Affirmed and Opinion filed September 9, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00928-CV

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LATONIA WYLETTE WILSON, Appellant

V.

WAL-MART STORES, a Foreign Corporation, JAMES BOYER, and VICTOR TUMLINSON, Appellees

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On Appeal from the 9th District Court
Waller County, Texas
Trial Court Cause No. 93-05-12683

O P I N I O N

Latonia Wilson filed suit against appellees, Wal-Mart Stores, James Boyer, and Victor Tumlinson, for false imprisonment and malicious prosecution. The trial court granted summary judgment in favor of appellees. On appeal, Wilson contends the trial court erred because genuine issues of material fact exist as to each cause of action. We affirm.

Viewed in the light most favorable to Wilson, the summary judgment proof demonstrates that in May of 1992, the manager of a Wal-Mart store, James Boyer, acquired

information that one of his cashiers, Lashonda Thompson, was periodically failing to scan items for select customers thereby allowing them to exit the store without paying for the merchandise.[1] Alerted to the thefts, Boyer began videotaping Thompson on each of her shifts. On four different days, Boyer observed the cashier bagging merchandise for customers without first scanning it through the register.

Wilson, the appellant, was also employed as a cashier at Wal-Mart. On one occasion when Thompson was being videotaped, Boyer observed Wilson walk to Thompson's register before the arrival of a customer. Thompson scanned some merchandise and Wilson began sacking it. Thompson then turned off the scanner. Even though much of the merchandise had not yet been scanned, Thompson and Wilson continued putting the merchandise in bags.[2]

The next day, Boyer approached Wilson and inquired about Thompson's failure to scan merchandise. Wilson, however, gave no information to Boyer. After Victor Tumlinson, a Wal-Mart district loss prevention supervisor, observed the videotape, he concluded that Wilson had knowingly participated in the theft. On May 21, 1992, Wilson was told to report for an "evaluation" and was led to a room in the back of the store. There she was joined by Boyer, Tumlinson, and another Wal-Mart employee. Tumlinson advised Wilson from the outset that he wanted to talk to her about the incident with Thompson. He also told her she was free to leave. Wilson chose to stay. Moreover, she never asked or attempted to leave the room.

Wilson was confronted with the evidence and accused of theft. Initially, Wilson denied any knowing involvement in the theft. Later, she signed a written statement in which she admitted that at the time she bagged the merchandise, she suspected it had not been paid

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[1] The cashier subsequently confessed to giving away merchandise and criminal charges were filed.

[2] The fact that a cashier would serve as a sacker for another cashier is not inherently suspicious because Wal-Mart store policy mandates that cashier's who have no customers must assist those who do by helping to bag the customer's merchandise.

for. However, Wilson claimed she did not report the incident because she had no proof. After obtaining the written statement, Boyer informed Wilson that her employment was terminated. The police were called, and Wilson was told she should wait for their arrival. When the police arrived, Wilson was arrested and charged with theft. The State eventually dismissed the charges, and Wilson filed her civil suit the following day.

The standard for reviewing a grant of summary judgment is well-established. The movant has the burden to show there exist no genuine issues of material fact and she is entitled to summary judgment as a matter of law. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). In deciding whether there is a disputed material fact issue precluding summary judgment, proof favorable to the nonmovant will be regarded as true and every reasonable inference will be indulged in her favor. *See id.* To be entitled to summary judgment, a defendant must either (1) conclusively negate at least one essential element of each of the plaintiff's causes of action, or (2) conclusively establish each element of an affirmative defense to each claim. *See Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). In reviewing the granting of summary judgment, we do not consider whether the summary judgment proof raises a fact issue for the jury, but whether the proof establishes that, as a matter of law, no genuine issue of material fact exists as to one of the essential elements of the cause of action. *See Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970).

False Imprisonment

The essential elements of false imprisonment are: (1) willful detention; (2) without consent; and (3) without authority of law. *See Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995) (citing *Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 375 (Tex.1985)). A willful detention may be accomplished by violence, by threats, or by any other means restraining a person from moving from one place to another. *See id.* at 644-45. Where, as here, it is alleged a detention was effected by a threat, the plaintiff must

demonstrate the threat was such as would inspire in the threatened person a just fear of injury to her person, reputation, or property. *See id.* Even when we consider the evidence in the light most favorable to appellant, we find she has not raised a fact question as to whether she was willfully detained without her consent.

The relevant summary judgment proof presented by Wilson consisted of her sworn affidavit, her statement made to Wal-Mart on the day of the incident, and her sworn deposition. Wilson testified that during questioning, Tumlinson said to her: "Oh, come on, you know you're involved. You better talk or I'm going to call the police." Wilson claims she responded by telling Tumlinson to call the police because she had not done anything wrong. In the same deposition, Wilson testified that (1) she was told she could leave if she wanted to, (2) she never told anyone she wanted to leave, (3) she never attempted to "get up and walk out," (4) and there was no physical coercion on the part of any Wal-Mart official to make her stay in the room. Specifically, Wilson testified:

> A: He [Tumlinson] told me — he asked — told me he was going to talk to me about the incident that happened to Lashonda Thompson back [sic] May 14th.
>
> Q: 92?
>
> A: 92. And he told me if I wanted to leave that I could.
>
> Q: Did you leave?
>
> A: No, I didn't.
>
> . . . .
>
> Q: But you chose not to leave, right?
>
> A: Right.
>
> . . . .
>
> Q: You didn't tell him you wanted to leave, right?
>
> A: Yes, I didn't tell – no, I didn't tell him I wanted to leave.
>
> Q: And you didn't try to get up and walk out?
>
> A: No.

