Rel: August 16, 2019

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2019

1180273

Ronald Heining and Tyler Heining

v.

Darryl Abernathy and Robert J. Dean, Jr.

Appeal from Calhoun Circuit Court
(CV-17-900555)

SELLERS, Justice.

Ronald Heining and his son, Tyler Heining, appeal from a summary judgment entered by the Calhoun Circuit Court in favor of Robert J. Dean, Jr., Public Works Director of the City of

Anniston, and Darryl Abernathy, a supervisor in the Public Works Department, in the Heinings' action seeking damages for false arrest, false imprisonment, malicious prosecution, and conspiracy. We affirm.

Facts and Procedural History

The evidence, viewed in the light most favorable to the Heining as the nonmovants for a summary judgment, reveals the following relevant facts: In June or July 2012, Ronald Heining discovered a sealed envelope that had been slipped underneath the door at his place of employment, B&T Supplies, which was owned by Ronald's son Tyler; B&T at the time sold janitorial supplies to the City of Anniston ("the City"). Ronald was the contact person for those sales. The envelope stated on the outside "Deliver Ben Little" and contained two or three pages of ethical violations allegedly committed by several employees of the Public Works Department, including Dean and Abernathy. Little was a councilman for the City. After reviewing the contents of the envelope, Ronald took the envelope and its contents to Councilman Little, who he claimed he did not know. Ronald and Councilman Little, in turn, took the information to Don Hoyt, the city manager, who conducted an extensive

investigation into the alleged ethical violations.[1]

Meanwhile, Councilman Little presented the allegations of ethical violations at a city-council meeting. Ronald Heining was present at that council meeting, during which he sat next to James Fluker, an employee in the Public Works Department. At that meeting, Fluker confided in Ronald that he had put "coolant seal" belonging to the City on the truck Abernathy used for his personal business. After the council meeting concluded, Ronald introduced Fluker to Councilman Little as "the guy that put coolant seal" on Abernathy's truck. Apparently, at that time, Councilman Little ordered Fluker to obtain from Abernathy's office a copy of a surveillance video allegedly depicting the theft of two city-owned utility trailers. Fluker informed Abernathy of Councilman Little's instructions; because Abernathy thought that stealing a surveillance video would violate the City's council-manager act and would also constitute theft, this information was provided to the Anniston Police Department and was

[1]Although Hoyt concluded that the specific ethical violations against Dean and Abernathy were unfounded, both Dean and Abernathy ultimately admitted to committing minor violations of the State's ethics laws and were required to pay an administrative penalty and/or a fine.

investigated by Lt. Allen George, an investigator with the department. Lt. George monitored a telephone call from Fluker to Councilman Little, which confirmed Councilman Little's instruction to Fluker to obtain the surveillance video. Subsequently, Councilman Little was arrested and was charged with violating the City's council-manager act; Fluker was a witness in that case.

Sometime after Councilman Little's arrest, Fluker told Abernathy that Ronald Heining had tried to bribe him not to testify against Councilman Little. Abernathy telephoned Lt. George and reported that conversation. The next day, Abernathy accompanied Fluker to the police department to report the bribery and witness-intimidation allegations.

On August 24, 2012, the Heinings were arrested for attempting to bribe and intimidate Fluker. The details of the alleged bribery and intimidation are set forth in the Alabama Uniform Incident/Offense Report, prepared by Lt. George and dated August 23, 2012:

> "Fluker ... is a witness in a case against Councilman Benjamin Little .... For the last several weeks, he has received threats by phone ... and was followed for an extended period of time on August 14, 2012 by Ronald Heining. Fluker feels that all

of these actions are because of him coming forward against Councilman Little.

"On August 18, 2012, at approximately 7pm, Fluker and his wife Amy Fluker drove to Scott's Grocery ... to purchase fuel. While they were at the fuel pumps ... Ronald Heining and a [white male] Fluker believed to be [Ronald] Heining's son pulled up in a small black SUV (4 Door). Fluker said that the [white male] with Ronald Heining stated 'I have $1,000 cash if you don't go to trial with Ben Little and keep your mouth shut.' Fluker said that the [white male] held up what appeared to be a roll of $100 bills. Fluker said to his wife 'something is fishy about this, this is a set up.' He said that Ronald Heining kept saying 'Take the money; you know you need the money, just take it.' Fluker said that Ronald told him, 'I will be at Ben Little's trial and will be on his side and testify about all of this crap.' He said that Ronald Heining then got into his vehicle and left the parking lot at a high rate of speed like he was mad.

