Affirmed and Opinion filed July 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00241-CV

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ROBERT FARROW, Appellant

V.

TAMARA LYNN HENDON, Appellee

On Appeal from the Count Court at Law No. 2
Harris County, Texas
Trial Court Cause No. 703,292

O P I N I O N

Robert Farrow appeals from a summary judgment granted in favor of Tamara Lynn Hendon in connection with his malicious prosecution suit. Because Hendon conclusively negated causation, an essential element of Farrow's cause, we affirm the trial court's judgment.

On February 15, 1998, Farrows was arrested by Harris County sheriff's deputies at Hendon's residence as he spoke to Hendon through the front door. Later that day, Farrow was charged by information with misdemeanor trespassing. On June 5, 1998, Hendon, as complaining witness, filed an affidavit professing her desire that the prosecution of the case be terminated. Later that month, the misdemeanor complaint against Farrow was dismissed.

In July 1998, Farrow filed suit against Hendon, alleging malicious prosecution. In December, Hendon moved for summary judgment on grounds that she had conclusively disproved causation, an essential element of Farrow's case. On February 3, 1999, the trial court signed the order granting judgment in favor of Hendon.

In a single point of error, Farrow complains the trial court erred in granting summary judgment in favor of Hendon.

A summary judgment in favor of a defendant is proper if the summary judgment proof conclusively establishes that there is no genuine issue of material fact as to one or more of the essential elements of the plaintiff's cause and that the movant is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Lear Siegler, Inc. v Perez*, 819 S.W.2d 470, 471 (Tex. 1991). In deciding whether there is a disputed material fact issue precluding summary judgment, we take as true, proof favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1970). When the proof offered to prove a fact is so weak as to do no more than create a surmise or suspicion of its existence, the proof is no more than a scintilla and is legally insufficient. *See Formosa Plastics Corp. USA v. Presidio Eng'rs and Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998).

In order to establish a cause of action for malicious prosecution there must be established the commencement of a criminal prosecution against the plaintiff; causation, that is, the initiation or procurement of the action by the defendant; termination of the prosecution in the plaintiff's favor; the plaintiff's innocence; the absence of probable cause for the proceedings; malice in filing the charge; and damage to the plaintiff. *See Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 517 (Tex. 1997); *Lonon v. Fiesta Mart, Inc.*, 999 S.W.2d 458, 460 (Tex. App.–Houston [14th Dist.] 1999, no pet.). A person cannot be held to have "caused" criminal prosecution as required to establish the tort of malicious prosecution unless the person's acts were both a necessary and sufficient cause of the prosecution, that is, the person's actions in the course of events brought about the prosecution and, but for the person's

actions, the prosecution would not have occurred. *See Browning-Ferris Indus., Inc. v. Lieck*, 881 S.W.2d 288, 292 (Tex. 1994) (citing RESTATEMENT (SECOND) OF TORTS § 653 (1977)). A person does not procure a criminal prosecution when the decision whether to prosecute is left to the discretion of another, including a law enforcement officer or a grand jury. *See id.* at 293. A person is not subject to liability merely for aiding or cooperating in causing a criminal prosecution. *See id.*

Hendon proffered an affidavit from Charles A. Noll, an assistant district attorney, who stated that he initiated the prosecution based on information given him by the investigating officers. He stated that Hendon did not sign a complaint against Farrow and that Hendon's desire or lack of desire to prosecute was not the determining factor in his decision to prosecute the case. To counter this affidavit, Farrow proffered his own affidavit in which he stated it was "his understanding" that Hendon called the sheriff's department to have him arrested. He also stated that just prior to his arrest, Hendon from inside the house stated, "THIS IS WHAT YOU CALL CRIMINAL TRESPASSING" [capitals in the original]. He also offers the state's motion to dismiss, which provided that the state wished to dismiss the cause at the request of the complaining witness.

The affidavit offered by Hendon is legally sufficient proof negating the element of causation. Noll stated that he instigated the prosecution based on evidence independent of information given by Hendon. Farrow's affidavit that it was his "understanding" that Hendon had him arrested is no proof that Hendon initiated or procured the prosecution. Moreover, although Hendon signed an affidavit of nonprosecution, after which the court dismissed the case on motion by the State, this is at most a mere scintilla of proof that Hendon's testimony was necessary and sufficient, and thus is no proof.

Hendon offered legally sufficient proof, not controverted, that Hendon did not cause the criminal prosecution. The trial court did not err in granting summary judgment in favor of Hendon. We overrule Farrow's single point of error. Having overruled Farrow's point of error, we affirm the trial court's judgment.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed July 13, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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