

2019 IL App (1st) 172962-U

No. 1-17-2962

Order filed March 29, 2019

Fifth Division

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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BORIS SAMOYLOVICH,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	
CITY OF CHICAGO, a municipal corporation,	)	No. 15 L 1747
JOHN SEBECK, EDWARD WODNICKI, GILBERT	)	
ORTIZ, and HENRY MONTESDEOCA,	)	
	)	
Defendants,	)	
	)	Honorable
(City of Chicago, a municipal corporation, John Sebeck,	)	Allen Price Walker,
and Edward Wodnicki, Defendants-Appellees).	)	Judge, Presiding.

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JUSTICE HALL delivered the judgment of the court.  
Justices Hoffman and Lampkin concurred in the judgment.

**ORDER**

¶ 1 *Held:* Circuit court's order granting defendants' motion for summary judgment in malicious prosecution case affirmed where there was probable cause to prosecute plaintiff for criminal damage to property.

¶ 2 Plaintiff Boris Samoylovich appeals from an order of the circuit court of Cook County which granted summary judgment in favor of defendants City of Chicago (City), Gilbert Ortiz, John Sebeck and Edward Wodnicki in a malicious prosecution action. On appeal, plaintiff contends that the circuit court erroneously granted defendants' combined motion for summary judgment because defendants did not have probable cause to prosecute plaintiff for criminal damage to property. For the reasons below, we affirm.

¶ 3 I. BACKGROUND

¶ 4 This case arises from plaintiff's arrest and prosecution for criminal damage to property pursuant to section 5/21-1 of the Illinois Criminal Code (720 ILCS 5/21-1 (West 2008)) in 2009. After his acquittal, plaintiff filed a malicious prosecution action against the City, Chicago Police Detective John Sebeck, Chicago Police Sergeant Edward Wodnicki, Chicago Police Detective Gilbert Ortiz and Henry Montesdeoca on May 6, 2010, alleging that defendants commenced criminal proceedings without probable cause and committed civil conspiracy with knowledge that plaintiff was not the perpetrator of the alleged crime.

¶ 5 A. Criminal Prosecution

¶ 6 At approximately 9:00 p.m. on January 6, 2008, Detective Ortiz, while off-duty, was with Montesdeoca in a neighbor's garage at 3310 North Troy in Chicago when they heard "unusual sounds" coming from the alley. Detective Ortiz asked the neighbor to open the garage door. As it was opening, he saw a man pulling at his garage door, which was located next door at 3308 North Troy. Detective Ortiz also saw another man inside another garage across the alley. He watched the two men briefly speak to each other before running to a parked Lincoln Continental in front of the garage where he and Montesdeoca were located. There was a domed street light

near the car and Detective Ortiz testified that for a few seconds, he could clearly see the man he identified at trial as plaintiff sitting in the driver's seat. He was eight or nine feet from the car and memorized the Lincoln's license plate number before it drove away.

¶ 7 Montesdeoca called 911 and Chicago Police Sergeant Wodnicki and Detective Sebeck arrived at the scene. Detective Ortiz gave the officers the Lincoln's license plate number and both men gave the suspects' general descriptions: two white males, 35 to 40 years of age, one weighing 180 pounds and the other standing 5 feet, 8 inches, wearing dark clothing and a skullcap.

¶ 8 Detective Sebeck ran the license plate number through the Law Enforcement Agencies Data System (LEADS) and found that the Lincoln was registered to Boris Samoylovich in Skokie, Illinois. The Lincoln's owner was identified as being in his 70s. The detectives then searched the Illinois Citizen and Law Enforcement Analysis and Reporting database (CLEAR) for "Samoylovich" and "Boris Samoylovich." That search yielded a 47-year-old man named Boris Samoylovich matching Detective Ortiz's and Montesdeoca's descriptions who lived in Glenview, Illinois. The search also yielded a Roman Samoylovich (Roman).

