STATE OF MICHIGAN

COURT OF APPEALS

NANCY ADAMS,

Plaintiff-Appellant,

v

CITY OF ROMULUS and KIMBERLY MATTHEWS,

Defendants-Appellees,

and

JOHN DOE POLICE OFFICERS 1-4, JANE DOE, ANTI-CRUELTY SOCIETY OF MICHIGAN and MICHAEL KILLIAN,

Defendants.

UNPUBLISHED
December 22, 1998

No. 204898
Wayne Circuit Court
LC No. 86-641101 NO

Before: Kelly, P.J., and Hood and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right an order dismissing defendants Anti-Cruelty Society of Michigan ("Society") and Michael Killian from the case and stating that should this Court affirm the grant of summary disposition in favor of defendants City of Romulus ("City") and Kimberly Matthews, then the order involving the Society and Killian would be without prejudice. On appeal, plaintiff argues that the trial court earlier erred in granting summary disposition regarding her intentional tort and gross negligence claims.[1] We affirm.

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition on all of her tort claims. We disagree. We review a trial court's decision to grant summary disposition de novo. *Terry v Detroit*, 226 Mich App 418, 423; 573 NW2d 348 (1997). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Smith v Union Charter Township (On Rehearing)*, 227 Mich App 358, 361-362; 575 NW2d 290 (1998).

The trial court must consider the pleadings, affidavits, depositions, and other documentary evidence, give the benefit of any reasonable doubt to the nonmoving party, and draw any reasonable inferences in favor of that party. *Id.* at 362. The nonmoving party has the burden of proving that a genuine issue of material fact exists. *Id.*

I

First, plaintiff argues that the trial court erred in granting defendants' motion for summary disposition on her intentional infliction of emotional distress claim. Plaintiff argues that defendant Matthews' conduct was extreme and outrageous because she conspired with defendant Killian to create "the appearance of an investigation in alleged criminal behavior when they knew that no unlawful conduct had been committed." Plaintiff further asserts that defendant Matthews deliberately failed to present plaintiff's checks written to the City in payment for animals she purchased from the animal control shelter in the ordinary course of business and, instead, withheld them from negotiation for an unreasonable amount of time. Thus, defendant Matthews "seized upon the purely coincidental occurrence of the bank's closing of Plaintiff's accounts to create a second pretextual basis to criminally charge the Plaintiff." Finally, plaintiff claims that defendant Matthews persuaded a prosecutor to charge plaintiff with violations of MCL 750.131; MSA 28.326 (writing checks less than $50 with insufficient funds) and acted as a complaining witness at plaintiff's trial. We disagree.

Panels of this Court have recognized claims of intentional infliction of emotional distress. *Clarke v K-Mart Corp*, 197 Mich App 541, 548; 495 NW2d 820 (1992). The tort of intentional infliction of emotional distress requires (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Haverbush v Powelson*, 217 Mich App 228, 233-234; 551 NW2d 206 (1996). "Liability for such a claim has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized society." *Id.* at 234.

When a complaining witness

> has in good faith *fully and fairly stated all of the material facts within his knowledge* to the prosecuting officer and acted upon his advice, proof of the fact establishes a case of probable cause. [*Flones v Dalman*, 199 Mich App 396, 404-405; 502 NW2d 725 (1993), quoting *Smith v Tolan*, 158 Mich 89, 93; 122 NW 513 (1909) (emphasis in original).]

Because defendant Matthews had probable cause to believe that plaintiff had committed a crime, she cannot be held liable for requesting a misdemeanor warrant against plaintiff, even though she may have known that such a request was certain to cause emotional distress. *Cebulski v City of Belleville*, 156 Mich App 190, 196; 401 NW2d 616 (1986). Furthermore, plaintiff offered no evidence which shows that, in effectuating plaintiff's legal arrest, it was defendant Matthews' intent to cause plaintiff the requisite emotional distress. Also, plaintiff did not offer any evidence that defendant Matthews knew that plaintiff's bank account had been closed before she presented plaintiff's checks for

negotiation. Summary disposition was properly granted with regard to plaintiff's claim for intentional infliction of emotional distress.

Next, plaintiff argues that the trial court erred in granting defendants' motion for summary disposition on plaintiff's malicious prosecution claim because defendant Matthews did not have probable cause to believe plaintiff committed a crime nor could defendant Matthews rely on the prosecutor's advice because she did not disclose all exculpatory details. We disagree.

In order to state a prima facie case of malicious prosecution, the plaintiff must prove "(1) that the defendant has initiated a criminal prosecution against him; (2) that the criminal proceedings terminated in his favor, (3) that the defendant 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). An officer who *merely* executes a warrant that is valid on its face is protected from liability. *Flones, supra* at 404. Immunity from liability for an arrest made pursuant to a warrant is grounded on the existence of probable cause as evidenced by the warrant. *Id.* "Failure to include all exculpatory facts is not adequate to sustain a suit for malicious prosecution." *Payton v Detroit*, 211 Mich App 375, 395; 536 NW2d 233 (1995). What is required is evidence that would give rise to the inference that the defendant knowingly included false facts in his affidavit, without which the prosecutor could not have concluded there was probable cause. *Matthews, supra* at 390; *Payton, supra* at 395.

