FILED
NOV 26 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JANE ANNE SMITH,

Plaintiff-Appellant,

vs.

CITY OF CEDAR RAPIDS, IOWA, TIM REYNOLDS, and LINN COUNTY, IOWA,

Defendants-Appellees.

301

Filed November 26, 1985

5-453
84-1524

Appeal from the Iowa District Court for Linn County - William L. Thomas, Judge.

Plaintiff appeals the lower court's directed verdict in favor of defendant Linn County, and also an adverse jury verdict in her causes of action against defendants Reynolds and City of Cedar Rapids. **AFFIRMED.**

Lloyd E. Humphreys of Humphreys & Associates, Cedar Rapids, Iowa, for plaintiff-appellant.

David F. McGuire, Cedar Rapids City Attorney, for defendants-appellees Cedar Rapids and Reynolds.

William H. Roemerman of Crawford, Sullivan, Read & Roemerman, Cedar Rapids, Iowa, for defendant-appellee Linn County.

Heard by Snell, P.J., Schlegel, and Hayden, JJ.

Plaintiff appeals the lower court's directed verdict in favor of defendant Linn County, and also an adverse jury verdict in her causes of action against defendants Tim Reynolds and City of Cedar Rapids. She sued the defendants in a civil action for damages arising from alleged false arrest, false imprisonment, malicious prosecution, abuse of process, and violation of civil rights. We affirm the trial court.

Plaintiff was arrested on a Sunday night in January, 1983, after defendant Cedar Rapids police officer Tim Reynolds clocked her on radar going 44 miles per hour in a 30 miles per hour speed zone. She does not dispute that prior to driving that night she had been drinking, that she probably had liquor on her breath and that she was unable to perform some of the "field sobriety tests" administered by Reynolds. She also admits disclosing to Reynolds that she had in her purse a bottle of the prescription drug Valium.

She disputes, however, that alcohol or the Valium caused her to fail the "field sobriety tests" such as recitation of the alphabet or touching her finger to her nose. She told Officer Reynolds at the time that her inability to walk a straight line and to perform other functions were due to physical maladies such as thyroid cancer, and a brain tumor. She did not deny, however, that the field alco-sensor test administered by Officer Reynolds, at the scene of the arrest, indicated a blood-alcohol reading of .110 percent by weight.

Based upon plaintiff's actions and the alco-sensor results, Officer Reynolds arrested plaintiff for driving under the influence of intoxicants or drugs, and transported her to the Linn County jail. At the jail, plaintiff submitted to a breath test on an intoxilyzer model 4011A machine which indicated a blood-alcohol equivalent of .085 percent by weight. Officer Reynolds signed a complaint charging plaintiff with operating a motor vehicle while intoxicated or drugged

in violation of Iowa Code section 321.281. Plaintiff was booked in and processed according to standard procedures and was brought before a magistrate at the next available time.

On the morning following plaintiff's arrest, a verified complaint which set forth the facts surrounding the arrest, including the intoxilyzer test showing a blood alcohol level of .085 percent by weight, was presented to the district court judge, who at that time, made a finding of probable cause.

On March 20, 1983, plaintiff filed a motion to dismiss the pending criminal prosecution against her on the basis that a test of .085 percent by weight on the intoxilyzer invalidated further prosecution. At the hearing on plaintiff's motion to dismiss the county attorney offered to dismiss the criminal prosecution against her so long as she would agree not to file a civil action. Plaintiff refused and her motion to dismiss was denied and both sides prepared for the criminal trial on the OWI charge.

Just prior to trial, the county attorney dropped the charges against plaintiff. Shortly thereafter plaintiff filed a petition in district court claiming: (against the defendants Reynolds and the City) (1) false arrest, a violation of her civil rights under 42 U.S.C. section 1983; (against all defendants) (2) false arrest and imprisonment, a violation of her civil rights under 42 U.S.C. section 1983 (after blood test and result of .085); (3) false charges, abuse of process, and false imprisonment (after blood test of .085, and plaintiff's motion to dismiss filed); and (4) abuse of process and malicious prosecution due to continued prosecution claiming actual and punitive damages in all counts.

The trial court sustained a motion in limine filed by Linn County that prohibited evidence of the offer to dismiss the criminal charges in consideration for a release of all civil liability of the defendants. The trial court also sustained the county's motion for a directed verdict on the basis that the county and its

agents were immune from suit. Claims of false arrest and false imprisonment were submitted to the jury against Officer Reynolds and the City of Cedar Rapids, and a civil rights claim under 42 U.S.C. section 1983 against Officer Reynolds only.

The jury returned a verdict in favor of the defendants on false arrest and imprisonment. It did not return a verdict in the 42 U.S.C. section 1983 action.