¶ 9 A few hours after the incident, Sergeant Wodnicki created photo arrays containing plaintiff's and Roman's pictures from the CLEAR system and asked Detective Ortiz and Montesdeoca to come to the station. Montesdeoca testified at trial that he and Detective Ortiz went to the police station together but were immediately separated after their arrival. Sergeant Wodnicki showed Detective Ortiz two photo arrays of six pictures each, and he "almost immediately" identified plaintiff in one photo array by pointing to his picture and putting his initials next to it. Sergeant Wodnicki subsequently showed Montesdeoca two different photo

arrays of six pictures each. He also identified plaintiff in one of the arrays by circling his picture. Detective Ortiz and Montesdeoca also identified a second suspect, later identified as Roman, in a different photo array. Sergeant Wodnicki believed that one of the two suspects would be at the Glenview address from CLEAR and he sent Detective Sebeck there. Plaintiff was arrested at that address and brought to the station. The officers did not find the Lincoln at plaintiff's Glenview address, but located it in Oak Lawn a few days later, abandoned. The officers unsuccessfully attempted to find Roman.

¶ 10 After arriving at the station, plaintiff was placed in a lineup and both Detective Ortiz and Montesdeoca separately identified him as one of the men they saw outside the garage earlier that evening. Plaintiff was then arrested.

¶ 11 After his arrest, plaintiff told police that he did not own a Lincoln. One of plaintiff's attorneys, George Chepov, testified that he went to the police station the day after plaintiff's arrest and told police that they had "the wrong guy" because the Lincoln was registered to a different, 70-year-old Boris Samoylovich. Chepov also testified that he told officers that the elder Boris passed away and had given the Lincoln to a cleaning lady.

¶ 12 Valere Samoylovich (Valere), the deceased Boris's son, signed an affidavit stating that while plaintiff was in custody, he told police that plaintiff "is not a member of my family \* \* \* and his arrest [is] a case of mistaken identity." Neither Sergeant Wodnicki nor Detective Sebeck performed any further investigation for other individuals possibly involved in this incident other than attempting to locate Roman.

¶ 13 After reviewing the investigation results and a receipt for the damage to Detective Ortiz's garage door, the Assistant State's Attorney (ASA) decided to charge plaintiff with criminal

damage to property. The ASA filed a complaint for preliminary examination on January 14, 2008, and the case proceeded to a grand jury.

¶ 14 On January 25, 2008, Detective Sebeck testified before a grand jury about the January 6 incident and subsequent investigation. He testified how officers determined that the license plate registration belonged to plaintiff in the following exchange:

"Q: Through the course of your investigation, were you able to determine anything regarding the license plate number that was given to you by the victim?

A: Actually it was the father -- so the defendant Boris Samoylovich is a junior, and the plate registered [*sic*] to his father."

¶ 15 Plaintiff was subsequently indicted and charged with criminal damage to property in excess of \$300. 720 ILCS 5/21-1(1)(a) (West 2008).

¶ 16 Prior to his bench trial, plaintiff filed a motion to quash and suppress the photo array and subsequent lineup identification made by Detective Ortiz, contending that the photo array was unduly suggestive because the men in the filler photos had dark complexions, were persons of color or had facial hair and he did not. Plaintiff further contended that there was no indication in the police report that Detective Ortiz saw either of the offenders because the report only stated that Montesdeoca clearly saw Boris' face in the light. The record does not contain the trial court's denial of that motion, but plaintiff indicated during the current litigation that the trial court denied his motion to quash and suppress on January 14, 2009.

¶ 17 At the criminal trial, Sergeant Wodnicki and Detective Sebeck testified about their investigation. When defense counsel asked how Detective Sebeck received information that plaintiff was the deceased Boris's son, he responded:

"A: If I'm not mistaken, I think Boris [plaintiff] said that that was his father and he was deceased.

Q: The defendant told you that was his father?

A: That's what he said."

¶ 18 Plaintiff presented three alibi witnesses: his wife Irina; his nephew Max; and his friend David, all of whom testified that at the time of the crime, plaintiff was at home celebrating Russian Orthodox Christmas.

