be inferred from a lack of probable cause. However, 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.

Peace officers who investigate or procure a prosecution may be held liable for malicious prosecution on other elements, including the presence of actual malice, Moser v. County of Black Hawk, 300 N.W.2d 150, 153 (Iowa 1981). Actual malice is synonymous with expressed malice, which has been defined as "malice in fact, ill-will, or wrongful motive." Moser at 152.

We must determine, viewing the evidence in a light most favorable to the plaintiff, whether there is evidence from which the jury could find actual malice on the part of the police officers West and Treloar. There are facts in the record from which the jury could determine that the police officers had no fact from which they could determine that Ronald Sisler's son had done anything more than catch a dog running at large in a parking lot. The jury could also determine that the police officers had no definite information that the missing dog was at Sisler's or that the dog was worth $1,000. The affidavit itself failed to state probable cause, and the officers refused to dismiss the charge when Hackert requested they do so. Furthermore, the officers testified they had signed statements when the charges were filed when in fact the record showed the statements were not signed until after the search and arrest.

We determine that a jury could infer from these facts that the officers acted with a wrongful motive. The trial court erred in finding no evidence to submit the issue of malice.

VI.

Plaintiff further contends that the trial court erred in directing a verdict on abuse of process. We disagree.

One who uses a legal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed is liable to the other for the pecuniary loss caused thereby. Sarvold v. Dodson, 237 N.W.2d 447, 448 (Iowa 1976). We agree with the trial court that there is no abuse of process here. There being no evidence from which the jury could find the process was used here to secure a purpose for which it was not intended. Where the claim is that defendant commenced and prosecuted a suit without probable cause, the proper cause of action is for malicious prosecution. Bickel v. Mackie, 447 F. Supp. 1376, 1379 (N.D. Iowa 1978). The trial court properly directed a verdict on the abuse of process issue as to all defendants.

Decision 376

We now apply our decision to the individual defendants. We have ordered the petition amended to include a §1983 action against all defendants. We make no determination whether the facts support a submission of the §1983 action against all defendants.

We determine the trial court was correct in directing a verdict on the malicious prosecution count and abuse of process count against Hackert. There is no evidence that Hackert did any more than talk to the police and county attorney before the charge was filed. Hackert gave a statement after Sisler was arrested. West investigated the charge and gave evidence before the magistrate. Treloar investigated the charge, gave evidence before the magistrate and filed charges. The directed verdict as to Treloar, West and the City of Centerville is affirmed on the abuse of process issue but is reversed and remanded for a new trial on the malicious prosecution issue. There is evidence that Treloar and West investigated and procured the warrants and that they were employees of the City of Centerville at the time of the alleged action.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.