

No. 1-18-0854

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

CLIFF URBAN,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 16 L 010517
)	
)	
CITY OF HARVEY AND CITY OF HARVEY)	
DETECTIVES; JEFF YORK, STAR NO. 1032; and E.)	
MUHAMMAD, STAR NO. 1013,)	Honorable
)	John P. Callahan Jr.,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* We reverse the circuit court’s order granting summary judgment in favor of the defendants in this malicious prosecution action, finding that genuine questions of fact exist on the issues of whether there was probable cause to commence and continue the criminal prosecution against the plaintiff and whether the individual defendants acted with malice.

¶ 2 The plaintiff appeals from an order of the circuit court of Cook County, granting the defendants’, the City of Harvey, Detective Jeff York, and Detective Elijah Muhammad’s, motion

for summary judgment on his two-count complaint for malicious prosecution. For the reasons which follow, we reverse the judgment of the circuit court and remand the matter for further proceedings.

¶ 3 The following facts are taken from the pleadings, testimonies during the plaintiff's criminal proceedings, depositions given in the instant proceedings, and other evidence relied upon by the circuit court in granting the defendants' motion for summary judgment.

¶ 4 On June 24, 2015, in Harvey, Illinois, Detectives York and Muhammad arrested the plaintiff for aggravated unlawful use of a weapon by reason of his possession of a firearm while in possession of cannabis, in violation of sections 24-1.6(a)(1) and 24-1.6(a)(3)(E) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/24-1.6(a)(1), (3)(E) (West 2014)). A preliminary hearing took place on August 17, 2015, during which Detective Muhammad testified that he was driving an unmarked vehicle with his partner Detective York when he "curb[ed]" the plaintiff's vehicle for "improper lane usage, going down a one way [street], as well as no seat belt." Detective Muhammad stated that, while he was "curbing" the plaintiff's vehicle, Detective York said that he saw the plaintiff throw something out of the window. He also testified that: upon approaching the plaintiff's vehicle, he smelled the strong odor of burnt cannabis emitting from inside; Detective York retrieved a handgun from the center console of the vehicle; and Detective York recovered a hand-rolled cigar (which tested positive for 0.9 grams of cannabis) from the ground near the plaintiff's vehicle. Detective Muhammad admitted that he did not see the plaintiff throw anything out of the window. The circuit court entered a finding of probable cause.

¶ 5 The State filed an information against the plaintiff charging two counts of aggravated unlawful use of a weapon pursuant to sections 24-1.6(a)(1) and 24-1.6(a)(3)(E) of the Criminal

Code. At the hearing on the plaintiff's motion to suppress evidence held on May 11, 2016, Detective Muhammad testified consistently with his preliminary hearing testimony. Detective York testified that the plaintiff was driving without his seatbelt the wrong way down a one-way street and that, as the plaintiff stopped his vehicle, he observed the plaintiff throw an object out of the window. He stated that, after the plaintiff's vehicle was stopped, he recovered the item that the plaintiff had thrown out of the window, which was a burning hand-rolled cigar that smelled of cannabis. Detective York also testified that, upon approaching the plaintiff's vehicle, he smelled a strong odor of cannabis, and he subsequently recovered a handgun from the interior of the plaintiff's vehicle. The plaintiff testified that he was not aware that he was driving the wrong way down a one-way street and that he was neither smoking cannabis inside his vehicle nor did he throw a hand-rolled cigar out of his vehicle. The circuit court denied the motion to suppress and set the case for trial.

¶ 6 The plaintiff elected a bench trial which was conducted on June 28, 2016. Detective York testified to the events resulting in the plaintiff's arrest. He stated that, on June 24, 2015, he was patrolling in an unmarked police vehicle with his partner, Detective Muhammad, in the area of 152nd Street and Turlington Avenue in Harvey, Illinois, when he observed the plaintiff driving without wearing his seatbelt. The plaintiff then made a left turn onto the "153rd block" and continued onto the "152nd block," driving in the wrong direction on a one-way street. Detective Muhammad, who was driving, activated the police vehicle's lights and sirens and proceeded to curb the plaintiff's vehicle. Detective York testified that he observed the plaintiff throw an unknown object out of his passenger window seconds before stopping his vehicle. According to Detective York, there was no more than 10 feet separating the police vehicle from the plaintiff's vehicle when he saw the plaintiff throw the object out of the window, and he never

lost sight of the object. When he recovered the object from the ground, he discovered that it was a lit, hand-rolled cigar, emitting a strong odor of cannabis. Detective York testified that, when he approached the plaintiff's vehicle, he could smell a strong odor of burnt cannabis and saw smoke emitting from the vehicle. He stated that he also recovered a loaded handgun from the center console of the plaintiff's vehicle.

¶ 7 After the plaintiff was taken into custody, Detective York inventoried both the cigar and the handgun and sent the cigar to the Illinois State Crime Lab for testing and analysis. Detective York admitted that no cannabis was found on the plaintiff's person and that the plaintiff was neither charged with driving under the influence (DUI) nor requested to perform any field sobriety tests.