¶ 19 Valere testified that his father previously owned the Lincoln car but passed away one year prior, and his mom sold the car to a neighbor. Valere also testified that he knew "of plaintiff," but was only acquainted with him because his parents owned a deli in the city and their daughters took ballet together once or twice a week. On cross examination, he admitted that plaintiff had a connection to the deceased Boris because he drove the deceased Boris's wife to the airport on the day of the crime.

¶ 20 Plaintiff also presented testimony from the neighbor who allegedly bought the car. Plaintiff did not testify. After his motion for directed finding was denied, he rested his case.

¶ 21 The trial court found plaintiff not guilty.

¶ 22 B. Malicious Prosecution

¶ 23 On May 6, 2010, plaintiff filed a complaint against the City, Detective Sebeck, Sergeant Wodnicki, Montesdeoca and Detective Ortiz based on his criminal prosecution, alleging malicious prosecution, false imprisonment and civil conspiracy in a 10-count complaint and seeking punitive damages.

¶ 24 Detective Ortiz, Sergeant Wodnicki and the City filed a joint 2-619.1 (735 ILCS 5/2-619.1 (West 2010)) motion to dismiss the complaint on August 23, 2010, and plaintiff moved to file a seven-count amended complaint without the false imprisonment counts. Detective Ortiz, Sergeant Wodnicki, Detective Sebeck and the City (the parties) subsequently jointly moved to strike the amended complaint. On September 1, 2011, the trial court dismissed various counts of the amended complaint, dismissed plaintiff's claims for punitive damages against Detective Ortiz, Sergeant Wodnicki and Detective Sebeck by agreement, and allowed plaintiff time to replead the remaining counts.

¶ 25 In plaintiff's second amended complaint filed on September 28, 2011, he alleged malicious prosecution against the officers, the City and Montesdeoca, and civil conspiracy against Detective Ortiz and Montesdeoca. Plaintiff alleged that Sergeant Wodnicki created a false and misleading photo array which led to his arrest. Plaintiff also alleged that the officers acted under color of law and within the scope of their employment as members of the Chicago Police Department but lacked probable cause to prosecute him.

¶ 26 Montesdeoca subsequently filed a 2-619 (735 ILCS 5/2-619(a)(9) (West 2010)) motion to dismiss plaintiff's second amended complaint on the basis of his immunity pursuant to the Citizen Participation Act (Act) (735 ILCS 110/1 *et seq.* (West 2010)) as a witness to a crime. The circuit court found Montesdeoca had immunity because plaintiff's second amended

complaint qualified as an Illinois Strategic Lawsuit Against Public Participation (SLAPP) under section 5 of the Act. 735 ILCS 110/5 (West 2010). Our supreme court subsequently issued a decision in *Sandholm v. Kuecker*, 2012 IL 111443, holding that the Act's purpose was only intended to target meritless, retaliatory SLAPPs and did not establish a new absolute or qualified privilege for defamation. *Sandholm*, 2012 IL 111443, ¶ 50. In light of this, the circuit court reversed its prior decision for Montesdeoca in a written order on May 2, 2012. Montesdeoca petitioned for leave to appeal (PLA) to this court, during which time the circuit court proceedings were stayed. We denied his PLA and Montesdeoca filed a PLA in the supreme court. The supreme court denied the PLA but remanded the matter back to this court for consideration as to each defendant. *Samoylovich v. City of Chicago*, No. 114802 (Ill. Nov. 28, 2012). We affirmed the circuit court's 2012 order, finding that Montesdeoca failed to demonstrate that plaintiff's suit was a meritless, retaliatory SLAPP within the meaning of the Act and remanded the case to the circuit court. *Samoylovich v. Montesdeoca*, 2014 IL App (1st) 121545, ¶ 48.

¶ 27 After remand, Detective Sebeck and Sergeant Wodnicki, Detective Ortiz and the City filed separate motions for summary judgment on October 30, 2014, alleging that based on the eyewitness identifications, there was probable cause to criminally prosecute plaintiff and as a matter of law, his complaint for malicious prosecution must fail. The circuit court granted plaintiff's motion to voluntarily dismiss Montesdeoca on September 6, 2016.

