

Reversed and Remanded and Opinion filed October 28, 1999.



In The

## Fourteenth Court of Appeals

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NO. 14-98-00322-CV

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**REGINA HARDY SMITH, Appellant**

**V.**

**CHOWDARY YALAMANCHILI d/b/a BROOKSTONE JOINT VENTURE  
d/b/a and f/d/b/a BROOKSTONE APARTMENTS, CNC INVESTMENTS, INC. a/k/a CNC  
INVESTMENTS a/k/a C&C INVESTMENTS, INC., and ALMA D. GARZA, Appellees**

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**On Appeal from the County Court at Law No. 3  
Harris County, Texas  
Trial Court Cause No. 657,839**

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### OPINION

In this malicious prosecution case, Regina Hardy Smith appeals a take nothing summary judgment entered in favor of Chowdary Yalamanchili d/b/a Brookstone Joint Venture d/b/a Brookstone Apartments (collectively, "Brookstone"), CNC Investments, Inc. a/k/a CNC Investments a/k/a C&C Investments, Inc. (collectively, "CNC"), and Alma D.

Garza on the ground that fact issues exist regarding causation, probable cause, and malice. We reverse and remand.

### **Background**

Smith was a tenant of an apartment complex owned by Brookstone and/or CNC and managed by Garza. After some of Smith's personal property was removed from her apartment for non-payment of rent, Garza informed the police that Smith had threatened her with physical harm. The police arrested Smith but later dismissed the charges. Smith thereafter sued appellees for malicious prosecution, slander, and libel in connection with Garza's statement to the police and Smith's arrest.

Appellees filed motions for summary judgment on the grounds that they did not initiate or procure a criminal prosecution against Smith, probable cause existed to file a criminal complaint against Smith independent of appellees' actions, appellees did not act with malice in making the complaint, and neither libel per se nor slander per se were committed against Smith. Smith opposed appellees' motions for summary judgment on the grounds that she did not make any threats and, therefore, that appellees' purposefully providing false and misleading information to the police to the contrary caused Smith's arrest, precluded any valid probable cause to arrest her, and constituted a malicious act. The trial court granted a take-nothing summary judgment in favor of appellees without stating the grounds upon which it was based. Smith appeals the summary judgment as to her claim of malicious prosecution<sup>1</sup> on the ground that fact issues existed concerning causation, probable cause, and malice.

### **Standard of Review**

Summary judgment may be granted if the evidence referenced in the motion or response shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or response. *See* TEX. R. CIV. P. 166a(c). Summary judgment is proper if a defendant disproves at least one element of each of the plaintiff's claims or establishes all elements of an affirmative defense to each claim. *See American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997).

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<sup>1</sup> Because Smith's brief does not assign error to the granting of summary judgment on her claims for libel and slander, we will not address them.

When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubt in the nonmovant's favor. *See Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). When a trial court's order granting summary judgment does not specify the grounds it relied upon, the reviewing court must affirm the summary judgment if any of the summary judgment grounds are meritorious. *See Bradley v. State ex rel. White*, 990 S.W.2d 245, 247 (Tex. 1999).

### **Existence of Fact Issues**

To prevail on a claim for malicious prosecution, 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. *See Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 517 (Tex. 1997).

### *Causation*

The causation element of a malicious prosecution claim requires a defendant to initiate or procure criminal proceedings. *See Browning-Ferris Indus., Inc. v. Lieck*, 881 S.W.2d 288, 292-93 (Tex. 1994). A person procures a criminal prosecution if his actions were enough to cause the prosecution, and but for his actions the prosecution would not have occurred. *See id.* at 293.<sup>2</sup> Conversely, a person does not procure a criminal prosecution when the decision whether to prosecute is left to the discretion of another, including a law enforcement official or the grand jury, unless the person provides information which he knows is false. *See id.* at 292. This is because an intelligent exercise of discretion is impossible when a prosecutor is provided false information. *See id.* at 294. Therefore, a person who provides false information cannot complain if a prosecutor acts on it; he cannot be heard to contend that the prosecutor should have known better. *See id.* at 294. Such a person has procured the resulting prosecution, regardless of the actions of the prosecutor, and the causation element for malicious prosecution is satisfied. *See id.*

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<sup>2</sup> A criminal prosecution may be procured by more than one person. *See Browning-Ferris*, 881 S.W.2d at 293.

In this case, appellees' summary judgment motion argued that causation was lacking because the decision to arrest Smith was made by Officer Wilson, the investigating officer, and the District Attorney's office, not appellees. Wilson stated in his affidavit that, based upon his personal observations at the apartments and the statements from Garza, Diane Kotwitz, and Patricia Dixson, he believed there was probable cause to arrest Smith for making terroristic threats. Specifically, Wilson's affidavit stated that the determination to arrest Smith was based on his own independent observations and discussions with the District Attorney's office.

However, despite the evidence in Wilson's affidavit, causation is not negated if the information Garza reported to Wilson was false. *See id.* Smith's affidavit accompanying her summary judgment response specifically denies that she ever made a threat of any kind. Taking this affidavit as true, as we must, it is evidence that the contrary information Garza provided to the police was false. Because a fact issue was thereby raised on that element, causation is not a ground upon which the summary judgment may be affirmed.

#### *Probable Cause*

The probable cause determination in a malicious prosecution claim 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. *See Richey*, 952 S.W.2d at 517.<sup>3</sup> In this case, Smith contends that her affidavit controverts that she ever made a threat and thus raises a fact issue whether appellees or a reasonable person could have believed that a crime had been committed. We agree. Because a fact issue was raised on the element of probable cause, it is not a ground upon which the summary judgment may be affirmed.

#### *Malice*

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<sup>3</sup> In malicious prosecution actions, there is an initial presumption that the defendant acted reasonably and in good faith and had probable cause to initiate the proceedings. *See Richey*, 952 S.W.2d at 517. That presumption disappears once a plaintiff produces evidence that the motives, grounds, beliefs, and other evidence upon which the defendant acted did not constitute probable cause. *See id.* at 518. The burden then shifts to the defendant to offer proof of probable cause. *See id.*

The malice element of malicious prosecution is satisfied by a showing that the offending actions were taken with reckless disregard for the rights of others. *See Smith v. Sneed*, 938 S.W.2d 181, 183 (Tex. App.–Austin 1997, no writ). In this case, appellees contend that nothing in Smith’s summary judgment affidavit indicate that they acted with malice. In addition, appellees noted in their summary judgment motion that Smith indicated in an interrogatory answer that there was no animosity or history of bad feelings between Smith and appellees.

Smith argues that the summary judgment evidence raises a fact issue concerning malice because Garza and Kotwitz made a false report to the police, which is itself evidence of malice. Furthermore, Smith contends that relevant information that was withheld from the arresting officers which would have precluded her arrest. This included a conversation between Smith and Garza regarding excessive late charges and Smith’s intention of notifying the corporate office of such charges.

We agree that the element of malice is not negated as long as a fact issue exists whether appellees made a false report to police against Smith. Because the controverting summary judgment evidence concerning whether a threat was made creates a fact issue on the elements of causation, probable cause, and malice, summary judgment was not properly granted. Accordingly, the judgment of the trial court is reversed, and the case is remanded for further proceedings.

/s/ Richard H. Edelman  
Justice

Judgment rendered and Opinion filed October 28, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig.

Do not publish — TEX. R. APP. P. 47.3(b).