Reversed and Remanded and Opinion filed September 6, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00827-CV

BRIDGETT BORDEN AND ROBERT BORDEN, Appellants

V.

JAN KENT, Appellee

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 98CV0004

O P I N I O N

Appellants, Bridgett and Robert Borden, filed suit against appellee, Jan Kent, for malicious prosecution. Kent moved for both a traditional summary judgment, under Rule 166a(c), and a no-evidence summary judgment, under Rule 166a(i). Under both summary judgment standards, Kent challenged two elements of the malicious prosecution claim: that in initiating a criminal prosecution against plaintiff, (1) Kent acted with malice, and (2) Kent acted without probable cause. In three issues for review, the Bordens appeal the trial court's order granting Kent's motion for summary judgment in their malicious prosecution case. The Bordens also complain on appeal that the trial court erred in striking part of the Borden's summary judgment proof as "conclusory," by refusing to re-open the case, and

declining to grant the Borden's motion for new trial. Kent cross-appeals that the trial court erred in taxing costs against the party incurring them, instead of taxing costs against appellants. We reverse and remand for proceedings on the merits.

FACTUAL BACKGROUND

There is a history of problems between Kent and the Bordens. Mrs. Borden believes that Kent holds ill will towards the Bordens for various reasons. The primary reason for the ill will, according to Mrs. Borden, is because the Bordens supported the principal of High Island High School, whom Kent, a member of the school board of High Island Independent School District ("HIISD"), wanted removed. This apparently caused several months of animosity between the Bordens and Kent, leading up to an incident at a school board meeting on April 1, 1996.

On April 1, 1996, the HIISD school board held a meeting that the Bordens attended. One of the agenda items was whether to reprimand High Island High School's principal. Most of the members of the audience, including the Bordens, were there in support of the principal. It was reported that the April 1st audience made some angry comments; however, there was no serious disruption or unruliness, and no one was ejected.[1] A vote was held on the matter of the reprimand. Kent abstained from the vote. In reaction to Kent's abstention, Mrs. Borden made an impromptu statement, the exact content of which is in conflict.[2]

On April 18, 1996, Kent lodged a complaint against Mrs. Borden with the Galveston County Sheriff's Department, alleging that Mrs. Borden had disrupted a public meeting. Subsequently, a warrant was issued for Mrs. Borden's arrest.

About 16 months later, Mrs. Borden discovered there was a warrant out for her arrest, and that she had been charged with disrupting a public meeting or procession. She

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[1] At a prior school board meeting, on March 14, 1996, the crowd was described as "hostile."

[2] Mrs. Borden admits to saying "that wicked witch," although Kent claims to have heard Mrs. Borden say, "that bitch."

turned herself in and spent about three hours in jail before she was released on bond. The Galveston County D.A. put the notation "hold on prosecution" on the file and never reinstituted the case. According to Borden's uncontradicted testimony, the hold was tantamount to a dismissal or acquittal.[3]

PROCEDURAL HISTORY

When the prosecution terminated, Mr. and Mrs. Borden sued Kent for malicious prosecution. After discovery, which included the depositions of all the parties, Kent filed a Motion for Summary Judgment, pursuant to both 166a(c) and 166a(i) of the Texas Rules of Civil Procedure, challenging two elements of the Bordens' malicious prosecution claim. Kent alleged that "as a matter of law, at least two of the elements of malicious prosecution fail because the evidence demonstrating the lack of those two elements is conclusive." She further alleged that "as to both of those elements, there is no evidence . . . ." The Bordens' response attached two affidavits: one from Mrs. Borden and one from Jim Curran, a Houston Chronicle reporter who attended the school board meeting on April 1st.

Kent then objected to the Bordens' summary judgment proof. Kent claimed, relevant to this appeal, that the assertions in Mrs. Borden's affidavit were conclusory, contradicted her deposition testimony, and failed to state the basis of her testimony. Similarly, Kent claimed that the assertions in Jim Curran's affidavit did not provide a basis for his testimony, and were contradictory. The trial court sustained Kent's objection as to one sentence of Mrs. Borden's affidavit, as applicable to this appeal, and one sentence of Curran's affidavit. The trial court then granted Kent's Motion for Summary Judgment. The court did not state which type of summary judgment motion was granted, nor the specific grounds for granting it. The Bordens moved to re-open the evidence and for a new trial. The motion for new trial was denied by operation of law. The Bordens then moved the trial court to reconsider its decision to overrule the motion for new trial. No action was taken on this motion. Both the Bordens and Kent filed timely notices of appeal, and this

[3] This aspect of the case does not seem to be in doubt. Neither party contends that the case was not dismissed.

appeal followed.