A threat of future action, such as calling the police and having someone arrested, is not ordinarily enough by itself to effectuate a false imprisonment. *See Morales v. Lee*, 668 S.W.2d 867, 869 (Tex. App.–San Antonio 1984, no writ). Additionally, if a plaintiff voluntarily complies with a simple request to remain and establish his or her innocence, no cause of action for false imprisonment arises. *See Martinez v. Goodyear Tire & Rubber Co.*, 651 S.W.2d 18, 21 (Tex. App.–San Antonio 1983, no writ). A review of Texas cases reveals that, generally, in order for threats to "inspire in the threatened person a just fear of injury to her person, reputation, or property," courts require more than just a threat to call the police or the possibility of future incarceration. *See, e.g.*, *Johnson*, 891 S.W.2d at 645-46 (finding no false imprisonment where employee claimed the defendant "sternly insisted to stay put, but no threat to detain was made"); *Black v. Kroger Co.*, 527 S.W.2d 794, 800 (Tex. App.–Houston [1st Dist.] 1975, writ dism'd) (finding false imprisonment where employee was told if she didn't confess she would be handcuffed and taken to jail); *Safeway Stores, Inc. v. Amburn*, 388 S.W.2d 443 (Tex. Civ. App.–Fort Worth 1965, no writ) (finding no false imprisonment where threat of imprisonment was made, but where no force nor threat of force made). *Compare with Skillern & Sons, Inc. v. Stewart*, 379 S.W.2d 687 (Tex. Civ. App.–Fort Worth 1964, writ ref'd n.r.e.) (finding false imprisonment where employee was told if she did not sign a confession, *she would never be allowed to leave*, and would be sent to the penitentiary).

The standard established by the supreme court is clear and unambiguous – a person cannot be "detained" by the force of a threat unless it rises to such a level that it inspires fear of injury to the victim's person, reputation, or property. *See Johnson*, 891 S.W.2d at 644-45. Here, there is nothing in the summary judgment record to suggest any threats were made to Wilson's reputation or property. Finally, a threat to call the police and of legal incarceration falls short of inspiring fear of personal injury. In other words, the summary judgment proof fails to raise any fact issue as to whether Wilson was "detained."

Malicious Prosecution

A plaintiff in a malicious prosecution claim 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. *See Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 517 (Tex. 1997).

At issue here is whether (1) the proceedings were resolved in Wilson's favor, (2) appellees had probable cause to initiate criminal proceedings against Wilson, and (3) appellees acted with malice in filing charges. We hold summary judgment was proper because probable cause existed to initiate criminal proceedings against Wilson. Accordingly, we address only that portion of Wilson's complaint.

Probable cause is defined as "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." *Akin v. Dahl*, 661 S.W.2d 917, 921 (Tex. 1983). "The probable cause determination asks whether a reasonable person would believe that a crime had been committed given the facts as the complainant honestly and reasonably believed them to be before the criminal proceedings were instituted." *Richey*, 952 S.W.2d at 517. Malicious prosecution actions begin with a presumption the defendant acted reasonably and in good faith and had probable cause to initiate the proceedings. *See id.* at 517-518.

Here, Wilson produced no proof rebutting the presumption that appellees had probable cause to prosecute. In her response to appellees' motion for summary judgement, Wilson alleged that appellees had provided false and misleading statements to the Hempstead Police when they asserted that Wilson confessed in the written statement taken at the store. Wilson contends that proof of false statements knowingly made is evidence

of an absence of probable cause. The supreme court recently held, however, that "failing to fully and fairly disclose all material information and knowingly providing false information to the prosecutor are relevant to the malice and causation elements of a malicious prosecution claim but have no bearing on probable cause." *Richey*, 952 S.W.2d at 519.

In reviewing the issue of probable cause, we note the inquiry is usually a mixed question of law and fact. However, where the facts and events leading up to the prosecution are not disputed, the existence of probable cause becomes a question of law for the court. *See McConnell v. Southside Sch. Dist.*, 858 S.W.2d 337, 343 (Tex. 1993). Here, appellees' undisputed summary judgment proof shows the following: (1) Thompson was suspected for under-ringing merchandise for certain customers; (2) surveillance cameras were then used to videotape Thompson under-ringing merchandise on several occasions; (3) on May 14, 1992, Thompson and Wilson were video-taped working together; (4) the surveillance video of the incident was reviewed by both Boyer and Tumlinson; (5) the video revealed that Wilson arrived at Thompson's register immediately before a customer; (6) while Thompson was ringing up the items, Wilson began bagging the merchandise; (7) before all the merchandise had been scanned, Thompson turned off the scanner and proceeded to take money from the customer; (8) Wilson and Thompson continued to bag unpaid merchandise; (9) a day after the incident, Wilson denied any knowledge of Thompson's under-ringing; and (10) a week later, Wilson admitted that at the time she helped bag the merchandise, she "believe[d] the merchandise wasn't paid for," but remained silent because she had no proof. Here, as in *Richey*, the facts leading up to the charges against Wilson are not in dispute, and we find these facts will support, as a matter of law, probable cause to believe Wilson was a knowing accomplice to the theft.

Accordingly, the trial court did not err in granting summary judgment as to both of Wilson's claims. Her first and second points of error are overruled, and the judgment of the trial court is affirmed.

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J. Harvey Hudson
Justice

Judgment rendered and Opinion filed September 9, 1999.

Panel consists of Chief Justice Murphy and Justices Hudson and Sears.*

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* Senior Justice Ross A. Sears sitting by assignment.