¶ 8 The parties stipulated that, if called as a witness, Deborah Magolan would testify that: (1) she is a forensic scientist employed by the Illinois State Police Division of Forensic Services; (2) she is qualified as an expert in forensic chemistry; (3) she received one hand-rolled cigar with a plant material from the Harvey Police Department; and (4) 0.9 grams of the cigar tested positive for cannabis.

¶ 9 The plaintiff moved for a directed verdict, which was denied by the circuit court. Thereafter, the plaintiff elected not to testify and rested without calling any witnesses. After hearing closing arguments, the circuit court found the plaintiff not guilty, stating: "There is a blunt burning on the ground, and there is no DUI investigation? That gives me great pause regarding that officer's testimony. I don't believe the State has proven the possession of cannabis beyond a reasonable doubt in this case. *** There is grave doubt."

¶ 10 On October 25, 2016, the plaintiff filed the instant action for malicious prosecution against the defendants. In Count I of his complaint, the plaintiff alleged that: (1) Detectives

York and Muhammad caused the commencement and/or continuation of a criminal prosecution against him; (2) there was no probable cause to commence or continue the criminal proceeding; (3) Detectives York and Muhammad acted intentionally and with malice in that they caused the commencement and/or continuance of his criminal prosecution despite knowing that there was no probable cause; (4) his criminal prosecution terminated in his favor when he was found not guilty; and (5) he was emotionally damaged as a result of the prosecution. In Count II against the City of Harvey, the plaintiff set forth the same allegations as in Count I, additionally asserting: that the acts of Detectives York and Muhammad occurred while they were on duty for the Harvey Police Department and acting within the scope of their employment; and that the City of Harvey is liable for the detectives' actions under the doctrine of *respondeat superior* and pursuant to section 9-102 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/9-102 (West 2014)).

¶ 11 When deposed, Detective York testified consistently with the testimony he gave during the hearing on the plaintiff's motion to suppress and during the trial on the criminal charges against the plaintiff. He also testified that he had no prior interactions with the plaintiff before his arrest on June 24, 2015, he has no reason to "harbor any ill will" towards him, and that the plaintiff was not charged with driving under the influence because he did not display any signs of impairment.

¶ 12 Detective Muhammad was also deposed, and his testimony was consistent with the testimony he gave at the preliminary hearing in the plaintiff's criminal prosecution. He too testified that he had no prior interactions with the plaintiff before his arrest on June 24, 2015. Detective Muhammad admitted that the plaintiff was not charged with driving under the influence, but was unable to explain why no citation was issued.

¶ 13 During his deposition, the plaintiff testified that, on the date of his arrest, he was not on a public street, but was instead in his vehicle in a driveway when he was approached by Detectives York and Muhammad. He stated that he did not know why he was stopped or approached by the detectives. The plaintiff denied being in possession of cannabis on the date of his arrest. Although he admitted that prior to his arrest he had never had any prior interactions with Detective Muhammad, he testified that he had been “pulled over” by Detective York once before.

¶ 14 On January 10, 2018, the defendants filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2016)), arguing that the evidentiary material of record established that the plaintiff is unable to prove that: (1) they commenced a criminal proceeding against the plaintiff; (2) they acted without probable cause; and (3) they acted with malice. The defendants also argued that, because they acted within the scope of their employment in arresting the plaintiff, they are shielded from liability under the Tort Immunity Act.

¶ 15 On April 5, 2018, the circuit court entered a written order granting the defendants’ motion for summary judgment, stating that the defendants “had probable cause to commence the action and there is insufficient evidence of malice.” This appeal followed.

¶ 16 First, the plaintiff maintains that the circuit court erred when it granted summary judgment in favor of the defendants because the evidence established a question of fact as to whether the defendants had probable cause to commence and continue his prosecution. We agree.

¶ 17 The purpose of a summary judgment motion is “not to try an issue of fact, but to determine whether one exists.” *Monson v. City of Danville*, 2018 IL 122486, ¶ 12. Summary

judgment is appropriate if “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2016); *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. In determining whether a genuine issue of material fact exists, “a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent.” *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). A triable issue precluding summary judgment exists where the material facts are disputed or where reasonable persons might draw different inferences from the undisputed facts. *Id.* Summary judgment is a drastic means of disposing of litigation “and, therefore, should be allowed only where the right of the moving party is clear and free from doubt.” *Bank Financial, FSB v. Brandwein*, 2015 IL App (1st) 143956, ¶ 40. Our review of a summary judgment is *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 18 In order to prove a claim for malicious prosecution, a plaintiff must establish: “(1) the commencement or continuance of an original criminal or civil judicial proceeding by the defendant[s]; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for such proceeding; (4) the presence of malice; and (5) damages resulting to the plaintiff.” (Internal quotation marks omitted.) *Swick v. Liataud*, 169 Ill. 2d 504, 512 (1996). Failure to prove any one element prevents recovery on the claim. *Id.*

¶ 19 The first question before this court is whether a genuine issue of fact exists on the question of whether the individual defendants instituted and/or continued the criminal proceeding against the plaintiff without probable cause. Probable cause is a state of facts that would lead a person of ordinary care and prudence to believe, or to entertain an honest and sound suspicion, that the accused committed the offense charged. *Adams v. Sussman & Hertzberg, Ltd.*,

