IN THE COURT OF APPEALS OF IOWA

No. 6-537 / 95-1907

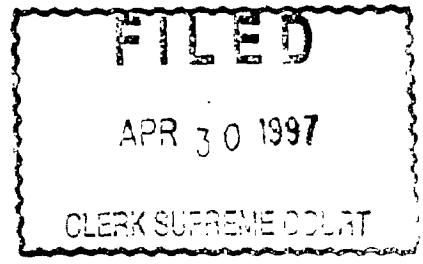
DAVID LEE NESBIT,

Plaintiff-Appellant,

vs.

CITY OF DES MOINES,

Defendant-Appellee.



Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

David Nesbit appeals from a district court order granting summary judgment in favor of the City of Des Moines in his action for malicious prosecution. **AFFIRMED.**

J. Keith Rigg, Des Moines, for appellant.

Bruce E. Bergman, Des Moines, for appellee.

Considered by Habhab, C.J., and Sackett and Cady, JJ.

SACKETT, J.

Plaintiff-appellant David Nesbit appeals from a district court order granting summary judgment in favor of the City of Des Moines. Plaintiff, who had sued the City claiming malicious prosecution, contends the district court erred in ruling on summary judgment there was not an issue of material fact as to whether the City of Des Moines police had probable cause for instigating and pursuing his prosecution. We affirm.

In August 1992, plaintiff and Lawrence Ihrig, an off-duty Des Moines policeman, were driving on the streets in the City. Plaintiff drove a motorcycle; Ihrig drove a car. According to plaintiff's version of the facts, Ihrig's car struck plaintiff's motorcycle. Plaintiff followed Ihrig to the police station. There the two men fought before going into the station where Ihrig told Sgt. Tim Johnson to arrest plaintiff for striking his car and his person. Ihrig sustained visible injuries in the fight. Johnson arrested plaintiff and charged him with serious assault. After a jury trial, plaintiff was acquitted of the charge and this action followed.

Ihrig claims plaintiff hit his car and his person first. Plaintiff contends he only hit Ihrig after Ihrig hit him.

The City filed a motion for summary judgment which plaintiff resisted. Following a hearing, the district court granted the summary judgment in the City's favor. The court ruled plaintiff's claim was not barred by the applicable statute of limitations. The court further ruled plaintiff failed to generate a jury question on

whether the City had probable cause to arrest and prosecute him. The court noted two officers saw plaintiff strike Ihrig and they, therefore, had probable cause for an arrest.

In actions for malicious prosecution, our review is limited to correction of errors at law. Iowa R. App. P. 4. Because this case reaches us on summary judgment, our task is to determine whether any disputed issues of material fact exist which would render summary judgment inappropriate and, if not, whether the trial court correctly applied the law to the undisputed facts. *Gibbs v. Illinois Central Gulf R.R. Co.*, 420 N.W.2d.2d 446, 447 (Iowa 1988); *see also* Iowa R. Civ. P. 237(c). The burden is upon defendants to show the nonexistence of material facts and to prove they are entitled to judgment as a matter of law. *Knapp v. Simmons*, 345 N.W.2d 118, 121 (Iowa 1984). Every legitimate inference that can be reasonably deduced from the evidence must be afforded the party resisting the summary judgment motion, and a question of fact is generated if reasonable minds could differ on how the issue should be resolved. *Northrup v. Farmland Indus., Inc.*, 372 N.W.2d 193, 195 (Iowa 1985). But entry of summary judgment is proper if the conflict in the record concerns only the legal consequences flowing from undisputed facts. *Jacobs v. Stover*, 243 N.W.2d 642, 643 (Iowa 1976).

To prevail on a claim for malicious prosecution, plaintiff must establish each of the following six elements: (1) a previous prosecution; (2) instigation of that prosecution by defendant; (3) termination of that prosecution by acquittal or discharge of plaintiff; (4) want of probable cause; (5) malice on the part of defendant for

bringing the prosecution; and (6) damage to plaintiff. *Sarvold v. Dodson*, 237 N.W.2d 447, 448 (Iowa 1976).