APPLICABLE LAW

I. Summary Judgment

A defendant seeking a traditional summary judgment must prove that no genuine issue of fact exists as to at least one element of the plaintiff's cause of action, and that, as a matter of law, he is entitled to judgment. TEX. R. CIV. P. 166a(c); *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). Evidence favorable to the plaintiff will be taken as true, every reasonable inference must be indulged in favor of the plaintiff, and any doubts must be resolved in favor of the plaintiff. *American Tobacco*, 951 S.W.2d at 425.

In a no-evidence summary judgment, the defendant must prove that there is no evidence to support at least one of the elements of the plaintiff's claim. TEX. R. CIV. P. 166a(i). We apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict. *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 146 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). We look at the evidence in the light most favorable to the respondent against whom the summary judgment was rendered, disregarding all contrary evidence and inferences. *Id*. A no-evidence summary judgment is properly granted if the respondent fails to bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to an essential element of the respondent's case. *Id*. Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact. *Id*. More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Id*.

II. Malicious Prosecution

In a malicious criminal prosecution claim, a plaintiff must establish,

(1) the commencement of a criminal prosecution against the plaintiff;

(2) causation (initiation or procurement) of the action by the defendant;

(3) termination of the prosecution in the plaintiff's favor;

(4) the plaintiff's innocence;

(5) the absence of probable cause for the proceedings;

(6) malice in filing the charge; and

(7) damage to the plaintiff.

Richey v. Brookshire Grocery Co., 952 S.W.2d 515, 517 (Tex. 1997). At issue in this case are the elements of probable cause and malice.

Probable cause is "the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the . . . [complainant], that the person charged was guilty of the crime for which he was prosecuted." *Id*. In other words, would a reasonable person believe that a crime had been committed, given the facts that the complainant, before initiating the criminal proceedings, honestly and reasonably believed to be true. *Id*. Probable cause existed in this case if, from the facts known to her at the time of her report to the police, Kent had reasonable grounds to believe, and did believe, that Mrs. Borden was guilty of the offense charged. *See Fisher v. Beach*, 671 S.W.2d 63, 66 (Tex. App.—Dallas 1984, no writ).

Malice is defined as ill will, evil motive, or reckless disregard for the rights of others. *Digby v. Tex. Bank*, 943 S.W.2d 914, 922 (Tex. App.—El Paso 1997, writ denied). Typically, malice is proved, not through direct evidence, but through circumstantial evidence. *Id*. The existence of malice may be inferred from the lack of probable cause. *Id*.; *Fisher*, 671 S.W.2d at 67.

III. Disruption of a Public Meeting

Section 42.05 of the Texas Penal Code criminalizes physical acts or verbal utterances that substantially impair the ordinary conduct of lawful meetings and thereby curtail the exercise of others' First Amendment rights. TEX. PEN. CODE ANN. § 42.05; *Morehead v. State*, 807 S.W.2d 577, 581 (Tex. Crim. App. 1991). Some impairment of order at public meetings is unavoidable; it is only that conduct which substantially impairs the ordinary conduct of a lawful meeting that can be criminalized. *Morehead*, 807 S.W.2d at 581.

IV. Knowledge of Law

All persons are presumed to know the law. *Stewart v. Texas Lottery Comm'n*, 975

S.W.2d 732, 735 (Tex. App.—Corpus Christi 1998, no pet.). Here, no exception to this presumption has been placed in issue. *See id.* (holding that exceptions are misrepresentation of the law by one with knowledge, taking advantage of a person's ignorance of the law, and reliance on one's superior knowledge of the law as well as that person's statement that an attorney is not necessary). Constructive knowledge of criminal law extends to procedural laws and case law. *See Wilson v. State*, 825 S.W.2d 155, 159 (Tex. App.—Dallas 1992, pet. ref'd). Thus, Kent is presumed to know the laws related to disruption of a public meeting, including the Court of Criminal Appeals' requirement that the disruption be substantial.