"On August 23, 2012, I met with Mr. Fluker and showed him six separate photos in a stapled packet that contained a photo of Tyler Heining and five other similar white males. Mr. Fluker identified photo number four as being the individual that offered him the money to not testify. Photo number four is a photo of Tyler Heining. ...

"At approximately 4pm, I met with Amy Fluker and asked her what she had observed. She stated that she and [Mr. Fluker] were at the fuel pumps at Scott's grocery when a small black SUV pulled up beside them. She said that the driver exited the vehicle and she saw the passenger holding up a roll of money. She said that she heard the driver who she believed was Ronald Heining, offering [Mr. Fluker] money. She said that she asked [Mr. Fluker] why he was offering him money and when he told her, she said that she told [Mr. Fluker] 'you better not

> take that money.' [Mrs. Fluker] said that after a few minutes, the vehicle sped away. Mrs. Fluker stated that at some point, the vehicle ended up behind them and began following them for a short distance before turning off. I asked Mrs. Fluker if she ever saw the individual holding up the money and she said that she couldn't see them real well. I showed Mrs. Fluker a photo packet containing the same photos that I showed Mr. Fluker, but in a different order. Mrs. Fluker was unable to identify the suspect from the array, saying that she didn't get a good enough look to be able to identify them.
>
> "Mr. Fluker will come to [the Anniston Police Department] on August 24, 2012, to be escorted to the District Attorney's office to seek warrants."

The bribery and witness-intimidation charges against the Heinings were ultimately nolle prossed.[2] The Heinings, thereafter, sued Dean and Abernathy, asserting claims of false arrest, false imprisonment, malicious prosecution, and conspiracy.[3] The complaint essentially alleges that Dean and Abernathy "fabricated a story for Fluker to tell police[, i.e.,] that Ronald and Tyler Heining attempted to bribe and influence Fluker into not testifying in an ethics case against [Councilman Little]." Dean and Abernathy moved for a summary judgment pursuant to Rule 56(c), Ala. R. Civ. P., denying that

[2]District Attorney Randy Moeller testified in his deposition that the charges against the Heinings were nolle prossed because Fluker "was a problematic witness."

[3]The Heinings did not sue Fluker or Lt. George.

they had taken any action to falsely accuse the Heinings of a crime and contending that, in any event, Lt. George's independent investigation into Fluker's allegations insulated them from liability. After conducting two hearings and allowing the Heinings to produce supplemental information, the trial court entered a summary judgment in favor of Dean and Abernathy, concluding, as a matter of law, that Lt. George's investigation into the allegations of bribery and witness-intimidation established probable cause to support the Heinings' arrests. The Heinings filed a motion to alter, amend, or vacate that judgment, which the trial court denied. This appeal followed.

Standard of Review

> "This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to

> produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004). See also Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986)(noting that "[s]ummary judgment for a defendant is proper when there is no genuine issue of a material fact as to any element of a cause of action and the defendant is entitled to a judgment as a matter of law").

Discussion

The False-Arrest/False-Imprisonment Claims

An essential element to establishing claims of false arrest and false imprisonment is the lack of probable cause. The dispositive issue presented for our review is whether the trial court correctly ruled, as a matter of law, that Lt. George had probable cause to arrest the Heinings.

