STATE OF MICHIGAN

COURT OF APPEALS

FAWAZ GHAITH, Plaintiff-Appellee,	UNPUBLISHED January 17, 2013
v	No. 308717 Bay Circuit Court
DON RAUSCHENBERGER, JR., Defendant-Appellant.	LC No. 11-003551-CZ

Before: OWENS, P.J., and FITZGERALD and RIORDAN, JJ.

PER CURIAM.

In this intentional tort case, defendant Don Rauschenberger, Jr. appeals the trial court's denial of his motion for summary disposition under MCR 2.116(C)(7) (governmental immunity)[1] and MCR 2.116(C)(10) (issue of fact). We reverse and remand.

At the time of the events leading to this lawsuit, plaintiff and Dawn Ghaith ("Dawn") were married with four children. Both plaintiff and Dawn were dual United States-Jordanian citizens with a permanent residence in Jordan. By August 2008, Dawn had decided that she wished to divorce Ghaith and return to the United States with their children to live closer to her mother and stepfather, Marion and Jerry Breasbois in Michigan. The main obstacle to her leaving was the fact that their youngest son, Samer, would not be able to leave Jordan until his expired Jordanian passport was renewed. Under Jordanian law, Samer's passport could only be renewed by Samer's father, plaintiff, unless plaintiff was dead or in prison.

Hanan, the couple's eldest daughter, who had a valid passport, traveled to the United States in August 2008 to live with Marion and Jerry Breasbois. Hanan left Jordan after Ghaith's brother (Hanan's uncle) reportedly beat her at Ghaith's instruction for talking with boys on her mobile phone. Ghaith, who was in the United States at the time for work, called his daughter when he learned that she was in the country. They spoke several times between August 28 and September 2, 2008, and their conversations were described by Hanan as "threatening." Also

[1] Plaintiff asserts that the trial court did not deny defendant's motion, but instead called it "premature," which indicated that it was not a final order and that this Court does not have jurisdiction. We reject plaintiff's jurisdictional challenge.

during this time period, Ghaith received and accepted an invitation from his in-laws to have dinner at their house in Michigan on September 2, 2008.

The Breasboises contacted the Gladwin County Sheriff on August 29, 2008, to report that Ghaith was harassing and threatening them and Hanan. Plaintiff alleges that these reports were false and that his in-laws conspired with Dawn to have him arrested and prosecuted so that Dawn could renew Samer's passport under Jordanian law and return to Michigan with all of her children. Still unaware of the complaint against him, on September 1, 2008, Ghaith confirmed the invitation to have dinner at the Breasboises' house at 5:00 p.m. the following day. On September 2, 2008, the Breasboises contacted defendant Detective Don Rauschenberger of the Michigan State Police to report that Ghaith was coming to their home at 5:00 p.m. that evening to take Hanan back to Jordan and that Ghaith had threatened to kill them if they stood in his way.

Ghaith arrived at the Breasboises' home with groceries for dinner at about 5:00 p.m. on September 2. Once notified that Ghaith was at the house, Rauschenberger returned there with State Police Officers Michael Newsham and Mark E. Burch at about 7:20 p.m. The officers approached and arrested Ghaith, who was still waiting in his car in the driveway. There are factual disputes regarding what each party said and did after Ghaith was arrested. When told why he was being arrested, Ghaith reportedly told Rauschenberger that it was a misunderstanding based on a "communication error" and that "these people have no right to interfere with my family."

After a preliminary hearing, Ghaith was charged with four counts of extortion, and transported to the Bay County Jail where he was held on a $500,000 bond. Ghaith was tried on the extortion charges, but a mistrial resulted when the jury could not reach a verdict. On the eve of the new trial, the Bay County Prosecutor's Office dismissed all of the charges against Ghaith and released him from jail after investigators were unable to confirm the threatening phone calls Ghaith allegedly made because of discrepancies between the reported times of the calls and Ghaith's phone records. Ghaith had spent 196 days in custody.