DISCUSSION AND HOLDINGS

I. The Trial Court's Decision to Strike Summary Judgment Proof

In their third point of error, the Bordens contend that the trial court abused its discretion in striking part of the Bordens' summary judgment proof as "conclusory." The trial court struck

> Curran['s] conclu[sion] that there was no disruption of the applicable school board meeting, and . . . Mrs. Borden['s] conclu[sion] that [Kent] hated Mrs. Borden and bore Mrs. Borden ill will. Specifically, [the statements that the court strikes are the portion of Curran's affidavit which states] "at no time did Mrs. Borden disrupt the school board meeting nor did anyone else in attendance,". . . and [the portion of Mrs. Borden's affidavit which states] "It is my testimony that Jan Kent, without probable cause and with malice, ill will and in reckless disregard of my rights, filed false criminal charges of disrupting a public meeting in an effort to damage me and my family."

When affidavits are used as summary judgment proof, the affidavit must affirmatively show that it is based on personal knowledge, and that the facts sought to be proved would be admissible in evidence in a conventional trial. TEX. R. CIV. P. 166a(f); *see Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996). The affidavit itself must set forth facts and show the affiant's competency. *Keenan v. Gibraltar Sav. Ass'n*, 754 S.W.2d 392, 394 (Tex. App.—Houston [14th Dist.] 1988, no writ) (referring to then Rule 166a(e)). The allegations made in the affidavit must be direct and unequivocal. *Id.*

Kent objected to Mrs. Borden's affidavit, arguing it was conclusory, conflicting, and

did not state the basis of her opinion. We hold that the trial court did not abuse its discretion in striking the portion of Mrs. Borden's affidavit, as set out above. The affidavit does not affirmatively show that it is based on personal knowledge, rather than information and belief. That portion of Mrs. Borden's affidavit merely recites a legal conclusion, and therefore is not competent summary judgment proof. *Schultz v. General Motors*, 704 S.W.2d 797, 798 (Tex. App.—Dallas 1985, no writ). Thus we overrule this part of the Bordens' third issue for review.

We hold that the trial court did abuse its discretion in striking the portion of Curran's affidavit, as set out above. Kent objected to Curran's affidavit because it failed to state the basis for the information in it, and it was contradictory. Though Curran did not use the phrase "based on my personal knowledge," the fact that this information is based on his personal knowledge is abundantly clear. He states that he is "personally familiar with the facts and events" which occurred at the school board meeting. He also states that he is attaching *his* news broadcast notes from the meeting. Clearly, he was present at the school board meeting. It also appears clear that this affidavit is not contradicted by its attachments. The letter Curran attached states "I do recall some angry comments, some arguments, on which subject I do not recall, but I have no recollection of any abusive or disruptive actions or language by any of those attending." We find that the trial court abused its discretion in striking Curran's statement, "At no time did Mrs. Borden disrupt the school board meeting nor did anyone else in attendance." While affidavits that merely state conclusions are not competent summary judgment proof, affidavits can reach a conclusion. *See Chopra v. Hawryluk*, 892 S.W.2d 229, 232 (Tex. App.—El Paso 1995, writ denied). Where, as here, the factual basis for a lay witness's opinion is clear, the opinion is competent summary judgment proof. *See* TEX. R. EVID. 701; *Alvarado v. Old Republic Ins. Co.*, 951 S.W.2d 254, 263 (Tex. App.—Corpus Christi 1997, no pet.). We therefore grant this portion of the Bordens' third point of error, and find that the trial court abused its discretion in striking this portion of Curran's affidvait. Curran's statement is not a mere conclusion, but is a conclusion that is supported by the facts attached to his affidavit.[4]

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[4] These attachments appear to be copies of original documents, and not the originals themselves. Copies of original documents are acceptable in summary judgment proceedings if accompanied by a properly sworn affidavit that states the attached documents are "true and correct" copies of the original. *Republic Nat'l Leasing Corp. v. Schindler*, 717 S.W.2d 606, 607 (Tex. 1986) (per curiam); *Hall v. Rutherford*, 911