This Court has stated the following concerning false arrest and false imprisonment:

> "A false arrest requires proof '"that the defendant caused [her] to be arrested without probable cause."' Walker v. City of Huntsville, 62 So. 3d 474, 493 (Ala. 2010) (quoting Higgins v. Wal-Mart Stores, Inc., 512 So. 2d 766 (Ala. 1987)). '[F]or a detention to be valid, the officer must reasonably, and in good faith, suspect the individual detained of being involved in some form of criminality.' Walker, 62 So. 3d at 493 (quoting Higgins, 512 So. 2d at 768). 'Section 6-5-170, Ala. Code 1975, defines false imprisonment as "the unlawful detention of the person of another for any length of time whereby he is deprived of his personal liberty."' Walker, 62 So. 3d at 492. A false arrest will support a claim of false imprisonment. Upshaw v. McArdle, 650 So. 2d 875 (Ala. 1994). As to false-arrest and false-imprisonment claims, '[p]robable cause exists where the facts and circumstances within the officer's knowledge and of which he has reasonable trustworthy information are sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed.' Walker, 62 So. 3d at 492 (internal quotation marks omitted)."

Ex parte Harris, 216 So. 3d 1201, 1213 (Ala. 2016).

Dean and Abernathy acknowledge a line of cases recognizing that liability for false arrest or false imprisonment may be predicated on a person's misconduct in falsely accusing another of a crime, although they deny that they falsely accused the Heinings of a crime. See Crown Cent. Petroleum Corp. v. Williams, 679 So. 2d 651, 654 (Ala. 1996)(noting that "persons other than those who actually effect an arrest or imprisonment may be so involved with or

related to the act or proceeding as instigators or participants therein as to be liable for false imprisonment"). Dean and Abernathy argue, however, that an individual is not considered to have "instigated" an arrest for purposes of a false-arrest or false-imprisonment claim when he or she provides information that leads a third party, such as Lt. George, to conduct an independent investigation resulting in the plaintiff's arrest. Dean and Abernathy cite Standard Oil Co. v. Davis, 208 Ala. 565, 567, 94 So. 754, 756 (1922), a suit alleging false imprisonment in which this Court stated:

> "The inquiry is: (1) whether or not the defendant or his agent directed, commanded, or in any way instigated the arrest; and (2) whether such conduct, if shown, was a material factor in causing the officer to make the arrest. Of course if the officer acts solely upon his own judgment and initiative, the defendant would not be responsible even though he had directed or requested such action, and even though he were actuated by malice or other improper motive."

(Emphasis added.)

Dean and Abernathy assert that Lt. George conducted an independent investigation into the allegations of bribery and witness-intimidation and that, based on that investigation, Lt. George acted on his own judgment and initiative in procuring the Heinings' arrests. The means Lt. George used to

gather facts concerning the investigation are set forth in the trial court's order:

> "Interviewing both Fluker and Fluker's wife, who Fluker stated was present during the Heinings' attempt to bribe and intimidate [Fluker].
>
> "Presenting a photographic lineup to both Fluker and Fluker's wife. Fluker identified Tyler Heining from the lineup. Fluker's wife confirmed the events but was unable to identify the Heinings from the photographic lineup.
>
> "Reviewing security camera footage from [Scott's Grocery] where the alleged crimes occurred. Although the footage did not show the Heinings or their vehicle, [Lt.] George testified in [his] deposition that he saw a vehicle that looked like Fluker's vehicle at [Scott's Grocery] at the time that Fluker said the Heinings tried to bribe and intimidate him. And, because of the angle of the camera, [Lt.] George felt he could not and would not have seen another vehicle pulling up.
>
> "Attempting to secure Ronald Heining's phone to see if it contained any evidence."

(Footnote omitted.)

The methods used to gather the underlying facts in Lt. George's investigation and those underlying facts are not in dispute. Lt. George interviewed both Fluker and his wife, he presented them with photographic lineups, he viewed the surveillance video at Scott's Grocery, and he attempted to secure Ronald Heining's cellular telephone. Accordingly,

because Lt. George conducted an independent investigation, Dean and Abernathy demonstrated a prima facie entitlement to a judgment as a matter of law. See Fina Oil & Chem. Co. v. Hood, 621 So. 2d 253, 257 (Ala. 1993)(noting that "[i]f the facts relating to a determination of probable cause are undisputed, the question of probable cause is one of law for the court and is not an issue for the jury to decide").