The court entered an order that the verdict of the jury necessarily would have had to be in favor of defendants on the 42 U.S.C. section 1983 cause of action in which no verdict was returned.

Plaintiff filed a motion for new trial and modification pursuant to Iowa Rules of Civil Procedure 179(b), but it was overruled.

On appeal, plaintiff raises the following issues: (1) evidence should not have been excluded concerning the offer to dismiss the criminal charge in exchange for release of civil liability; (2) depositions of two doctors should have been admitted into evidence; (3) a directed verdict for defendant Linn County and its attorney should not have been entered on grounds of immunity; (4) theories of malicious prosecution and abuse of process against all of the defendants should not have been withdrawn from the jury's consideration; (5) various instructions to the jury were error; and (6) various errors were committed on certain evidentiary matters.

I. **Directed Verdict in Favor of Linn County and the County Attorney.** The trial court granted defendant Linn County's motion for a directed verdict on the grounds that the county attorney and the county itself were immune from civil liability based upon the facts and allegations brought forth by the plaintiff.

A directed verdict in defendant's favor is appropriate if there is no substantial evidence in support of one of the elements of plaintiff's claim. Dennett v. City of Des Moines, 347 N.W.2d 691, 692 (Iowa Ct. App. 1984). In considering the propriety of a motion for a directed verdict, the court views the evidence in the light most favorable to the party against whom the motion was made. Iowa R. App. P. 14(f)(2).

The record reveals no instances where the county attorney performed any act other than his official duty as a prosecutor in a criminal matter. The evidence shows that the county attorney's acts were simply filing and prosecuting the charges against the plaintiff. In Burr v. City of Cedar Rapids, 286 N.W.2d 393, 395 (Iowa 1979), the supreme court said, "prosecutors, as quasi-judicial officers, ... are generally cloaked with the same immunity afforded judges when their duties are primarily judicial—the filing and vigorous prosecution of criminal charges." The law is well settled in Iowa that a county attorney is immune from civil liability when his acts are performed within his official duties. See Moser v. Black Hawk County, 300 N.W.2d 150, 152 (Iowa 1981). It follows that this immunity extends to the county as well. Id.

We hold, therefore, the trial court was correct in granting a directed verdict in favor of defendant Linn County and the county attorney.

II. **Motion in Limine.** Plaintiff alleges that the trial court erred in excluding evidence of the offer to dismiss the criminal charges against her in exchange for a promise by her not to file a civil suit against the defendants. She argues that this offer is proof of the county attorney's ill-will and maliciousness and that it is evidence of the prosecutor's state of mind. Because we hold that the county and the prosecutor are immune from suit in this instance, this issue is moot and need not be decided.

III. Malicious Prosecution and Abuse of Process Theories. The trial court refused to submit to the jury, the allegations of malicious prosecution and abuse of process on the part of any defendant. Plaintiff alleges that it was error to refuse to submit the claims. Since we have already decided that the county and its attorney are immune, we will restrict our discussion on this issue as it applies to Officer Reynolds and the City.

A. Abuse of Process. The supreme court, in Sarvold v. Dodson, 237 N.W.2d 447, 449 (Iowa 1976), defined the tort abuse of process.

> Abuse of process, . . . , is the intentional use of legal process for an improper purpose incompatible with the lawful function of the process by one with an ulterior motive in doing so, ... The improper use which is the essence of the tort is ordinarily an attempt to secure from another some collateral advantage not properly includable in the process itself, and is, in Prosser's words, "a form of extortion" in which a lawfully used process is perverted to an unlawful use.

We can find no evidence where any defendant in this action intentionally used the legal process for an improper purpose, or used the process to obtain some collateral advantage not properly includable in the process itself. The trial court did not err in refusing to submit this issue to the jury. An issue without evidentiary support should not be submitted to the jury. Dutcher v. Lewis, 260 N.W.2d 404, 406 (Iowa 1977).

B. Malicious Prosecution. The supreme court, in Sarvold v. Dodson, at 448, also discussed the elements and the basis of a malicious prosecution action.

> The elements of a malicious prosecution action are: (1) a previous prosecution, (2) instigation or procurement thereof by defendant, (3) termination of the prosecution 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 plaintiff. Vander Linden v. Crews, Iowa, 231 N.W.2d 904, 905; Liberty Loan Corp. of Des Moines v. Williams, Iowa, 201 N.W.2d 462, 466.

307

> 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. Hyde Construction Co., Inc. v. Koehring Company, 387 F. Supp. 702, 713 (S.D. Miss. 1974); Liberty Loan Corp. of Des Moines v. Williams, supra, 201 N.W.2d 462, 466; 72 C.J.S. Process § 119, p. 1189.

