IN THE COURT OF APPEALS OF IOWA

No. 6-053 / 94-1543

000209

MARTY B. MIXELL and NICKOLAS D. PILIPCHUK,

Appellants,

vs.

FILED
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CLERK SUPREME COURT

MENARD, INC.; MENARD CASHWAY LUMBER, a Division of MENARD, INC; and STEVE R. FABER,

Appellees.

Appeal from the Iowa District Court for Black Hawk County, K.D. Briner, Judge.

Mixell and Pilipchuk brought suit against Menard seeking damages associated with their termination and arrest for allegedly stealing a pair of gloves and a tape measure. **AFFIRMED.**

Beth Hansen and Larry J. Cohrt of Swisher & Cohrt Waterloo, for appellants.

Iris E. Muchmore and Leonard T. Strand of Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, and David T. Coriden, Eau Claire, Wisconsin, for appellees.

Heard by Sackett, P.J., and Cady and Streit, JJ.

CADY, J.

Marty Mixel and Nickolas Pilipchuk appeal a district court's judgment in favor of Menard, Inc. concerning their claims of false arrest, malicious prosecution, abuse of process, and invasion of privacy. Upon our review, we affirm.

Mixel and Pilipchuk were employed by Menard and worked in its Waterloo, Iowa store. Mixel was the assistant department manager of the millwork department and Pilipchuk's immediate supervisor. Steven Faber was the store manager.

In February 1992, Faber accused both men of stealing a package of measuring tape and a pair of gloves from the company's inventory. Faber called Pilipchuk into a conference room. Faber inquired as to whether Pilipchuk had a receipt for the items. He said he did not and indicated Mixel had told him to retrieve the measuring tape. After Faber was finished with Pilipchuk, he called Mixel into the conference room and inquired about a receipt for the gloves or measuring tape. Mixel indicated Pilipchuk had obtained the gloves and tape under Menard's "in-store use" policy which allowed employees to use store items only at work and list it on a sheet by the end of their shift.

Faber told Pilipchuk and Mixel their actions constituted theft, and it was Menard's policy to terminate and prosecute employee theft. Faber filed out termination forms, which the men eventually signed after noting on the form they claimed they were using the items for "in-store use." Faber contacted the police, who

escorted the men out of the store and into a squad car. Pilipchuk and Mixel were issued citations for fifth-degree theft, but the charges were dismissed later that day.

Mixel and Pilipchuk filed suit against Menard, Inc., Menard Cashway Lumber, and Faber for false arrest, malicious prosecution, abuse of process, slander, and invasion of privacy. The slander claim was dismissed during trial. Following a bench trial, the district court determined, while Faber's actions were "rash, ill-considered, unwise, and unfair," Mixel and Pilipchuk failed to prove the elements of their tort claims, and entered judgment in favor of the defendants.

Mixel and Pilipchuk appeal contending the district court erred in failing to grant them recovery for their claims for false arrest, malicious prosecution, abuse of process, and invasion of privacy.

I. Standard of Review

Where a case is tried at law, our review is for errors only. Iowa R. App. 4; *Grinnell Mut. Ins. Co. v. Voltz*, 431 N.W.2d 783, 785 (Iowa 1988). Findings of fact in an action without a jury have the effect of special verdict and are binding on appeal if supported by substantial evidence. Iowa R. App. P. 14(f)(1); *Power Eng'g & Mfg., Ltd. v. Krug Int'l*, 501 N.W.2d 490, 493 (Iowa 1993). Evidence is substantial when reasonable minds would accept the evidence as adequate to reach the same finding. *Drew v. Lionberger*, 508 N.W.2d 83, 85 (Iowa App. 1993).

When a district court finds the party with the burden of proof failed to carry its burden, we will not interfere on appeal unless the evidence shows the party carried

its burden as a matter of law. *K. Carr v. Hovick*, 451 N.W.2d 815, 817 (Iowa 1990); *Tom Riley Law Firm, P.C. v. Tang*, 521 N.W.2d 758, 759 (Iowa App. 1994). The findings are to be construed broadly and liberally to uphold, rather than defeat, the district court's judgment. *Knudsen v. Chicago and Northwestern Transp. Co.*, 464 N.W.2d 439, 442 (Iowa 1990).

II. False Arrest

The essential elements of false imprisonment are (1) detention or restraint against one's will and (2) the unlawfulness of such detention or restraint. *Kraft v. City of Bettendorf*, 359 N.W.2d 466, 469 (Iowa 1984); *State v. Snider*, 479 N.W.2d 622, 623 (Iowa App. 1991). A false arrest is one way of committing the tort of false imprisonment. *Children v. Bruton*, 331 N.W.2d 673, 678 (Iowa 1983) *cert. denied*, 464 U.S. 848, 104 S.Ct. 155, 78 L. Ed. 2d 143 (1983).

