FILED
MAY 28 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ERNEST FITZGERALD and **CLARA FITZGERALD,** Plaintiffs-Appellees,	)	Filed May 28, 1985
vs.	)	
RONALD BROOKS, Defendant-Appellant.	)	5-24 84-338

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Appeal from the Iowa District Court for Polk County - Harry Perkins, Jr., Judge.

Defendant appeals from an adverse judgment in a malicious prosecution action. AFFIRMED.

Joel W. Bittner and David R. Gault of Barrett & Bittner, Des Moines, for defendant-appellant.

Oscar E. Jones of Rockwell & Jones, Des Moines, for plaintiffs-appellees.

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

PER CURIAM

Ernest Fitzgerald was charged and tried for criminal mischief; he was accused of cutting a telephone line to the home of his next-door neighbor, Des Moines police officer Ronald Brooks, in revenge for Brooks' role in ticketing a Fitzgerald vehicle parked on the street outside the two houses. Fitzgerald alleged that the wire was not deliberately cut but rather was accidentally knocked down by Fitzgerald's truck. The wire, which passed over the Fitzgerald driveway, had been installed by the telephone company. There was testimony that the wire had been knocked down earlier by a delivery truck. Fitzgerald was acquitted of the criminal mischief charge.

Fitzgerald and his wife later filed the present malicious prosecution action against Brooks alleging that Brooks had procured Ernest Fitzgerald's citation and prosecution for the criminal mischief charge. A jury awarded the Fitzgeralds $700 in actual damages and $700 in punitive damages. Brooks has appealed from the resulting judgment.

Brooks contends the evidence was insufficient to permit a jury to find that: he had instigated the prosecution; that he had abused his public office to encourage charges to be filed; or that there was a lack of probable cause for the criminal mischief charge. Brooks asserts the evidence shows that he merely reported the broken telephone line to the police department and then permitted the department's investigation to proceed without any contribution from him. He testified that he was not acquainted with the investigation officer and that he did not use his police position to influence either the investigating officer or the assistant county attorney who filed the charge.

Brooks also contends the trial court's instructions on actual malice were improper. He contends that he was being sued in his capacity as a police official, and he argues that a showing of actual malice must be made. The Fitzgeralds deny that Brooks was being sued in his capacity as a public official.

probable cause but must be the subject of an affirmative showing that the instigation of criminal proceedings was "primarily inspired by ill-will, hatred or other wrongful motives." Id.

We reject Brooks' argument that he was sued as a public official and that a showing of actual malice was required in this case. The petition stated that: "defendant is an individual, a member of the Des Moines Police Force, and a resident of Des Moines, Polk County, Iowa." There was no specific allegation that Brooks was acting in his official capacity as police officer in filing the complaint. The Des Moines Police Department and the City of Des Moines were not included as parties. The evidence presented indicates that Brooks was acting as a private citizen when he called to file the complaint against Fitzgerald. We find, therefore, that Brooks was not sued as a public official and that a showing of actual malice was not required.

II. Sufficiency of the Evidence. Appellant Brooks argues that the trial court erred in failing to sustain his motion for a directed verdict and motion for judgment notwithstanding the verdict. The standard for determining whether the trial court's ruling was proper was set forth in Meeker v. City of Clinton, 259 N.W.2d 822, 828 (Iowa 1977).

> In determining whether a jury question was engendered when a party seeks a directed verdict, dismissal, or judgment notwithstanding the verdict, the trial court views the evidence in the light most favorable to the party against whom the motion was made regardless of whether such evidence is contradicted and every legitimate inference which may be reasonably deducted therefrom must be carried to the aid of the evidence and if reasonable minds can differ on the issue it is for the jury. Schiltz v. Cullen-Schiltz & Assoc., Inc., 228 N.W.2d 10, 17 (Iowa 1975).

> Our function is to review the evidence to determine, not whether it proves defendants' negligent maintenance caused the flood to occur, but whether it is sufficient so the trial court was justified in submitting the question to the jury as the trier of facts. Miller v. Young, 168 N.W.2d at 51.

> In determining this issue this court views the evidence in accordance with the same principles required for review by the trial court. Schiltz v. Cullen-Schiltz & Assoc., Inc., 228 N.W.2d at 17.

Appellant argues that the appellee did not present sufficient evidence to generate a jury question on the following elements of the cause of action: (1) the previous prosecution was instigated by the defendant; (2) a lack of probable cause; and (3) malice in bringing the prosecution on the part of the defendant.

In Sergeant v. Watson Bros. Transp. Co., 244 Iowa 185, 52 N.W.2d 86 (1952), the supreme court discussed the standard to be applied in determining whether these elements have been established:

> Probable cause, as herein used, means "the knowledge by the prosecuting witness of such a state of facts as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice, to believe that the person accused is guilty." Bair v. Schultz, 227 Iowa 193, 288 N.W. 119, 122; Weisz v. Moore, 222 Iowa 492, 265 N.W. 606, 269 N.W. 443. To instigate the prosecution means that the party against whom damages are sought was the proximate and efficient cause of maliciously putting the law in motion. As stated in Restatement, Law of Torts, Par. 653, Subsec. g, "In order to charge a private person with responsibility for the instigating of a proceedings by a public official, it must therefore appear that his desire to have the proceedings initiated, expressed by direction, request, or pressure of any kind, was the determining factor in the official's decision to commence the prosecution or that the information furnished by him upon which official acted was known to be false." See also Minard v. Boss Hotels Co., supra. Malice, as used herein may be actual or inferred, and may be inferred from a want of probable cause. Connelly v. White, 122 Iowa 391, 98 N.W. 144; Richmond v. Whitaker, 218 Iowa 606, 255 N.W. 681. Malice means any wrongful act which has been wilfully and purposely done to the injury of another. As stated in Glipp v. Crittenden, 223 Iowa 240, 271 N.W. 599, if one makes use of the criminal law for some private purpose and not to vindicate the law, such proceeding will be considered malicious.

Sergeant, 244 Iowa at 193, 52 N.W.2d at 91.

We find that there was sufficient evidence from which the jury could find that Brooks had instigated the criminal proceedings against Fitzgerald, that there was a lack of probable cause for the criminal mischief charge, and that malice on

the part of Brooks could be inferred from the lack of probable cause. The record indicates an acrimonious relationship had existed between the parties for some time. Both parties testified to the problems they had experienced during the time they were neighbors. It was Brooks who called the police to lodge a complaint that Fitzgerald had cut the phone line. On the basis of this complaint, a Criminal Investigation Report was filed and the subsequent charges of criminal mischief were lodged against Fitzgerald.

The testimony at the criminal hearing showed that Fitzgerald had left early in the morning in his truck to make a delivery to Kansas City. The record indicates that the wire could have been cut by the truck top when Fitzgerald backed the truck out of the driveway.

On the basis of the record before this court, we find that the trial court acted properly in overruling the motion for a directed verdict and motion for judgment notwithstanding the verdict.

III. Wife's Testimony and Amount of Verdict. We find that the trial court properly excluded Mrs. Brooks' testimony as to statements made to her after he learned the telephone wire had been cut. Because Mr. Brooks testified himself, we find such testimony to be cumulative and unduly repetitive. We also find that this testimony was hearsay and did not fall within the state of mind exception. The trial court acted properly in excluding it.

Finally, we reject Brooks' argument that the damages awarded were not supported by the evidence. After reviewing the record, we conclude that there was substantial evidence to support the award of both actual and punitive damages.

The findings of the trial court are affirmed.

AFFIRMED.