¶ 28 On September 5, 2017, Detective Sebeck and Sergeant Wodnicki moved to amend their joint memorandum in support of summary judgment, in which the City requested to join. They contended that there was probable cause to prosecute plaintiff in the underlying case because: (1) two witnesses separately identified plaintiff four times through photo arrays and lineups; (2)

plaintiff was connected to the Lincoln due to his nearby address and a shared uncommon name with the deceased Boris; (3) Valere admitted at trial that there was a connection between the deceased Boris and plaintiff because plaintiff knows Roman and drove the deceased Boris's wife to the airport the day of the crime; and (4) plaintiff's indictment was *prima facie* evidence to support probable cause.

¶ 29 The parties further maintained in the joint memorandum that there was no malice in their prosecution because the witnesses had no contact or connection to plaintiff before the crime and the witnesses had no motive except to assist police in locating the person who committed the crime. The parties also contended that there was insufficient evidence of malice to support plaintiff's request for punitive damages.

¶ 30 In a separate motion to amend his memorandum in support of summary judgment, Detective Ortiz contended that while he was employed as a police officer, at the time of the attempted crime, he was off-duty, only a witness to and a victim of it. He further contended that it was his civic duty to contact the police and as a witness, he was not liable for malicious prosecution in fulfilling that duty. Detective Ortiz also asserted that there was no evidence to support plaintiff's allegation that he and Montesdeoca conspired to falsely identify plaintiff or that they in fact falsely identified plaintiff, and there was insufficient evidence of malice to support plaintiff's request for punitive damages.

¶ 31 Detective Sebeck, Sergeant Wodnicki and Detective Ortiz also filed a joint motion to strike the punitive damage claims from plaintiff's second amended complaint. On September 11, 2017, the circuit court struck plaintiff's punitive damage claims from his second amended complaint pursuant to a previous 2011 circuit court order, finding that the motions to strike the

claims were moot. In a separate order, the circuit court granted defendants' requests to amend the memoranda to their summary judgment motions.

¶ 32 Plaintiff filed a combined response to the separate motions for summary judgment on October 10, 2017, contending that there was a genuine issue of material fact as to whether there was probable cause to arrest and prosecute him because the facts showed that the officers did not "honestly" suspect that plaintiff was the culprit. He further asserted that: (1) it was questionable whether in a "few seconds" the witnesses properly viewed the culprits; (2) Sergeant Wodnicki created an unduly suggestive photo array; and (3) the trial court should have let plaintiff's expert testify to refute the identification evidence. Plaintiff also maintained that the officers ignored exculpatory information such as: (1) testimony from Chepov and Valere that they told officers that they had the wrong Boris, (2) the discrepancy between the addresses and ages found in the LEADS and CLEAR databases, and (3) no connection between the Lincoln and plaintiff except that the registered owner and plaintiff had the same name. Plaintiff argued that even if the officers had an honest belief that he was guilty of the offense, such belief was based on gross negligence because they never investigated any of the various leads with exculpatory information and the officers' other contentions were irrelevant because knowing the deceased Boris and members of his family did not translate to probable cause.

¶ 33 Alternately, plaintiff contended that the officers acted maliciously in their arrest and prosecution of him because they rushed to make an arrest without a proper investigation and proceeded with an indictment when there was significant doubt that he committed the crime. Plaintiff also attached the photo array, contending that while Sergeant Wodnicki had hundreds of photo options for the photo array, he chose photos of men that did not look like plaintiff. He also

asserted that the officers maliciously failed to further investigate despite the age and address differences in the databases and information received from his attorney. Plaintiff also attached Detective Sebeck's "malicious and false" grand jury testimony that was impeached during the criminal trial, namely that plaintiff told him the deceased Boris was his father.

¶ 34 In responding to the City's summary judgment motion, plaintiff incorporated his responses to the officers' motion and additionally contended that his claims against the City were based on the officers' conduct as employees of the City. Plaintiff did not oppose Detective Ortiz's summary judgment motion.