A. Conference Room

Mixel and Pilipchuk allege the detention in the Menard's conference room constituted a false arrest as they were restrained against their will. However, the record shows both men entered and stayed in the room voluntarily. Neither men asked to leave the room, nor attempted to do so at any time during Faber's questioning. Neither men were told they could not leave the room. While both men signed their termination of employment forms, they were not told leaving the room was contingent upon their signing the forms. Mixel admitted he stayed in the room

in order to explain to Faber the reasons for the removal of the gloves and measuring tape.

Mixel and Pilipchuk also contend the restraint was unlawful. A merchant may lawfully detain a person he or she believes concealed property if he or she has reasonable grounds for believing the party has concealed or was attempting to conceal property. Iowa Code § 808.12(3) (1993). *See also Lenstra v. Menard, Inc.*, 511 N.W.2d 410, 412 (Iowa App. 1993). Here, prior to the detention, Faber received a report Pilipchuk had taken items off the shelf and returned to his department without paying for them. He also discovered, prior to the detention, the packaging for the gloves and the measuring tape in the trash, yet neither of the items nor their identifying numbers had been entered upon the "in store use" sheet. While questioning Pilipchuk, Faber discovered he had obtained the measuring tape because Mixel had lost his own personal measuring tape. Pilipchuk at no point during the meeting indicated he took the items under the "in store use" policy.

We cannot find the detention in the conference room satisfies the elements of false arrest as a matter of law. Neither men appeared to be restrained against their will in the conference room. Moreover, with the evidence presented, we cannot find Faber's actions in detaining the men in the conference room were unreasonable, and therefore unlawful, as a matter of law.

B. Police Interrogation

Similarly, Mixel and Pilipchuk argue the police actions of taking the men through the store and the interrogation in the police car constituted a false arrest since they were unlawfully restrained against their will.

We recognize mere submission to authority to a law enforcement officer does not equate to an arrest. *State v. Johnson-Hugi*, 484 N.W.2d 599, 601 (Iowa 1992); *State v. Ransom*, 309 N.W.2d 256, 258-59 (Iowa App. 1981). Here the officer requested the men come with him through the store to his police car, indicating the normal practice is to use handcuffs. Both men, without handcuffs, went voluntarily with the officer through the store and into the police car. The officer never placed the men under formal arrest, informed them of their *Miranda* rights, nor took them to the police station or jail.

The men were issued citations while in the police car and told they could leave. Testimony from the officer who issued the citations indicated the men "in a sense . . . would be under arrest."[1] We cannot find Mixel and Pilipchuk were restrained against their will as a matter of law when they complied with the police officer's requests.

Nonetheless, even if the men were restrained against their will, the arrest must still be unlawful. Once a plaintiff establishes a warrantless arrest, the burden of proof

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[1] The district court found Officer Richard L. Harned to be unavailable to testify at trial. His testimony given at a prior employment hearing was admitted into evidence.

shifts to the defendant to show justification for the arrest. *Children*, 331 N.W.2d at 679. An arrest is lawful if the arresting party had reasonable grounds, equivalent to probable cause, for believing the party being arrested had committed a crime. Iowa Code § 804.7(3) (1993); *Children*, 331 N.W.2d at 679. The officer in this case received a report of employee theft from the Menard management, discussed the situation with Faber, and inquired about the store's policy for prosecution. We cannot find the officer's actions in escorting the men out of the store and issuing the citation was unlawful as a matter of law.

We also agree with the district court Faber never "instigated or participated in the unlawful confinement" of Mixel and Pilipchuk by the officer. *See* Restatement (Second) of Torts § 45A (1977).[2] As such, we find no error in the district court's denial of relief for Mixel and Pilipchuk's false arrest claim.

III. Malicious Prosecution

In order to establish a claim for malicious prosecution, the plaintiff must prove (1) a previous criminal prosecution, (2) instigation of the prosecution by the defendant, (3) termination of the prosecution, (4) want of probable cause, (5) malice on the part of the defendant for bringing the prosecution, and (6) damage to the plaintiff. *Royce v. Hoening*, 423 N.W.2d 198, 200 (Iowa 1988). The damage element

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[2] According to the Restatement (Second) of Torts, instigation of an arrest is equivalent to words or conduct similar to "officer, arrest that man!" Restatement (Second) of Torts § 45A cmt. c (1977). When a person gives information to an officer about the commission of a crime, or has accused another of committing a crime, no instigation occurs so long as the decision concerning whether or not to arrest is left to the police officer. *Id.*

of a claim for malicious prosecution can only be proven by proof of arrest, seizure of property, or other special injury which would not necessarily result in all suits prosecuted to recover for like causes of action. *Id.*

The district court found no prosecution occurred. Mixel and Pilipchuk were issued citations for fifth-degree theft, and a few hours later informed by police they could rip up the citations and no prosecution would be done.[3] Iowa Code section 714.2(5) defines fifth-degree theft as a simple misdemeanor. No subscribed or sworn complaint was filed with a magistrate or district court clerk, as is required to commence prosecution for simple misdemeanors. Iowa R. Crim. P. 35.