Ghaith sued in federal court under 42 USC § 1983, asserting that his constitutional rights were violated by several state officials, including Rauschenberger and Bay County Prosecutors Richard Dresser and Scott Gordon.[2] Ghaith also filed the present lawsuit against Dawn and Rauschenberger alleging the following state law claims: false arrest, false imprisonment, malicious prosecution, concert of action, civil conspiracy, and ethnic intimidation. All claims were dismissed against Dawn. Rauschenberger then filed a motion for summary disposition

[2] The police officers and prosecutors filed motions for summary judgment, and the federal district court, finding that the defendants were entitled to qualified or absolute immunity because Ghaith's constitutional rights were not violated, granted the motions. The court also found that there was no question of material fact on the question of probable cause, and that Ghaith's claim of malicious prosecution was not supported by "evidence that Rauschenberger participated in the prosecution beyond investigating the crime and serving as a witness. Ghaith's appeal of this decision was denied by the 6th Circuit Court of Appeals, and his petition for rehearing en banc was also denied.

asserting his entitlement to governmental immunity on all claims. The trial court concluded that it was not ready to make a decision on the motion, and was going to allow the case to continue to discovery. The court stated that it had not denied defendant's motion with finality, but merely found it premature. Defendant filed a claim of appeal with this Court, along with an emergency motion for a stay of all proceedings in the trial court. This Court granted both motions.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008). We also review questions of law regarding governmental immunity de novo. *Tellin v Forsyth Twp*, 291 Mich App 692, 698; 806 NW2d 359 (2011). "In reviewing a(C)(7) motion, a court must accept all well-pleaded allegations as true and construe them in favor of the nonmoving party." *Id.* "[I]n order to determine whether defendant is entitled to summary disposition under MCR 2.116(C)(7), the proper inquiry is whether defendant has met his burden of proof in establishing that he is entitled to governmental immunity as a matter of law." *Oliver v Smith*, 290 Mich App 678, 684–685; 810 NW2d 57 (2010). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ." *Nuculovic v Hill*, 287 Mich App 58, 61–62; 783 NW2d 124 (2010).

Generally, governmental immunity does not apply to intentional torts. However, governmental immunity does apply to intentional torts when the conduct at issue meets the following criteria: (1) the challenged acts were undertaken during the course of employment and the employees were acting, or reasonably believed that they were acting, within the scope of their authority, (2) the acts were undertaken in good faith, and (3) the acts were discretionary, as opposed to ministerial. *Odom v Wayne Co*, 482 Mich 459, 461; 760 NW2d 217 (2008), citing *Ross v Consumers Power Co. (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984).

The first element is met here, as Ghaith's claims arise out of Rauschenberger's exercise of police authority that he undertook while on duty and in the course of his public employment. Under the good faith requirement "there is no immunity when the governmental employee acts maliciously or with a wanton or reckless disregard of the rights of another." *Odom*, 482 Mich at 474, (emphasis in original) (footnote omitted). Ghaith cannot establish that Rauschenberger acted outside of his authority or in bad faith because of estoppel. Thus, the second element is also met. The third element is met because, by definition, the investigatory police work challenged here is discretionary and not ministerial or operational. Collateral estoppel, also known as issue preclusion, "bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006), citing 1 Restatement Judgments, 2d, § 27 at pg. 250. "Generally, for collateral estoppel to apply three elements must be satisfied: (1) 'a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment'; (2) 'the same parties must have had a full [and fair] opportunity to litigate the issue'; and (3) 'there must be mutuality of estoppel.'" *Monat v State Farm Ins Co*,

469 Mich 679, 682-684; 677 NW2d 843 (2004), quoting *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988).

Ghaith already had two opportunities to challenge probable cause: (1) at his preliminary examination and (2) in federal court. He failed both times and is not allowed to seek a different outcome here. The first element of collateral estoppel is met, because both determinations were valid and final. The second element is clearly present in the federal case, as the same parties before this court had the opportunity to brief and argue the issue of probable cause. Ghaith also had a full and fair opportunity to challenge probable cause in his criminal case.

Finally, there is mutuality of estoppel here because the prior judicial determinations of probable cause apply equally to Ghaith and Rauschenberger. Accordingly, the keystone of Ghaith's tort claims crumbles because he is barred as a matter of law from alleging that he was arrested or prosecuted without probable cause. His two earlier attempts to challenge probable cause were unsuccessful and he does not get a third opportunity in this court. As a result, there can be no genuine question of material fact for any claim that includes lack of probable cause as an essential element. More fundamentally, because Rauschenberger had probable cause, he is entitled to governmental immunity for any tort claim.

To be sure, Ghaith's affidavit submitted in opposition to the motion for summary judgment creates numerous factual disputes in this case. But nearly every dispute involves purported statements or actions by the parties that took place *after* Ghaith was arrested, and none of them significantly affects whether there was probable cause. The undisputed facts show that the police received credible reports of serious threats made by Ghaith and that the subsequent investigation corroborated those reports. And, more broadly, there is no evidence from which a reasonable jury could infer that Rauschenberger entered into a conspiracy with Ghaith's family to have him arrested without justification. In the end, the fact that one phone call was not mentioned in the report does not undermine all of the other facts known to the officers at the time indicating that Ghaith may have threatened his family.