In response to Dean and Abernathy's properly supported summary-judgment motion, the Heinings rely on the affidavit of Fluker, dated July 11, 2015, in which Fluker states that Dean and Abernathy induced him to make false charges against the Heinings in exchange for promises of additional pay, so long as he cooperated with their scheme. The Heinings claim that Fluker's affidavit presents a genuine issue of material fact as to whether Dean and Abernathy instigated the Heinings' arrest and whether their conduct was a material factor in causing Lt. George to procure the Heinings' arrests. However, as noted in Standard Oil, if Lt. George acted solely upon his own judgment and initiative in procuring the Heinings' arrests, Dean and Abernathy would not be liable, even if they acted with malice or other improper motive.

The Heinings claim that Lt. George could not have acted solely upon his own judgment and initiative in procuring their arrests because, they say, the video surveillance at Scott's Grocery provided no "concrete" evidence to corroborate the allegations that the Heinings were there at the time the Flukers alleged.[4] For this reason, they contend that Lt. George based his decision to arrest solely on the false information provided by the Flukers. The Heinings point to Lt. George's deposition testimony, in which he stated that, other than the Flukers' statements, he had no concrete evidence indicating that the Heinings were actually at Scott's Grocery at the time alleged by Fluker. However, concrete evidence is not the standard for determining probable cause to arrest.

In Dixon v. State, 588 So. 2d 903, 906 (Ala. 1991), this Court defined probable cause as follows:

> "Probable cause exists if facts and circumstances known to the arresting officer are sufficient to

[4]The Heinings also argued to the trial court for the first time in their supplemental opposition to Dean and Abernathy's summary-judgment motion that Lt. George failed to interview alibi witnesses that "would have" conclusively established that they were not present at Scott's Grocery at the time alleged by the Flukers. However, as the trial court noted, the Heinings never presented Lt. George with the names of any alibi witnesses to interview.

> warrant a person of reasonable caution to believe that the suspect has committed a crime. United States v. Rollins, 699 F.2d 530 (11th Cir.) cert. denied, 464 U.S. 933, 104 S. Ct. 335, 78 L. Ed. 2d 305 (1983). 'In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act....' Brinegar v. United States, 338 U.S. 160, 175, 69 S. Ct. 1302, 1310, 93 L. Ed. 1879, 1891 (1949). '"The substance of all the definitions of probable cause is a reasonable ground for belief of guilt."' Id. 'Probable cause to arrest is measured against an objective standard and, if the standard is met, it is unnecessary that the officer subjectively believe that he has a basis for the arrest.' Cox v. State, 489 So. 2d 612 (Ala. Cr. App. 1985). The officer need not have enough evidence or information to support a conviction in order to have probable cause for arrest. Only a probability, not a prima facie showing, of criminal activity is the standard of probable cause. Stone v. State, 501 So. 2d 562 (Ala. Cr. App. 1986)...."

Lt. George stated in his deposition that the surveillance video showed a vehicle that looked like Fluker's vehicle at Scott's Grocery at the time Fluker alleged he was offered the money. He further stated that, because of the angle of the surveillance camera, he would not have seen another vehicle such as the Heinings' vehicle pulling up to the fuel pumps. Lt. George also interviewed Fluker's wife, Amy, who confirmed the events that transpired at Scott's Grocery, although she stated that she was unable to get a good look at the

individuals in the vehicle allegedly occupied by the Heinings. The fact that the video surveillance did not provide concrete evidence that the Heinings were present at Scott's Grocery at the time of the alleged crimes does not mean that Lt. George based his decision to arrest solely on the Flukers' allegations. In fact, Lt. George was never asked his opinion about whether he thought Fluker's statements were false, nor was he asked about the materiality of any of the false or misleading statements Fluker allegedly made. As noted by the trial court, Lt. George was unaware that any of the information presented to him by Fluker had been allegedly "manufactured" by Dean and Abernathy, and there was no evidence indicating that Lt. George was part of any alleged conspiracy in investigating Fluker's allegations. Accordingly, Fluker's affidavit testimony, recanting his original allegations, does not undermine Lt. George's independent investigation, nor does it undermine the existence of probable cause to arrest. Simply put, Fluker's affidavit failed to raise a triable issue of fact because the essential facts underlying the investigation were undisputed and, viewed

objectively, support a finding of probable cause as a matter of law.