¶ 35 In a combined reply on October 16, 2017, the City and the officers contended that while plaintiff stated that the photo array was suggestive, it complied with section 5/107A-5(c) of the Illinois Criminal Code (725 ILCS 5/107A-5(c) (West 2008)) as it existed at the time.<sup>1</sup> That section stated that "suspects in a lineup or photo spread should not appear to be substantially different from 'fillers' or 'distracters' in the lineup or photo spread, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw attention to the suspect." 725 ILCS 5/107A-5(c) (West 2008). Defendants further contended that plaintiff did not challenge the subsequent lineup identification by Detective Ortiz or Montesdeoca, and those identifications alone were enough to constitute probable cause against him. Defendants asserted that even if plaintiff's allegations were true, they would amount at most to negligence and would not rise to the level of gross negligence required to defeat probable cause. Defendants also contended that plaintiff presented no evidence to support his claim that the officers doubted the reliability of the eyewitness identifications.

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<sup>1</sup> This section was since repealed by Pub. Act 98-1014, § 15 (eff. Jan. 1, 2015).

¶ 36 During a hearing on November 3, 2017, the circuit court found no issue of material fact regarding probable cause to prosecute plaintiff in the underlying criminal case because the criminal court previously found that the photo array was admissible and further that any possible mistakes the officers made did not rise to gross negligence. The court also found that since it ruled in favor of defendants on the probable cause element, it did not need to address the malice element of plaintiff's malicious prosecution claim, thus his claim failed as a matter of law. The court entered a written order granting defendants' motions for summary judgment and dismissed the case in its entirety. This timely appeal followed.

¶ 37

## II. ANALYSIS

¶ 38 On appeal, plaintiff contends that the circuit court improperly granted summary judgment to the defendants for malicious prosecution because: (1) there was no probable cause to prosecute him because the photo array and subsequent lineup were unduly suggestive; (2) alternately, any mistake in probable cause was due to gross negligence; (3) the circuit court erred and improperly applied collateral estoppel in adopting the criminal court's finding that the photo array and lineup satisfied probable cause instead of making an independent finding; and (4) the officers acted with malice and improperly prosecuted plaintiff when Detective Sebeck ignored exculpatory evidence and falsely testified during his grand jury testimony.

¶ 39 Summary judgment is proper when "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 that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). The reviewing court analyzes these items strictly against the movant and favorably towards the nonmovant. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). The

purpose of summary judgment is not to try a question of fact but rather to determine whether a genuine issue of material fact exists. *Adams*, 211 Ill. 2d at 42–43. Summary judgment is a drastic means of disposing of litigation and "should be allowed only when the right of the moving party is clear and free from doubt." *Adams*, 211 Ill. 2d at 43. "A triable issue precluding summary judgment exists where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). We apply a *de novo* standard when reviewing a circuit court order granting summary judgment. *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196, 201 (2008). We have a duty to review the entire record to determine whether summary judgment was proper (*Foy v. City of Chicago*, 194 Ill. App. 3d 611, 616 (1990)), and can affirm summary judgment on any basis in the record (*Sang Ken Kim v. City of Chicago*, 368 Ill. App. 3d 648, 653 (2006)).

¶ 40 A party brings a malicious prosecution action to recover damages suffered from a previous suit that was filed maliciously and without probable cause. *Miller v. Rosenberg*, 196 Ill. 2d 50, 58 (2001). To prevail on a claim of malicious prosecution, the plaintiff must prove each of the following elements: (1) the commencement or continuance of an original criminal or civil judicial proceeding by the defendant, (2) the termination of the proceeding in plaintiff's favor, (3) the absence of probable cause for such proceeding, (4) malice, and (5) damages. *Burrell v. Village of Sauk Village*, 2017 IL App (1st) 163392, ¶ 16. The damages element requires that plaintiff plead and prove some special injury or damage beyond the usual expense, time or annoyance of defending a lawsuit, unless the action is based on the commencement of a criminal proceeding. *St. Paul Fire & Marine Insurance Co. v. City of Zion*, 2014 IL App (2d) 131312, ¶

15. The failure to satisfy any of the foregoing elements precludes recovery for malicious prosecution. *Gauger v. Hendle*, 2011 IL App (2d) 100316, ¶ 99.

