COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP285 **Cir. Ct. No. 2014CV29**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

RANDY J. KEEFE,

PLAINTIFF-APPELLANT,

V.

ANTOINETTE P. SCHAFFRATH,

DEFENDANT-RESPONDENT,

DUANE A. MCCLYMAN,

DEFENDANT.

APPEAL from an order of the circuit court for Marquette County: MARK T. SLATE, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Randy Keefe appeals the circuit court's order dismissing his tort claim for malicious prosecution against his now-ex-wife, Antoinette Schaffrath, and a man Schaffrath knew named Duane McClyman. Keefe, who is pro se, argues that the circuit court erred in granting summary judgment in several respects. Broadly speaking, Keefe's brief presents a single issue: whether summary judgment against Keefe was improper because there exists a genuine issue of material fact relating to probable cause for the underlying prosecution. Because Keefe fails to point to evidence showing such a dispute, we affirm.

Background

¶2 In his claim against Schaffrath and McClyman, Keefe alleged that, in September 2010, a criminal complaint "void of … probable cause" was filed against him based on false statements by Schaffrath and McClyman.[1] A copy of the criminal complaint shows that Keefe was charged with two counts of disorderly conduct involving domestic abuse and one count of misdemeanor bail jumping, all for incidents involving Schaffrath. In February 2012, the complaint was dismissed on the district attorney's motion.

¶3 In the instant action, Schaffrath moved for summary judgment, arguing that Keefe's malicious prosecution claim could not succeed because the underlying criminal complaint was supported by probable cause. Keefe opposed the motion. The circuit court agreed with Schaffrath, granted summary judgment

[1] The underlying prosecution must be "'by, or at the instance of'" the defendant. *See* ***Krieg v. Dayton-Hudson Corp.***, 104 Wis. 2d 455, 460, 311 N.W.2d 641 (1981) (quoted source omitted). Here, we assume without deciding that the criminal complaint against Keefe was filed "at the instance of" Schaffrath and McClyman.

against Keefe, and dismissed Keefe's claim. We reference additional facts as needed below.[2]

Discussion

¶4 A plaintiff in a malicious prosecution action must prove several elements, but our focus here is on the element requiring that there was a "'want of probable cause for the institution of the former proceedings,'" here the criminal complaint against Keefe. *See* ***Krieg v. Dayton-Hudson Corp.***, 104 Wis. 2d 455, 460, 311 N.W.2d 641 (1981) (quoted source omitted). This element presents a "'mixed question of law and fact.'" ***Pollock v. Vilter Mfg. Corp.***, 23 Wis. 2d 29, 41, 126 N.W.2d 602 (1964) (quoted source omitted). "'Where the facts are in dispute, the jury determines the facts, … and the court determines the question of probable cause from such facts.'" ***Id.*** (quoted source omitted).

¶5 We review summary judgment de novo, applying the same standards as the circuit court. *See* ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶11, 277 Wis. 2d 21, 690 N.W.2d 1. "We will affirm a grant of summary judgment when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." ***Id.***

[2] Keefe alleged a second claim for "Fraud, Theft and Defiance of Divorce Judgment Addendum in Schaffrath v. Keefe, Marquette County Case No. 2009-FA-44." The circuit court dismissed that claim as well. The argument Keefe makes relating to this second claim is among the many that we do not address because of a failure to adequately develop the argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 645-47, 492 N.W.2d 633 (Ct. App. 1992) (providing examples of undeveloped arguments and explaining that we need not address such arguments); *see also* ***Waushara Cty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992) (although the court may make some allowances for pro se litigants, those litigants "are bound by the same rules that apply to attorneys on appeal").

