

{¶3} In the spring of 1997, allegations of favoritism and special treatment for certain customers were raised by a salvage facility employee, Shawn Kiefer. Ms. Kiefer was responsible for scheduling appointments for inspections at the facility. She complained to Captain Freeman at the Jackson County District Headquarters of the Ohio State Highway Patrol (OSHP) that certain customers received priority scheduling from certain employees, now plaintiffs, in exchange for providing the employees with gifts of food such as pizzas or boxes of donuts and by occasionally supplying them with car parts.

{¶4} Although Ms. Kiefer was supposed to schedule appointments on a first-come, first-served basis, she reported that customers who spoke directly with plaintiffs Cheadle and Stevison received priority scheduling. According to Ms. Kiefer, Troopers Cheadle and Stevison would add these “special customers” to the schedule within the week whereas other customers had to wait as long as six weeks for an appointment. Ms. Kiefer testified that some inspections were completed without an appointment and that the inspections usually lasted ten to fifteen minutes. Ms. Kiefer noticed that customers with appointments waited fifteen or twenty minutes while the “special” customers were having their vehicles inspected. Ms. Kiefer noted that the favored customers appeared at the facility two or more times per week and usually arrived before 8:30 a.m. with donuts, pastries or snacks. Those customers given lunchtime appointments supplied the staff with pizzas, fast food meals or items to be grilled on the premises such as hot dogs, hamburgers or bratwurst. Ms. Kiefer also described one incident when a customer left \$20 on Trooper Cheadle’s desk and explained that he had not had time to stop and buy food but that the employees should take the money and purchase lunch. According to Ms. Kiefer’s recollection, Trooper Stevison and Ms. Holdcroft accepted the money and used it to buy a pizza for the staff. Ms. Kiefer related several other instances of alleged impropriety that included customers who gave employees fresh turkeys at Thanksgiving, one regular customer who provided the staff with a catered Christmas dinner, and another regular client who left a car jack for Ms. Holdcroft.

{¶5} Based on these allegations, Captain Freeman ordered Lt. Hudson (then Sgt. Hudson) to begin an investigation into possible violations of OSHP policies and/or criminal

activity by facility employees. Lt. Hudson conducted numerous interviews with past and present employees and customers of the facility. He also received permission to install a surveillance video camera in the facility garage to observe how the vehicle inspections were being performed.

{¶6} After viewing the surveillance video and speaking with Shawn Kiefer, Lt. Hudson became convinced that charges of bribery, dereliction of duty and falsification of inspections were warranted. Plaintiffs and several other employees were then temporarily reassigned to other duties away from the facility.

{¶7} Lt. Hudson testified that all of the investigatory records, videotapes, and summaries of interviews compiled by him were turned over to the Jackson County Prosecutor, Mark Ochsenbien, in the summer of 1997. The prosecutor presented the case to the grand jury in October 1997 and in November 1997 the grand jury returned indictments against several customers and employees including plaintiffs Cheadle, Stevison and Callihan. The grand jury declined to return any indictments against Ms. Holdcroft. However, after the results of the grand jury proceedings were released, Lt. Hudson conferred with the prosecutor, after which he proceeded to file charges in Jackson County Municipal Court against Ms. Holdcroft for receiving improper compensation; i.e., a car jack and a twenty-dollar bill.

{¶8} In February 1998, all of the charges against another employee, who is not a party to this action, were dismissed by Judge Grey, who was sitting by assignment at the Jackson County Court of Common Pleas. Judge Grey determined that the conduct engaged in by that employee, Motor Vehicle Inspector Livesay, did not rise to the level of a criminal offense. Inspector Livesay had worked at the salvage facility with plaintiffs and had also been indicted by the same grand jury as a result of Lt. Hudson's investigation. Mr. Livesay faced prosecution for 68 counts of dereliction of duty and five counts of receiving improper compensation. In dismissing the charges against Livesay, Judge Grey cited the following provisions of R.C. 2921.44: "(E) No public servant shall recklessly fail to perform a duty expressly imposed by law with respect to his office, or recklessly do any act expressly forbidden by law with respect to his office."