¶ 41 With regard to the first element of malicious prosecution, the record in this case clearly establishes that plaintiff was criminally prosecuted for criminal damage to property. Our supreme court recently considered the first element of malicious prosecution in *Beaman v. Freesmeyer*, 2019 IL 122654, which plaintiff was granted leave to cite as additional authority. In *Beaman*, the court clarified whether police officers' conduct could subject them to liability under the first element of malicious prosecution, and reversed the appellate court's decision, holding that if defendant officers' actions were "actively instrumental" to the prosecution, then defendants could be liable. *Beaman*, 2019 IL 122654, ¶ 44. The court further held that the trial court was required to examine "whether the defendants' conduct or actions proximately caused the commencement or continuance of the original criminal proceeding by determining whether defendants played a significant role in [the defendant]'s prosecution." *Beaman*, 2019 IL 122654, ¶¶ 15-16.

¶ 42 Turning to the case at bar, we consider whether defendants had a "significant role" in the commencement or continuation of plaintiff's prosecution for criminal damage to property to satisfy the first element of malicious prosecution.

¶ 43 Here, the record establishes that the officers: failed to investigate the vehicle registration belonging to the deceased Boris, did not follow up on Chepov's or Valere's statements, and failed to disclose that they had any additional evidence besides the eyewitness identifications to the prosecuting ASA or the grand jury. Additionally, Detective Sebeck's statement to the grand jury that plaintiff was a junior to the deceased Boris was later found to be false. While the ASA made

the ultimate decision to continue plaintiff's prosecution, it is standard procedure for prosecutors to rely on police investigations when making a decision to prosecute. *Beaman*, 2019 IL 122654, ¶ 43. As police officers can be liable for malicious prosecution if they were "actively instrumental" in causing plaintiff's prosecution, failed to present exculpatory evidence and presented false statements, we conclude that defendants' actions in not investigating other leads and Detective Sebeck's false statement to the grand jury played a significant role in the continuation of plaintiff's prosecution. *Beaman*, 2019 IL 122654, ¶¶ 43-44.

¶ 44 The second element of malicious prosecution, the termination of the underlying proceedings in plaintiff's favor, is satisfied because plaintiff was acquitted after his criminal trial.

¶ 45 Turning our attention to the third element of malicious prosecution, the absence of probable cause for such proceeding, plaintiff contends that summary judgment was improper because a question of fact existed as whether there was probable cause at the time of his prosecution. Specifically, plaintiff argues that the photo array and subsequent lineup were unduly suggestive and alternately that the vehicle registration information for the deceased Boris did not match plaintiff's address or age; the officers ignored evidence from Chepov and Valere that he did not own the car and that they arrested the wrong person; and Detective Sebeck lied to the grand jury. Plaintiff contends that any "honest mistake" was due to the officers' gross negligence.

¶ 46 While plaintiff attempts to relitigate his motion to suppress filed during the pendency of his criminal proceedings, and further argues that there was no probable cause for his arrest, those issues are not part of our review. We do not assess probable cause at the earlier time of arrest in reviewing a malicious prosecution action, but instead look to what defendants knew at the time of "subscribing a criminal complaint." *Porter v. City of Chicago*, 393 Ill. App. 3d 855, 868-69

(2009); *Gauger*, 2011 IL App (2d) 100316, ¶ 112. Accordingly, we look to the events after plaintiff's arrest to determine whether probable cause existed for his prosecution. *Porter*, 393 Ill. App. 3d at 869.

¶ 47 "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." *Fabiano v. City of Palos Hills*, 336 Ill. App. 3d 635, 642 (2002). Probable cause is a continuous concept and probable cause to arrest an individual is distinct from whether there was probable cause to prosecute. *Gauger*, 2011 IL App (2d) 100316, ¶¶ 114-15. Probable cause to prosecute depends not on the facts as an outside observer would perceive them but on the facts as they would have appeared to a reasonable person in the defendant's position. *Fabiano*, 336 Ill. App. 3d at 655. . In a malicious prosecution action, events leading up to the point of prosecution may be considered in conjunction with events before and after arrest to determine if there was probable cause to prosecute. *Gauger*, 2011 IL App (2d) 100316, ¶ 112.