¶6 Keefe relies on case law for the proposition that dismissal of the criminal complaint is "prima facie" or "sufficient" evidence to support the lack-of-probable-cause element in a malicious prosecution claim. *See* ***Messman v. Ihlenfeldt***, 89 Wis. 585, 591, 62 N.W. 522 (1895); *see also* ***Lechner v. Ebenreiter***, 235 Wis. 244, 252, 292 N.W. 913 (1940). As we read this case law, it simply sets up a rebuttable presumption that a dismissal was based on lack of probable cause; this presumption may be rebutted by other evidence. *See* ***Messman***, 89 Wis. at 592 (defendant has "the onus of overcoming with proof this *prima facie* presumption"). Here, the presumption was rebutted. The record indicates that the judge presiding over the criminal proceedings *rejected* Keefe's request for dismissal for lack of probable cause and, it is clear, properly so. It is true that the charges against Keefe were eventually dismissed, but, as Keefe concedes, the reason the judge dismissed the case was because a new district attorney wrote to the court stating that he did not think the state would be able to meet its burden of proof, meaning proof beyond a reasonable doubt at a trial.

¶7 Keefe's briefing fails to make clear why our analysis should not end here. Nonetheless, it may be that Keefe means to make an alternative argument. Keefe emphasizes other evidence in the record suggesting that he takes the position that this other evidence creates a material factual dispute. We will, in Keefe's favor, apply summary judgment standards to that other evidence. *See, e.g.*, ***Hajec v. Novitzke***, 46 Wis. 2d 402, 407-08, 416-17, 175 N.W.2d 193 (1970) (considering, in a malicious prosecution case, testimony demonstrating that the complaining witnesses' allegations were based on what they "honestly believed").

¶8 As pertinent here, summary judgment standards include that we examine the "moving party's affidavits and other proof to determine whether a prima facie case for summary judgment has been established." *See* ***Baumeister***,

277 Wis. 2d 21, ¶12. "If a moving party has established a prima facie case, the opposing party must then establish that there are disputed material facts, or undisputed material facts from which reasonable alternative inferences could be drawn, that entitle such a party to a trial." ***Id.***

¶9 Schaffrath's submissions are sufficient to establish a prima facie case for summary judgment. That is, Schaffrath submitted factual materials—including a copy of Schaffrath's and McClyman's statements to police—that, if uncontradicted, plainly establish facts supporting probable cause for the criminal complaint against Keefe.[3] Keefe cannot, and, as far as we can tell, does not, seriously dispute this point.

¶10 Rather, as we understand it, Keefe argues that there is other evidence in the record showing that Schaffrath and McClyman lied in their statements. Thus, in Keefe's view, summary judgment against him was inappropriate.

¶11 The problem for Keefe is that he fails to point to evidence showing a dispute as to any *material* fact in Schaffrath's or McClyman's statements. That is, he fails to point to any evidence to support a finding that Schaffrath or McClyman lied about something that would make a difference in terms of whether there was probable cause to charge Keefe.

¶12 Keefe does not point to either his own affidavit or testimony contradicting Schaffrath or McClyman. Rather, he directs our attention to a statement from a witness named Riege. However, our review of that statement

[3] For example, Schaffrath's statement to police relating to one of the counts describes Keefe provoking a physical altercation involving Schaffrath, Keefe, and McClyman during which Keefe shoved Schaffrath into bar stools.

shows that it does not, if believed, negate probable cause supporting charges against Keefe and, indeed, provides support for one of the disorderly conduct charges. It is true that Riege's statement contradicts Schaffrath's and McClyman's statements in some respects, including on the topic of whether Keefe or McClyman provoked a physical altercation. But Riege's statement also portrays Keefe as an active participant in that altercation, even after Schaffrath became involved. Riege stated:

> [H]ere comes [McClyman] … following [Keefe] … to the parking lot. [McClyman]'s still yelling some sort of things to [Keefe] …. [McClyman] heads toward [Keefe] …. They start yelling and pushing each other…. By now they are all three [Keefe, McClyman, and Schaffrath] getting tangled up with each other …. [Schaffrath was] trying to push [McClyman] back in the bar, but [McClyman] wo[uld]n't let go of [Keefe]'s shirt, the next thing you know all three of them fall in the bar door, still all tangled up with each other and on top of one another—arms, legs, and pool cues flying. This is when [another individual] steps in to help break things up. [The other individual]'s pulling, pushing and grabbing to try to get [Schaffrath] out of the pile first. He gets her out of the pile and she trips and goes crashing into the barstools. [Keefe] and [McClyman] are still wrestling on the bar floor ....

Conclusion

¶13 For the reasons stated above, we affirm the circuit court's order dismissing Keefe's action.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).