{¶9} Judge Grey noted that the duties expected of a motor vehicle inspector such as Mr. Livesay are set out in Ohio's Administrative Code and are not so specific that failure to properly perform them would give rise to criminal liability. Judge Grey opined that the most severe sanction for this type of misconduct would be administrative discipline under workplace guidelines. Judge Grey also noted that while there was an appearance of favoritism, the acceptance of foodstuffs in return for special consideration was more closely akin to a violation of a job-related policy than a criminal or illegal act. Judge Grey explained, "**** an appearance of favoritism may arise in a situation where a regular customer provides some amenity like buying donuts for the staff. Nothing prevents the office supervisor from prohibiting it or punishing any member of the staff who violated the policy. Violations of the policy would only give rise to grounds for some job action such as suspension or firing. It would never rise to the status of a criminal offense." (Plaintiffs' Exhibit 28.)

{¶10} Once Judge Grey's decision was issued, the prosecutor conveyed to defendant that this ruling, in essence, would apply to all the other charges pending against all the employees indicted by the grand jury, as well as those levied against Ms. Holdcroft. Prosecutor Ochsenbien declined to prosecute the pending cases and dismissed all criminal charges related to Lt. Hudson's investigation.

{¶11} Thereafter, plaintiffs filed the instant action against defendant seeking damages for malicious prosecution and abuse of process. Plaintiffs allege that the criminal charges were filed against them with malice and without probable cause and, that defendant pursued the charges in an attempt to protect Captain Freeman from any administrative scrutiny involving his failure to monitor the day-to-day operations at the Jackson facility. Defendant has denied liability and argues that the investigation was conducted based upon a good faith belief that misconduct had occurred. In addition, defendant maintains that the legal proceedings were initiated against plaintiffs upon the sole discretion or advice of the prosecuting attorney. Defendant specifically denies that there was an ulterior motive or other hidden reason for seeking the prosecutor's involvement.

{¶12} The tort of malicious prosecution allows plaintiffs to be compensated for injury to their reputations and dignity caused by false accusations of a crime. *Trussel v. Gen. Motors Corp.* (1990), 53 Ohio St.3d 142, 144-145. The elements of the tort of malicious prosecution are listed as follows: 1) malice in instituting or continuing the prosecution; 2) lack of probable cause; and, 3) termination of the prosecution in favor of the accused. *Id.*

{¶13} “Malice,” as that term is used in the context of malicious prosecution actions, refers to “an improper purpose, or any purpose other than the legitimate interest of bringing an offender to justice.” *Criss v. Springfield Township* (1990), 56 Ohio St.3d 82, 85. Although malice may be inferred from the absence of probable cause, probable cause may be present even though no crime has been committed. *McFinley v. Bethesda Oak Hosp.* (1992), 79 Ohio App.3d 613, 617. Probable cause exists when the facts and circumstances are such that a reasonably cautious individual would be warranted in the belief that the person accused is guilty of the offense for which that person is charged. *Portis v. TransOhio Savings Bank* (1988), 46 Ohio App.3d 69, 70. Probable cause should be measured in light of the situation and the facts and circumstances which the complainant knew or reasonably should have known at the time the criminal complaint was filed. *Id.* There is no requirement that defendant must have evidence that will ensure a conviction. *Epling v. Express Co.* (1977), 55 Ohio App.2d 59, 62.

{¶14} Plaintiffs have established the third element of their malicious prosecution claim, since all the pending charges were dismissed soon after Judge Grey’s opinion was released. However, the court finds that plaintiffs have failed to prove the first and second elements: malice and lack of probable cause. To the contrary, the facts and circumstances ascertained by Lt. Hudson were sufficient to lead a reasonably cautious person to conclude that plaintiffs had engaged in wrongdoing. Lt. Hudson testified that although he supplied the prosecutor with the investigatory evidence and a list of potential charges, the prosecutor made the decision to present the case to the grand jury. Lt. Hudson stated that during the summer of 1997 he turned the file over to the prosecutor who in turn prepared and presented the case to the grand jury in the fall. The grand jury returned indictments

against Cheadle and Stevison for multiple counts of dereliction of duty, falsification and receiving improper compensation, and MVI Callihan was indicted on 31 counts of dereliction of duty.