The legal question for this Court to decide is not whether Ghaith's intentional tort claims under Michigan law were already litigated with finality. They plainly were not because the federal court declined supplemental jurisdiction over them after it dismissed with prejudice all of Ghaith's federal claims. The question here, rather, is whether the critical issue of probable cause was already litigated. *See Leahy*, 269 Mich App at 530, citing 1 Restatement Judgments, 2d, § 27 at pg. 250; *see also Monat*, 469 Mich at 682-84. We conclude that the answer is yes. The federal court expressly held that "the evidence that Rauschenberger was entitled to rely on in finding probable cause was *extensive*." *Ghaith v Rauschenberger, et al*, 778 F Supp 2d 787, 798 (ED Mich 2011) (emphasis added). This is the *same* body of evidence relied upon here. The federal court also rejected as immaterial Ghaith's emphasis on alleged omissions or erroneous statements in Rauschenberger's police report.

While the claims are different in this forum, the undisputed facts and the issue of probable cause are the same. Because of that overlap, the doctrine of collateral estoppel applies. *Monat*, 469 Mich at 682-684. Ghaith therefore may not re-litigate probable cause here. Without that necessary element, his claims fail as a matter of law and Rauschenberger is entitled to governmental immunity.

Probable cause is fatal to the claims of false arrest, false imprisonment, and malicious prosecution. The first category concerns claims that have lack of probable cause as an essential element. A claim of false arrest requires proof that the arrest lacked probable cause. *Burns v Olde Discount Corp*, 212 Mich App 576, 581; 538 NW2d 686, 688 (1995), citing *Blase v Appicelli*, 195 Mich App 174, 177; 489 NW2d 129 (1992); see also *Tope v Howe*, 179 Mich App 91; 445 NW2d 452 (1989). Similarly, a malicious prosecution claim requires proof that there was no probable cause for the proceeding. *Burns*, 212 Mich App at 581. While false arrest is an illegal or unjustified arrest, false imprisonment is the unlawful confinement of another person. *Lewis v Farmer Jack Division, Inc*, 415 Mich 212, 218; 327 NW2d 893 (1982). Both causes of action require Ghaith to show that Rauschenberger instigated or participated in an unlawful arrest. *Id*. Ghaith cannot show that probable cause was lacking here.

The trial court opined that Rauschenberger conducted an investigation and sought and obtained the requisite probable cause to arrest. The trial court further opined that this determination was sustained in district court at the preliminary examination and subsequently in circuit court during his criminal case. Also, the decision to confine Ghaith pending trial was not Rauschenberger's to make. Bail was for Ghaith and the prosecution to argue and the court to decide. Accordingly, Ghaith has presented no genuine question of material fact for his claims of false arrest or false imprisonment.

For malicious prosecution, Ghaith has the burden of proving (1) that the defendant has initiated a criminal prosecution against him, (2) that the criminal proceedings terminated in his favor, (3) that the private person who instituted or maintained the prosecution lacked probable cause for his actions, and (4) that the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice. *Matthews v Blue Cross and Blue Shield of Michigan*, 456 Mich 365, 378; 572 NW2d 603 (1998).

This claim fails for the same reasons that probable cause existed. Ghaith, moreover, can show no question of fact on the other essential elements. The prosecutor decided whether Ghaith should be charged and the court determined whether he should go to trial. Accordingly, Rauschenberger did not initiate the prosecution. Nor, as the trial court noted, did the prosecution end in Ghaith's favor. There was a mistrial and the prosecutor dismissed the charges without prejudice. Favorable termination "is a missing element from this case of action . . . . which would be, I think, fatal to the – to the tort – or the count of malicious prosecution." Finally, Ghaith cannot show that Rauschenberger undertook any actions with malice or for any unlawful purpose.

To recover for abuse of process, Ghaith must plead and prove (1) an ulterior purpose, and (2) an act in the use of process that is improper in the regular prosecution of the proceeding. *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). Ghaith simply cannot show that Rauschenberger had an ulterior purpose here. The record before the court is that he responded to credible crime victim reports and that he merely sought to ensure their safety and appropriately investigate the case. He had no stake and no role in the underlying family dispute. Nor is there any indication in the record that Rauschenberger did anything other than his job. Relatedly, once the process was instituted, Rauschenberger's role was limited to testifying as a witness. Ghaith identifies nothing in the record that shows Rauschenberger abused the criminal process for any personal advantage or other improper end. Further, the trial

court ruled that any contact outside of court with the State Department or any other governmental entity simply does not constitute abuse of process.