¶ 48 A mistake or error that is not grossly negligent will not affect the question of probable cause in an action for malicious prosecution when there is an honest belief that the accused is probably guilty of the offense. *Turner v. City of Chicago*, 91 Ill. App. 3d 931, 935 (1980). There is no need for police to verify the veracity of each item of information obtained; one need only act with reasonable prudence and caution in proceeding. *Johnson v. Target Stores, Inc.*, 341 Ill. App. 3d 56, 72 (2003). A reasonable ground for the belief of the guilt of an accused may be based on information from others as well as personal knowledge. *Turner*, 91 Ill. App. 3d at 935; *Reynolds v. Menard, Inc.*, 365 Ill. App. 3d 812, 820 (2006). If the victim of the crime supplies police with the information forming probable cause, there is a presumption that the information

is inherently reliable. *Sang Ken Kim v. City of Chicago*, 368 Ill. App. 3d 648, 655 (2006). The issue of probable cause as an element of a malicious prosecution claim is a mixed question of law and fact. *Grundhoefer v. Sorin*, 2018 IL App (1st) 171068, ¶ 14. Whether the circumstances proving probable cause are true is a question of fact, but whether these circumstances amount to probable cause is a question of law for the courts. *Grundhoefer*, 2018 IL App (1st) 171068, ¶ 14.

¶ 49 We thus determine whether any genuine issue of fact existed regarding probable cause to continue plaintiff's prosecution at the time of his indictment.

¶ 50 In a summary judgment proceeding, a defendant has the initial burden to produce evidence that would entitle him to a finding that probable cause existed as a matter of law. *Fabiano*, 336 Ill. App. 3d at 642. Probable cause acts as a complete defense in an action for malicious prosecution. *Grundhoefer*, 2018 IL App (1st) 171068, ¶ 14. Summary judgment is only appropriate if undisputed facts lead to only one reasonable conclusion. *Fabiano*, 336 Ill. App. 3d at 642. Where a reasonable person could draw different inferences from undisputed facts or if there is a dispute as to a material fact, summary judgment should be denied and the trier of fact should decide the issue. *Beaman*, 2019 IL 122654, ¶ 22.

¶ 51 In the case at bar, at the time of plaintiff's indictment, the evidence available to defendants was: the eyewitnesses' identifications of plaintiff in the photo array and lineup; the information from the LEADS database that indicated that the Lincoln was registered to a Boris Samoylovich who was in his 70s and lived in Skokie; the information in the CLEAR database that a 47-year old Boris Samoylovich resided in Glenview and who matched the eyewitnesses' descriptions; Chepov and Valere's statements to the officers after plaintiff's arrest that the police had the wrong guy; and Detective Sebeck's mistatement to the grand jury; he said that he

believed defendant gave him the information that the deceased Boris was his father. Additionally, defendants relied on plaintiff's indictment as *prima facie* evidence of probable cause. The record also reflects that, at the time of plaintiff's indictment, he had not yet presented an alibi for that evening. We find that the officers had no obligation to accept Chepov's and Valere's exculpatory statements as true and had no further obligation to follow those leads as they acted with reasonable caution (*Reynolds*, 365 Ill. App. 3d at 820) and objectively believed that plaintiff committed the crime (*Burrell*, 2017 IL App (1st) 163392, ¶ 16).

¶ 52 Plaintiff further contends that any "honest mistake" in probable cause to prosecute plaintiff was due to the officers' gross negligence for failing to investigate Chepov's and Valere's statements and Detective Sebeck's misstatement to the grand jury.