292 Ill. App. 3d 30, 43 (1997). “A reasonable ground for belief of the guilt of an accused may be on information from other persons as well as on personal knowledge.” *Turner v. City of Chicago*, 91 Ill. App. 3d 931, 935 (1980). Whether the circumstances alleged to establish probable cause are true is a question of fact, but if the circumstances are true, whether they amount to probable cause is a question of law to be decided by the court. *Fabiano v. City of Palos Hills*, 336 Ill. App. 3d 635, 642 (2002). “[W]here the circumstances giving rise to an alleged malicious prosecution are in dispute, the appropriate venue to resolve that dispute is before a jury and not by a court as a matter of law.” *Howard v. Firmland*, 378 Ill. App. 3d 147, 151 (2007).

¶ 20 In support of their motion for summary judgment, the defendants relied upon the finding of probable cause at the preliminary hearing on the criminal charges brought against the plaintiff and the testimony of Detectives York and Muhammad that: the plaintiff was stopped after committing several traffic violations; the plaintiff was observed throwing a hand-rolled cigar, which tested positive for cannabis from the window of his vehicle; and a strong odor of burnt cannabis emanated from the vehicle that the plaintiff was driving. In opposition to the motion, the plaintiff relied upon his sworn testimony that: when he was approached by Detectives York and Muhammad on the date of his arrest, he was not on a public street, but was instead in his vehicle in a driveway; he did not throw a hand-rolled cigar out of the window of his vehicle; he was not in possession of cannabis; and he had not used cannabis. We conclude, therefore, that the plaintiff’s sworn testimony created a genuine issue of fact on the question of whether Detectives York and Muhammad had probable cause to arrest the plaintiff and cause the institution of criminal proceedings against him; an issue to be resolved by the trier of fact and not by the court as a matter of law. *Howard*, 378 Ill. App. 3d at 151.

¶ 21 In his complaint, the plaintiff alleged that Detectives York and Muhammad acted with

malice when they arrested him and caused the institution of criminal proceedings against him, knowing that they lacked probable cause and that the charges placed against him were false. Based upon his own sworn testimony, the plaintiff asserts that a genuine issue of fact exists on the question of whether Detectives York and Muhammad acted with malice, and argues therefore, that the circuit court erred in deciding the issue as a matter of law and granting summary judgment in favor of the defendants. We agree.

¶ 22 Malice, in the context of a malicious prosecution claim, is defined as the “initiation of a prosecution for any reason other than to bring a party to justice.” *Rodgers v. Peoples Gas, Light & Coke Co.*, 315 Ill. App. 3d 340, 349 (2000). Malice, as an element of malicious prosecution, is proved by establishing that criminal proceedings were instituted with an improper motive. *Id.*; *Swick*, 169 Ill. 2d at 524. Where two conflicting inferences may be drawn from the evidence, the question of whether the defendants acted with malice is one of fact to be decided by the trier of fact. *Frye v. O’Neill*, 166 Ill. App. 3d 963, 977 (1988). A party’s intent when acting is a question of fact (see *People v. Cardamone*, 232 Ill. 2d 504, 517 (2009)), the resolution of which is particularly inappropriate in the context of a summary judgment proceeding. *Schroeder v. Winyard*, 375 Ill. App. 3d 358, 368 (2007).

¶ 23 Based upon the plaintiff’s sworn testimony that: when he was approached by Detectives York and Muhammad on the date of his arrest, he was not on a public street, but was instead in his vehicle in a driveway; he did not throw a hand-rolled cigar out of the window of his vehicle; he was not in possession of cannabis; and he had not used cannabis, a trier of fact could draw an inference of malice and a lack of good faith on the part of the detectives in arresting the plaintiff and instituting the criminal proceedings against him. We conclude, therefore, that the circuit court erred in resolving the issue of malice as a matter of law and granting summary judgment in

favor of the defendants as a genuine issue of fact exists on the question of whether Detectives York and Muhammad acted with malice.

¶ 24 Lastly, the plaintiff contends that the circuit court properly rejected the defendants' alternative grounds for summary judgment based upon the Tort Immunity Act. However, our reading of the record fails to disclose that the circuit court ever reached the issue. Nevertheless, the foregoing analysis also negates the possibility that summary judgment in favor of the defendants could be affirmed based upon immunity from liability afforded by the statute.

¶ 25 Section 2-208 of the Tort Immunity Act (745 ILCS 10/2-208 (West 2016)) is not a complete bar to liability on a claim for malicious prosecution against a public employee. Rather, the statute shields a public employee from liability for initiating judicial proceedings "within the scope of his employment, unless he acts maliciously and without probable cause." 745 ILCS 10/2-208 (West 2016). Because the record in this case establishes that genuine issues of fact exist on the questions of whether Detectives York and Muhammad acted maliciously and without probable cause, those issues must be decided by the trier of fact and not as a matter of law.

¶ 26 Based on the foregoing analysis, we reverse the order of the circuit court granting the defendants' motion for summary judgment and remand this matter for further proceedings.

¶ 27 Reversed and remanded.