The rest of the summary judgment proof, including other proof objected to by Kent but not stricken by the trial court, is part of the appellate record, and is properly before us for our review. *B.M.L. Through Jones v. Cooper*, 919 S.W.2d 855, 858 (Tex. App.—Austin 1996, no writ); *Utilities Pipeline Co v. American Petrofina Mktg.*, 760 S.W.2d 719, 722-23 (Tex. App.—Dallas 1988, no writ). We therefore turn to whether the rendition of summary judgment was proper.

II. Traditional Motion for Summary Judgment

Under the traditional motion for summary judgment, we hold that the proof reveals discrepancies of fact as to the existence of probable cause. Kent argues that the Bordens' summary judgment proof confirmed that there was some interference with the meeting. We agree. In the letter and other attachments to Curran's affidavit, Curran observed that "I can assure that if there had been a serious disruption of the meeting, if the board president had had to curb any unruliness or eject anyone, it would have played high in the story." Curran also stated that "I do recall some angry comments, some arguments, on which subject I do not recall, but I have no recollection of any abusive or disruptive action or language by any of those attending." The crime charged requires a substantial disruption of the meeting. We know that Borden made a comment. However, Kent failed to conclusively prove that she reasonably believed the comment substantially disrupted the meeting. Thus, we cannot hold that, as a matter of law, Kent proved she had probable cause to initiate the criminal prosecution against Mrs. Borden. Furthermore, since malice may be inferred by lack of probable cause, and here there is a fact issue as to probable cause, we hold there is a fact issue as to malice as well. *See Fisher*, 671 S.W.2d at 67.

III. No-evidence Motion for Summary Judgment

As to Kent's no-evidence motion for summary judgment, we hold that the Bordens came forward with competent summary judgment proof of lack of probable cause and of malice so as to present the court with a genuine issue of material fact.

In a no-evidence summary judgment from a malicious prosecution case, the non-

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S.W.2d 422, 425 (Tex. App.—San Antonio 1995, writ denied). These attachments were not sworn to in the affidavit. However, this is a formal defect that, not having been objected to by Kent, is waived. *Mathis v. Bocell*, 982 S.W.2d 52, 60 (Tex. App.—Houston [1st Dist.] 1998, no pet.). Therefore, those affidavits are properly before us for our consideration.

movant plaintiff must bring forth evidence to prove a negative – that probable cause to initiate a criminal prosecution against her did not exist.

Mrs. Borden's affidavit does not discuss the events of the school board meeting at all. To find evidence of the existence of malice and lack of probable cause, we are left with Curran's affidavit and attachments, as well as the videotape, unobjected-to by Kent, that the Bordens attached to their reply to the motion for summary judgment. Curran's letter states that he does not recall "any abusive or disruptive actions or language by any of those attending the school board meeting." The videotape appears to include all the public portions of the April 1st school board meeting, stopping only after all members of the school board adjourned from the room for executive sessions. Nothing on the videotape reveals any disruptive utterance by Mrs. Borden.

Curran's affidavit and attachments, as well as the videotape exhibit, do not reveal that Mrs. Borden's comment, whatever it was, substantially impaired the ordinary conduct of a lawful meeting. As a result, we find that a fact issue exists as to probable cause.

As for malice, the Borden's summary judgment proof reveals a history of animosity between the Bordens and Kent. Kent She also chose to file charges against Mrs. Borden when Mrs. Borden was one of many people making "angry comments." This is some evidence creating a fact issue as to malice.

As a result, we grant the Bordens' first two issues for review. Thus we reverse and remand this cause of action for a trial on the merits, in accordance with this opinion.[5]

Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed September 6, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

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[5] Because of our disposition on the Bordens' first two issues for review, we need not consider the remaining issues the Bordens bring in their third issue for review (that the trial court erred in refusing to re-open the case, and in declining to grant their motion for new trial, and/or their motion to reconsider the court's ruling, by operation of law, on the motion for new trial). Additionally, because we remand this to the trial court for a trial on the merits, we need not consider Kent's cross-appeal.