¶ 53 Negligence will not establish a claim for malicious prosecution and only gross negligence will affect the question of probable cause when there is an honest belief by the complainant that the accused is probably guilty of the offense. *Burrell*, 2017 IL App (1st) 163392, ¶ 16. It is the state of mind of the one commencing the prosecution, and not the actual facts of the case or the guilt or innocence of the accused that is at issue for probable cause. *Johnson*, 341 Ill. App. 3d at 72. If there is an honest belief that the accused is probably guilty, then a mistake or error that does not amount to gross negligence will not affect the question of probable cause. *Turner*, 91 Ill. App. 3d at 935.

¶ 54 Negligence is the failure to exercise ordinary care (*Dardeen v. Kuehling*, 213 Ill. 2d 329, 336 (2004)), and during an investigation it is "inadvertence, mistake and other errors of the like" (*Loitz v. Remington Arms Co. Inc.*, 138 Ill. 2d 404, 415 (1990)). Gross negligence means a high degree of negligence, an element of recklessness and the absence of the slightest degree of care.

*Michigan Central Railroad Co. v. Carrow*, 73 Ill. 348, 357 (1874). When a defendant acts with gross negligence, he shows a blatant disregard for the rights of others. *Loitz*, 138 Ill. 2d at 415. Only the total failure to verify any of the facts that support a prosecutor's honest belief for probable cause to prosecute will overstep the bounds of good faith and show there was no probable cause. *Mack v. First Sec. Bank of Chicago*, 158 Ill. App. 3d 497, 503 (1987).

¶ 55 In the instant case, it is clear that the police officers made mistakes in not investigating Chepov's and Valere's statements, but probable cause is determined at the time of subscribing a criminal complaint and it is immaterial that the accused may thereafter be found not guilty. See *Howard v. Firmand*, 378 Ill. App. 3d 147, 150 (2007). In the hearing on defendants' summary judgment motion, the circuit court acknowledged that the officers' failure to investigate Chepov's and Valere's statements was error but in its view these errors arose to "mistakes or errors amounting to negligence, not gross negligence." As stated above, honest mistakes and errors not amounting to gross negligence will not affect probable cause. *Turner*, 91 Ill. App. 3d at 935. While the officers may have been negligent in failing to investigate Chepov's and Valere's statements, when looking at all the facts of investigation, there were eye witness identifications evidence and no alibi from plaintiff to counter these statements. Thus, the officers' decisions can still support an honest belief as to plaintiff's guilt at the time of prosecution. See *Mack*, 158 Ill. App. 3d at 503.

¶ 56 Plaintiff lastly contends that officers did not have an honest belief that he was guilty at the time of prosecution because Detective Sebeck purposely lied at the grand jury proceedings to get an indictment against him. In order to successfully defeat a summary judgment motion for malicious prosecution, there must be a showing that a defendant requested, directed or pressured

the officer into swearing out the complaint for the plaintiff's arrest or that one of the defendants knowingly gave false information to the police. *Geisberger v. Vella*, 62 Ill. App. 3d 941, 949 (1978).

¶ 57 Nowhere does plaintiff allege in his complaint that any defendant knowingly made false statements to the police, although he does allege that Detective Sebeck purposely lied to the grand jury. Nor does plaintiff alleged that any of the defendants directed, requested or pressured any official to proceed against plaintiff. See *Geisberger*, 62 Ill. App. 3d at 950. The record reflects that Detective Sebeck made a single misstatement during the grand jury testimony about plaintiff being a junior, and immediately afterwards the ASA asked a question about a different subject matter. Detective Sebeck's incorrect statement, when looking at the totality of the circumstances, does not negate the eye witness identification evidence, prove that he exerted any pressure over the ASA or the grand jury or prove that he knowingly gave false testimony in an effort to influence their decisions to prosecute. Thus, when we consider the events prior to and leading up to plaintiff's prosecution as a whole, we find there was probable cause to prosecute plaintiff for criminal damage to property.

¶ 58 As plaintiff has not satisfied the third element of malicious prosecution, and the failure to satisfy any element bars a successful claim for malicious prosecution (*Gauger*, 2011 IL App (2d) 100316, ¶ 99), we need not reach the final elements of malice or damages. We conclude that the circuit court properly granted summary judgment in favor of defendants.

¶ 59 CONCLUSION

¶ 60 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 61 Affirmed.