The Malicious-Prosecution Claim

The Heinings' claim of malicious prosecution also requires them to demonstrate by substantial evidence, among other things, that Dean and Abernathy lacked probable cause to instigate the criminal prosecution:

> "In order to succeed in a malicious prosecution action, a plaintiff must prove that a prior judicial proceeding was instigated by the present defendant without probable cause and with malice; that the prior proceeding ended in favor of the present plaintiff; and that the present plaintiff was damaged thereby."

Fina Oil, 621 So. 2d at 256. Probable cause in the context of a malicious-prosecution claim is defined as "'"'[a] reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged.'"'" Moon v. Pillion, 2 So. 3d 842, 846 (Ala. 2008)(quoting Eidson v. Olin Corp., 527 So. 2d 1283, 1285 (Ala. 1988), quoting in turn Parisian Co. v. Williams, 203 Ala. 378, 383, 83 So. 122, 127 (1919)).

The Heinings argue that Fluker's affidavit, stating that Dean and Abernathy influenced him to provide false information to Lt. George, is substantial evidence that Dean and Abernathy maliciously instigated the charges of bribery and witness-intimidation. Again, as indicated in Standard Oil, in a suit alleging false imprisonment, "if the officer acts solely upon his own judgment and initiative, the defendant would not be responsible even though he had directed or requested such action, and even though he were actuated by malice or other improper motive." 208 Ala. at 567, 94 So. at 756. In Dismukes v. Trivers Clothing Co., 221 Ala. 29, 32, 127 So. 188, 190 (1930), this Court held that the principle set forth in Standard Oil "is equally applicable to suits for malicious prosecution." See also 54 C.J.S. Malicious Prosecution § 13, p. 746 (2010) (noting that "[i]t is a complete defense to a malicious prosecution action that the defendant was not the determining factor in the decision to prosecute"). We also find persuasive the rationale stated by the Texas Supreme Court in King v. Graham, 126 S.W.3d 75, 78 (Tex. 2003):

> "[A] person who knowingly provides false information to the grand jury or a law enforcement official who has the discretion to decide whether to prosecute a criminal violation cannot be said to have caused the

> prosecution if the information was immaterial to the decision to prosecute. If the decision to prosecute would have been made with or without the false information, the complainant did not cause the prosecution by supplying false information. Therefore, to recover for malicious prosecution when the decision to prosecute is within another's discretion, the plaintiff has the burden of proving that that decision would not have been made but for the false information supplied by the defendant."

The Heinings failed to provide substantial evidence that Lt. George's decision to prosecute was based solely on the story allegedly fabricated by Dean and Abernathy or that his decision to prosecute would not have occurred but for the story allegedly fabricated by Dean and Abernathy. Because the facts before Lt. George at the time the criminal proceeding was initiated against the Heinings gave rise to probable cause to support the criminal proceedings, we conclude that the summary judgment entered in favor of Dean and Abernathy on the malicious-prosecution claim was proper.

Conclusion

Although the facts concerning Fluker's reliability and credibility and whether Dean and Abernathy fabricated a story to implicate the Heinings in a bribery scheme are disputed, those facts have no bearing on whether Lt. George acted on his own initiative and exercised his independent judgment in

believing that a crime had been committed. Once the trial court determined that there was no dispute concerning the underlying facts of Lt. George's independent investigation, it became irrelevant whether the information conveyed to Lt. George by Fluker had been originally fabricated by Dean and Abernathy. The summary judgment in favor of Dean and Abernathy on the claims of false arrest, false imprisonment, and malicious prosecution are affirmed. Additionally, the Heinings' conspiracy claim is moot. It is well established that a civil-conspiracy claim cannot exist in the absence of the underlying tort claims, here false arrest, false imprisonment, and malicious prosecution. Willis v. Parker, 814 So. 2d 857 (Ala. 2001).[5]

AFFIRMED.

Parker, C.J., and Bolin, Wise, and Stewart, JJ., concur.

[5]The trial court noted in its order that the Heinings had conceded to the dismissal of their conspiracy claim. The Heinings argue, and Dean and Abernathy admit, that the Heinings never agreed to the dismissal of their conspiracy claim. As indicated, however, any argument concerning the conspiracy claim is moot given our ruling on the underlying claims of false arrest, false imprisonment, and malicious prosecution.