For concert of action and civil conspiracy, Ghaith must show some underlying tortious conduct. *Holliday v McKeiver*, 156 Mich App 214, 217-19; 401 NW2d 569 (2003); *Rencsok v Rencsok*, 46 Mich App 250, 252; 207 NW2d 910 (1973). As the trial court noted, these "aren't independent torts themselves." Ghaith cannot prove any underlying tort against defendant and thus cannot sustain claims of concert of action and civil conspiracy.

According to the applicable statute:

> A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following:
>
> (a) Causes physical contact with another person.
>
> (b) Damages, destroys, or defaces any real or personal property of another person.
>
> (c) Threatens, by word or act, to do an act described in subdivision (a) or (b), if there is reasonable cause to believe that an act described in subdivision (a) or (b) will occur. MCL 750.147b(1).

Ghaith cannot prove these elements for his claim against Rauschenberger. There is no evidence that he had the requisite specific intent or animus outlined in the statute. In terms of causing physical contact, Ghaith claims that the arrest is sufficient. But where the arrest is lawful and justified, there can be no offensive contact that would be the subject of an ethnic intimidation claim. Nor is there any evidence that any of Ghaith's property was damaged, destroyed, or defaced. At best, some of Ghaith's property was properly seized and inventoried either as evidence or incident to arrest. But this falls far short of the destructive conduct that the statute requires.

Rauschenberger's entitlement to governmental immunity is grounded in admissible evidence and not, as Ghaith contends, on inadmissible hearsay. The core of that admissible evidence is the sworn testimony that Hanan and Dawn provided at the preliminary examination. Absent from Ghaith's brief on appeal is any discussion about this crucial evidence and the obvious independent and adequate basis that it provided for the trial court's probable cause determination. Ghaith instead focuses on the testimony of Rauschenberger, whom the prosecutor did not call to the stand and who answered no questions for the prosecutor. Ghaith's attorney called Rauschenberger to the stand to probe Ghaith's defense that Ghaith was "being treated differently because basically of [sic] the color of his skin and his religion." Additionally, Ghaith argues to no avail that the police reports should be stricken as inadmissible hearsay. The case law he cites is inapposite because in this case Rauschenberger has sworn an affidavit that (1) summarized his grounds for probable cause to arrest Ghaith and (2) generally attested to the truth and accuracy of the police reports.

As the federal district court concluded in Ghaith's earlier-filed case, "[t]he credible reports of Hanan, Dawn, and Marion Breasbois suggesting that plaintiff threatened to kill them if

Hanan did not return to Jordan established probable cause to arrest plaintiff for extortion." *Ghaith*, 778 F Supp 2d at 800. "Plaintiff has advanced little factual support for his assertion that the State Defendants knew or should have known that the allegations against him were false or that the State Defendants otherwise 'conspired' with Defendant Dawn and her family to have plaintiff arrested." *Id.* at 798.

Equally fundamental is Ghaith's apparent misapprehension of the definition of hearsay and the applicability of available exceptions. The bulk of the alleged hearsay is not in fact hearsay because Rauschenberger does not offer it to prove the truth of the matter asserted. MRE 801(c). The other purposes are (1) to show that the statements were uttered and (2) to demonstrate the effect that these statements had upon Rauschenberger's unfolding investigation. Accordingly, any such statements or writings by the complaining witnesses (Hanan, Dawn, Marion Breasbois and Jerry Breasbois) are admissible as non-hearsay. *See, e.g., People v Knolton*, 86 Mich App 424, 429; 272 NW2d 669 (1978). Equally, the conversation Rauschenberger had with John Stuenkel, Ghaith's primary trucking company manager, is admissible to show the effect that conversation had on the criminal investigation and Rauschenberger's conduct. Rauschenberger's affidavit, further, is admissible evidence that attests to his investigation, related personal observations, and the fact that certain utterances were made in his presence. Ghaith has offered no solid basis for excluding any of this evidence from the court's consideration.

Finally, Ghaith asserts a question of fact concerning his conversation with Rauschenberger post-arrest regarding collateral matters such as Miranda warnings, language barriers, and interference with Ghaith's family. But none of these proposed factual disputes are material because of the post-arrest timing of the conversation. At that point, probable cause to arrest was established and the universe of facts upon which Rauschenberger could rely was frozen. *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983); *People v O'Neal*, 167 Mich App 274, 280-81; 421 NW2d 661 (1988). "Probable cause requires only the probability of criminal activity not some type of 'prima facie' showing." *Criss v City of Kent*, 867 F2d 259, 262 (CA 6, 1988). Any dispute about what happened or was said later is simply not relevant to the litany of bases that Rauschenberger had to suspect that Ghaith had threatened his family over the telephone. *See* MCL 750.213.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Michael J. Riordan