The basis for plaintiff's malicious prosecution claim against Officer Reynolds and the City is that they should have released her and stopped prosecution once they became aware of the .085 percent by weight intoxilyzer results. She claims that even if there was probable cause for her arrest and initial confinement, the exculpatory nature of the intoxilyzer results should have required her discharge and that any further confinement after the results were known amounted to false imprisonment and evidence of malice for the malicious prosecution claim.

We note, initially, that false arrest is indistinguishable from false imprisonment. Kraft v. City of Bettendorf, 359 N.W.2d 466, 469 (Iowa 1984). And, because we agree with the district court judge who found probable cause for the arrest, we hold that plaintiff's arrest and subsequent incarceration were proper.

Plaintiff argues strenuously, however, that the intoxilyzer results were exculpatory and that further retention by the city was malicious. We cannot agree that the .085 percent by weight result was, in and of itself, exculpatory. Iowa Code section 321.281 creates a presumption of intoxication if a chemical test shows a blood-alcohol level in excess of .100 percent by weight. But the reverse is not necessarily true. That is, the statute does not create a negative presumption that a person with a test of less than .100 percent by weight is not under the influence.

We hold further that plaintiff failed to show the requisite malice required to submit this issue against defendants Reynolds and the City. "What showing

must be made to establish malice in an action for malicious prosecution depends on the status of the defendant." Yoch v. City of Cedar Rapids, 353 N.W.2d 95, 102 (Iowa Ct. App. 1984). In an action against a public official, malice must be subject to an affirmative showing. Id.

> Actual malice is synonymous with express malice, which has been defined as "malice in fact, ill-will, or wrongful motive . . . ." Black's Law Dictionary, 4th Ed., 1968, p. 1109. See Giltner v. Stark, 219 N.W.2d 700, 708 (Iowa 1974). 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 defendant's instigation of criminal proceedings against plaintiff was primarily inspired by ill-will, hatred or other wrongful motives. If the defendant's purpose in instigating proceedings was otherwise proper, the fact he felt indignation or resentment toward the plaintiff will not subject him to liability. See Prosser on Torts, 4th Ed., § 119, pp. 847-848.

Id. Because the record shows no instances of actual malice, we hold the trial court was correct in refusing to instruct the jury on this issue. See Dutcher v. Lewis, supra.

IV. Civil Rights, 42 U.S.C. Section 1983 Claim. The principal objection here is the court order of July 24, 1983. In order to most clearly demonstrate the circumstances and the court's reasoning, we quote a portion of the order itself.

> The jury was returned into open court outside the presence of the parties and attorneys at 5:00 p.m. on July 20, 1984, after having informed the court that they had reached a verdict.
>
> The jury completed Verdict Form No. 2 under the form for false arrest and imprisonment which states, "2. We, the jury, find for the Defendants, City of Cedar Rapids and Tim Reynolds, and against the Plaintiff, Jane Anne Smith. Dated this 20th day of July, 1984" and signed by Dean F. Striley, the foreman.
>
> The jury did not complete either form of verdict under the second form submitted to them which was entitled civil rights.

> The Court questioned the foreman about this who expressed the view the verdict on the first claim necessarily decided the second claim. The Court agrees that for the jury to have found for the Defendants under the claim for false arrest and imprisonment, they must necessarily have found for the Defendant Tim Reynolds on the claim for violation of civil rights. This verdict is analogous to a jury in a criminal case finding a Defendant guilty of a lesser included offense. Such a verdict necessarily finds the Defendant not guilty of the greater offense.
>
> Based on the forms returned by the jury it is the order of the Court that the Clerk enter judgment in favor of the Defendants and against the Plaintiff on all claims in this case. Costs are taxed to the Plaintiff.

Apparently, no record was made of this exchange between the court and the jury. Plaintiff objected to this order and procedure in her Motion for New Trial. The trial court overruled her motion.

"In ruling upon motions for new trial, the trial court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties." Iowa R. App. P. 14(f)(3); Wirtanen v. Provin, 293 N.W.2d 252, 257 (Iowa 1980).

The trial court did not abuse its discretion. We agree with the trial court's reasoning that the jury's verdict regarding the false arrest and false imprisonment issues would preclude any basis for rendering a favorable verdict for plaintiff on the civil rights issue. Substantial justice was served by the trial court's order on this issue.

V. Other Issues. Plaintiff alleges that the trial court erred in: (1) refusing to admit certain depositions; (2) failing to instruct the jury her interpretation of false imprisonment; and (3) failing to admit personnel records of Officer Reynolds. We have reviewed these issues and hold they are without merit.

Because we hold the defendants acted entirely within their official duties and without malice during all times alleged in this appeal, we affirm the trial court on all issues raised by plaintiff.

AFFIRMED.