We cannot find the issuance of the citation and the short period of time before the men were told to tear up their citations constituted "prosecution" as a matter of law. Moreover, we also cannot find as a matter of law Faber "instigated" the prosecution. *See Lukecart v. Swift & Co.*, 256 Iowa 1268, 130 N.W.2d 716 (1964) (if the decision whether or not to prosecute is left to the uncontrolled choice of a third person, the giving of information or accusation of a person does not constitute procurement of prosecution).

IV. Abuse of Process

To prevail on an abuse of process claim, a plaintiff must prove (1) the defendant initiated legal process against them and (2) the defendant used the process

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[3] Mixel testified Officer Harned stated "we are not prosecuting and go ahead and rip up your tickets, you are done with us."

in an improper or unauthorized manner, and (3) damages. *Palmer v. Tandem Management. Servs.*, 505 N.W.2d 813, 817 (Iowa 1993). An abuse of process occurs when the legal process is used for a different purpose than for which it was designed and intended. *Wilson v. Hayes*, 464 N.W.2d 250, 267 (Iowa 1990). The typical abuse of process claim involves some form of extortion or attempt to pressure a person to take some action unrelated to the subject of the legal process. *Id.*

Mixel and Pilipchuk contend Faber and Menard instigated the issuance of the citations in an attempt to terminate their employment while at the same time having a basis to deny unemployment benefits. The district court rejected this "improper motive" alleged by Mixel and Pilipchuk as illogical and unsupported by the evidence. Mixel and Pilipchuk proffered no reasons for which Menard would want to terminate their employment, other than the alleged theft incident. We cannot find as a matter of law the legal process was used for an "improper purpose."

V. Invasion of Privacy

To recover a claim for invasion of privacy, a plaintiff must prove the defendant either (1) unreasonably intruded on his or her seclusion, (2) appropriated his or her likenesses, (3) unreasonably gave publicity to their private lives, or (4) communicated to a third person something which unreasonably placed him or her in a bad light. *Stessman v. American Black Hawk Broadcasting Co.*, 416 N.W.2d 675, 686-87 (Iowa 1987) (citing Restatement (Second) of Torts § 652A (1977)). Mixel and Pilipchuk contend Faber and Menard invaded their privacy by releasing facts about their

personal lives and placing them in a bad light. The district court found Mixel and Pilipchuk failed to meet the "publication" element of their invasion of privacy claim.

At trial, Mixel and Pilipchuk argued their privacy had been invaded when they were being escorted out of the store with the police officer, in view of employees and customers. The evidence does not reveal Faber, any other Menard management personnel, or the police officer said or indicated the men had stolen anything or were being investigated for committing a crime. The men did not wear handcuffs. No evidence presented indicated anyone even saw the men walking through the store.

Moreover, the act of walking through the store does not communicate anything by Faber or Menard. No evidence suggests Faber chose or suggested the officer take the men through the store. Faber conducted his meeting with the men in a closed conference room, away from other employees or customer. We cannot find the action of Mixel and Pilipchuk walking through the store constituted a "publication" or "communication" by Faber or Menard as a matter of law.[4]

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[4] On appeal, Mixel and Pilipchuk contend Faber and Menard invaded their privacy by requiring them to note the reason for their termination was employee theft on future employment applications. This theory was barely argued to the district court. Mixel and Pilipchuk's post-trial brief to the district court did not specify this theory, but generally claimed Faber's act of pressing charges against the men invaded their privacy. The district court did not address this in its ruling and no Rule 179(b) motion was filed for the district court to address this alternate theory of invasion of privacy. As such, we find error was not properly preserved. *See State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206 (Iowa 1984) (when a trial court fails to rule on an issue, a Rule 179(b) motion is essential to preserve error).

V. Conclusion

We cannot find Mixel and Pilipchuk are entitled to relief for false arrest, malicious prosecution, abuse of process, or invasion of privacy as a matter of law. As such, we affirm the district court's denial of relief for all of their claims.

AFFIRMED.