We find that defendant Matthews had probable cause to believe that plaintiff violated MCL 750.131; MSA 28.326. Probable cause exists where the known facts and circumstances would cause a person of reasonable prudence to believe that a crime has been committed and that the person to be arrested committed it. See *People v Johnson*, 431 Mich 683, 690-691; 431 NW2d 825 (1988). On June 22, 1994, July 13, 1994, and August 8, 1994, plaintiff wrote checks to defendant City for $25, $15, and $15 respectively for the purchase of animals from defendant City's animal control shelter. When plaintiff's checks were presented to the bank,[2] they were returned to defendant City stamped, "Returned Account Closed Do Not Present Again." On March 24, 1995, defendant Matthews' investigator's report revealed that plaintiff's checks had been returned and that the bank had closed plaintiff's account because of a history of checks being written on insufficient funds.

In order to support a conviction for an insufficient funds charge, the prosecution must prove (1) an intent to defraud, (2) the drawing of a check for the payment of money upon a bank, and (3) knowledge by the drawer of the check that the bank account has insufficient funds or credit for the payment of the check. MCL 750.131; MSA 28.326; *People v Chappelle*, 114 Mich App 364, 370; 319 NW2d 584 (1982). The checks plaintiff wrote to defendant City were returned because plaintiff's account was closed and plaintiff's bank statements indicate several returned insufficient funds checks. Accordingly, defendant Matthews had probable cause to believe that plaintiff had committed a crime. Furthermore, on March 24, 1995, a Wayne County Prosecuting Attorney recommended, and plaintiff was charged with, two counts of drawing on insufficient funds with a check less than $50 in violation of MCL 750.131; MSA 28.326 based upon these facts.

We believe that defendant Matthews, the complaining witness, "*fully and fairly stated all of the material facts within [her] knowledge* to the prosecuting officer and acted upon his advice." *Flones, supra* at 404-405, quoting *Smith, supra* at 93 (emphasis in original). Plaintiff's assertion that defendant Matthews failed to include all exculpatory facts is not adequate to sustain a suit for malicious prosecution. *Payton, supra* at 395.

Plaintiff offered no evidence that would give rise to the inference that defendant Matthews knowingly included false facts in her affidavit without which the prosecutor could not have concluded there was probable cause. *Matthews, supra* at 390; *Payton, supra*. Also, despite plaintiff's argument that defendant Matthews failed to inform the prosecutor that her actions caused the checks to be returned because of insufficient funds after she withheld them from negotiation for an unreasonable amount of time, plaintiff provides no evidence to support this version of the facts. Therefore, because probable cause was established, the trial court properly dismissed plaintiff's malicious prosecution claim. *Flones, supra* at 405.

III

Next, plaintiff argues that her claim of false arrest and imprisonment should not have been dismissed. Again, we disagree. To prevail on a claim of false arrest or false imprisonment, a plaintiff must show that the arrest was not legal, i.e., the arrest was not based on probable cause. *Lewis v Farmer Jack, Inc*, 415 Mich 212, 218; 327 NW2d 893 (1982); *Tope v Howe*, 179 Mich App 91, 105; 445 NW2d 452 (1989). If the arrest is legal, there has not been a false arrest or false imprisonment. *Tope, supra* at 105. Whether the plaintiff could actually have been convicted is irrelevant because actual innocence is not an element of false arrest. *Lewis, supra* at 218 n 1; *Brewer v Perrin*, 132 Mich App 520, 527; 349 NW2d 198 (1984).

A complaining witness is immune from liability for false arrest where a valid complaint is issued. *Raudabaugh v Baley*, 133 Mich App 242, 248; 350 NW2d 242 (1983). This immunity does not, however, extend to instances where the complaining witness does not act reasonably, i.e., when he knew or should have know that but for his mistake, the arrest warrant would not have been issued. *Raudabaugh, supra*.

As discussed herein, defendant Matthews had probable cause to believe plaintiff had committed a crime and she acted reasonably when she submitted her testimony and investigator's report to the prosecutor. *Id*. Accordingly, plaintiff's arrest was not illegal and summary disposition was appropriate. *Lewis, supra* at 218.

IV

Finally, plaintiff argues that her gross negligence claim against defendant Matthews should not have been dismissed. We disagree. Defendant Matthews made full and fair disclosure to the prosecutor's office and did not knowingly include false facts in her investigator's report without which the prosecutor could not have concluded there was probable cause. *Matthews, supra* at 390; *Payton, supra* at 395-396; *King, supra* at 466. Thus, probable cause was established. In addition, defendant

Matthews was acting within the scope of her authority by submitting her investigator's report to the Wayne County Prosecutor's office because she suspected that plaintiff violated the law. *Payton, supra* at 392. In doing so, defendant Matthews was also discharging a governmental function because "there are few functions more clearly governmental in nature than the arrest, detention, and prosecution of persons suspected of having committed a crime and the decisions involved in determining which suspects should be prosecuted and which should be released." *Payton, supra* at 392; *Bell v Fox,* 206 Mich App 522, 525; 522 NW2d 869 (1994).

Moreover, defendant Matthews' conduct was reasonable and did not constitute conduct "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). Because defendant Matthews was acting within the scope of her authority, she was engaged in the discharge of a governmental function, and her actions did not amount to gross negligence, she was protected from suit by governmental immunity. *Bell, supra* at 525.

We affirm.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Jane E. Markey

[1] Plaintiff challenges the trial court's granting of summary disposition to defendants, City and Matthews. However, in her response to defendants' motion, plaintiff conceded that defendant City was immune from plaintiff's common law tort claims and did not object to the dismissal of her claims against defendant City. As a result, plaintiff cannot seek redress in this Court for the dismissal of her claims against defendant City. *Phinney v Perlmutter* 222 Mich App 513, 544; 564 NW2d 532 (1997).

[2] The checks, written in June, July and August, 1994, were presented to the bank for payment in August but were refused on August 19, 1994 because the account had been closed.