{¶15} The Restatement of the Law of Torts, Second, Section 666 entitled “Effect of Advice of Counsel,” provides as follows: “(1) The advice of an attorney at law admitted to practice and practicing in the state in which the proceedings are brought, whom the client has no reason to believe to have a personal interest in obtaining a conviction, is conclusive of the existence of probable cause for initiating criminal proceedings in reliance upon the advice if it is (a) sought in good faith, and (b) given after a full disclosure of the facts within the accuser’s knowledge and information.”

{¶16} In Comment a, the drafters state that “Under the rule stated in this Section the advice of counsel establishes the existence of probable cause only when the person consulted is an attorney admitted to practice either in the state where the proceedings are brought or in another state under the conditions stated in Subsection (2). *This includes a prosecuting attorney.*” (Emphasis added.) Comment b explains that the “advice of counsel is chiefly important in cases in which the criminal proceedings are initiated in the mistaken belief that the conduct of which the accuser reasonably believes the accused to have been guilty constitutes, as a matter of law, the crime charged in the proceedings.”

{¶17} In *Adamson v. May Co.* (1982), 8 Ohio App.3d 266, the court held that a grand jury indictment creates a rebuttable presumption of probable cause. Consequently, the plaintiff who files a subsequent malicious prosecution action must present probative evidence that the indictments were based on perjured testimony or came about as the result of some irregularity in the proceedings. Otherwise, the courts will defer to the grand jury’s determination since its panel members were able to weigh credibility and observe the demeanor of the witnesses who testified.

{¶18} The court finds that plaintiffs have failed to prove by a preponderance of the evidence that the indictments resulted from perjured testimony or that the grand jury proceedings were in some way irregular. The court also is satisfied that Lt. Hudson consulted with the prosecuting attorney prior to filing charges against Ms. Holdcroft, as

evidenced by his investigatory notes. (Plaintiffs' Exhibit 8.) Although the prosecutor could not recall the substance of the conversations with Lt. Hudson, he did state that conversations may have occurred. The prosecutor verified that it was his job to present cases to the grand jury as a lawyer, as he perceives the charges, but that the grand jury decides the outcome. Moreover, Mr. Ochsenbien stated that it was common practice for him as the county prosecutor to instruct officers to prepare charges to be filed in municipal court.

{¶19} In the final analysis, the court finds the testimony of Shawn Kiefer to be credible and notes that it takes a certain measure of courage to act as a whistleblower in our society. Moreover, the court is convinced that while favoritism was shown to some customers, the conduct did not rise to the level of bribery. However, the situation easily could have been avoided if the policies of the OSHP had been enforced at the facility. Nevertheless, the court finds that at the time criminal indictments were sought or filed against plaintiffs, the facts known to defendant were more than sufficient to convince a reasonably cautious person that plaintiffs had engaged in wrongdoing. Thus, plaintiffs' malicious prosecution claim must fail for lack of proof on the essential element of the absence of probable cause.

{¶20} The three elements of the tort of abuse of process are: 1) that a legal proceeding has commenced in proper form and with probable cause; 2) that the proceeding has been corrupted to facilitate an ulterior purpose for which it was not originally designed; and, 3) that direct harm has resulted from the wrongful use of process. *Thompson v. Cook* (June 19, 1997), Franklin County Court of Appeals Nos. 96APE10-1277 and 96APE10-1278, citing *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 1994-Ohio-503. "The distinguishing factor is the existence of probable cause." *Id.* As stated in *Yaklevich at 300*, the "key consideration in an abuse of process action is whether an improper purpose was sought to be achieved by the use of a lawfully brought previous action."

{¶21} The court is satisfied that, based on the testimony and evidence, Captain Freeman ordered Lt. Hudson to conduct the investigation in the honest belief that the

reputation of the OSHP was suffering great harm in the community. There has been no persuasive evidence presented that Captain Freeman or Lt. Hudson harbored any malice toward plaintiffs or that their actions were prompted by some secret or ulterior motive. Similarly, the evidence in this case established that Lt. Hudson reasonably believed that probable cause existed that each of the plaintiffs committed the charges levied.

{¶22} For the foregoing reasons, the court finds that plaintiffs' malicious prosecution and abuse of process claims are without merit and judgment is rendered in favor of defendant.

FRED J. SHOEMAKER
Judge

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