Additionally, Iowa has adopted what is known as the "special injury rule" which requires that the sixth element, damage, can only be sustained 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." *Royce v. Hoening*, 423 N.W.2d 198, 200 (Iowa 1988).

The first three elements were established by the record in the case before us. The fifth element, malice, can be inferred from want of probable cause. *See Davis v. Rudolph*, 243 Iowa 744, 750, 52 N.W.2d 15, 19 (1952). Defendant was arrested. Consequently, the requirements of the "special injury rule" have been met.

The question is whether plaintiff introduced facts which, if believed, would prove there was not probable cause for the arrest and injury. This must be determined from the particular facts of each case. *Kraft v. City of Bettendorf*, 359 N.W.2d 466, 470 (Iowa 1984).

There was a warrantless arrest. Consequently, the burden of proof shifts to the City to show justification for the arrest. *Children v. Burton*, 331 N.W.2d 673, 679 (Iowa 1983).

> In Iowa, a valid warrantless arrest may be made by a peace officer when he "has reasonable ground for believing that an indictable public offense has been committed and has reasonable ground for believing that the person to be arrested has committed it." Section 755.4(3), The Code. The "reasonable ground" standard is consistent with the federal constitutional standard of probable cause needed to

> make a valid warrantless arrest. *United States v. Berryhill*, 466 F.2d 621, 624 (8th Cir. 1972), *cert. denied* 409 U.S. 1046, 93 S. Ct. 547, 34 L. Ed. 2d 498 (1972). Such reasonable ground exists when the known facts and circumstances would lead a reasonably cautious man to believe a crime is being or has been committed. *State v. King*, 191 N.W.2d 650, 653 (Iowa 1971), *cert. denied* 406 U.S. 908, 92 S. Ct. 1617, 31 L. Ed. 2d 819 (1972), and citations. The existence of reasonable ground (probable cause) is dependent upon the facts of each case.

State v. Mattingly, 220 N.W.2d 865, 868 (Iowa 1974).

In dealing with civil damage actions for false arrest, courts apply a probable cause standard less demanding than the constitutional probable cause standard in criminal cases. If the officer acts in good faith and with reasonable belief that a crime has been committed and the person arrested committed it, his actions are justified and liability does not attach. *Children*, 331 N.W.2d at 673.

If pertinent facts pertaining to the existence of probable cause are in dispute, the existence of probable cause is a jury question. *See Children v. Burton*, 331 N.W.2d 673, 680 (Iowa 1983), *cert. denied* 464 U.S. 848, 104 S. Ct. 155, 78 L. Ed. 2d 143 (1983). Probable cause cannot exist if the person initiating the proceedings knew the alleged facts were not true. *Wilson v. Hayes*, 464 N.W.2d 250, 262 (Iowa 1990).

It is undisputed before the arrest Ihrig gave the arresting officer his version of the facts and the officer would have seen Ihrig was injured.

The trial court considered evidence other on-duty police officers had seen the men hitting each other in finding plaintiff had failed to show substantial evidence that

would support a finding there was not probable cause for an arrest. The evidence of whether the arresting officer at the time of the arrest had been told by the two other officers they saw the fight is in dispute.

The question, therefore, is whether Ihrig's statements to Officer Johnson plaintiff had struck him, coupled with the undisputed evidence Ihrig had a cut on his arm, a scrape on his shoulder, and a cut on his forehead, were sufficient probable cause for the arrest.

In evaluating the conduct of an officer who responds to a statement made by another where the officer is not in a position to know if what is said is true, the significant circumstances are what is told the officer rather than the truth of what is said. *State v. Bailey*, 452 N.W.2d 181, 183 (Iowa 1990).

Probable cause does not depend on the actual state of the case in point of fact, as it may turn out upon legal investigation, but on knowledge of facts and circumstances that would be sufficient to induce a reasonable belief in the truth of the accusation. It depends on the facts known, at the time of the arrest, to the person by whom the arrest is made, from which it follows that an arrest cannot be justified by what a subsequent search discloses. *Children*, 331 N.W.2d at 673.

We find there is undisputed evidence to support a finding the officer had probable cause to make the arrest. We affirm.

AFFIRMED.