

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

No. 49625-9-II

**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

HAFID TAHRAOUI,

Appellant

v.

FRANKLIN BROWN, ET AL.,

Respondents.

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

This case involves a claim for malicious prosecution against a Sheriff's department and its deputies during the course of investigating a minor theft claim.

B. ASSIGNMENTS OF ERROR

1. The trial Court erred in granting Respondents motion for summary judgment.

2. The trial Court erred in dismissing Appellant's claim for malicious prosecution.

3. The trial Court erred in granting Respondents' judgment for attorneys' fees and costs.

C. ISSUES PERTINING TO ASSIGNMENTS OF ERROR

1. Did the trial Court erred in granting Respondents' motion for summary judgment when material issues of fact still exist with regard to the issue of malicious prosecution?

2. Did the trial Court erred in dismissing Appellant's claim for malicious prosecution when material issues of fact still exist to whether Respondents acted in good faith and made a fair and full disclosure, of relevant facts known to them, to the prosecuting attorney?

3. Did the trial Court erred in granting Respondents' attorneys' fees and cost under RCW 4.84, when they failed to raise the issue of fees and costs before the case was dismissed.

D. STATEMENT OF THE CASE¹

1. On or around May 9, 2008, Appellant Hafid Tahraoui ("Tahraoui") went to the Spanaway area in Pierce County, Washington, to buy a small generator that was listed for sale on Craigslist by an individual named Eric Pate ("Pate"). Shortly after meeting with Pate, Tahraoui agreed to buy the generator and paid Pate \$250 cash. Also, Pate informed Tahraoui that he was moving out of state and has a lot of tools for sale. Then, Tahraoui agreed to meet Pate at his house, later that day, to see if there are some tools he wanted to buy. CP at 131

2. Around 6 p.m., that same day, Tahraoui arrived at Pate's house and inspected the tools that are for sale. Few hours later, Tahraoui bought a dozen of tools from Pate and paid him \$450 cash. Before leaving, Tahraoui informed Pate that he was also interested in buying his forklift. Tahraoui and Pate, again, agreed to meet next day, at his house, to discuss the sale of the forklift.

¹ The statement of the case is based on Tahraoui's declaration in support of Plaintiff's response to Defendants' motion for summary judgment. See Clerk's papers at 130-135.

3. The next day, May 10, 2008, around 10 a.m., Tahraoui arrived at Pate's house where a garage sale was under way. Pate's step father, "Shelly", was conducting the sale and collecting the payment. Pate, however, was not seen around and was not involved in the sale. Tahraoui asked Shelly to see Pate, and Shelly told him that Pate will be available in about half hour. Tahraoui start going through the garage sale while waiting for Pate to came out. Some time after, Tahraoui saw Pate from distance, in tear, getting to his car and leaving the house with his wife. Tahraoui asked Shelly about Pate and why he was in tear. Shelly told him that Pate's father has passed away and Pate was going to his father's house. CP at 132

4. During the garage sale on that day, Tahraoui bought few more items from Shelly and paid him \$200 cash, including a trailer hitch ("hitch") priced at \$50. And at around 12 p.m., Tahraoui left Pate's house driving home without talking to Pate. CP at 132

5. On May, 11, 2008, Pate telephoned Tahraoui and informed him that his step father shelly made a mistake by selling him the hitch because it was not for sale. In rude manner, Pate asked Tahraoui to bring him back the hitch immediately. Tahraoui explained to Pate that he bought the hitch from Shelly and he is not

obligated to give it back to him. However, he may consider give him back the hitch if can be respectful and willing to come his home and get it. During that conversation, a dispute arouses between Tahraoui and Pate as to whether the hitch was properly sold to the Tahraoui. CP at 132

6. On that same day, Pate contacted the Pierce County Sheriff to report that Tahraoui had stolen the hitch from him. Respondent Deputy Sheriff Franklin Brown ("Brown") was dispatched to Pate's house to investigate the theft claim. CP at 132

7. At 12:01 p.m., Brown, arrived at Pate's house.

8. At 12:07 p.m., less than 6 minute after arriving at Pate's house and without conducting an investigation in good faith or a meaningful one, Brown called and left a message for the Tahraoui threatening to arrest him in very quick manner if he did not return the hitch to Pate immediately. Brown said in his message:

"Hafid, this is Deputy Brown with the Pierce County Sheriff's Department. You took the trailer hitch from Eric (Pate) from his house. I'll bet that you will return the hitch before I get my hand on you and put you in the Pierce County Jail. If you want to contact me call 911 and ask for Deputy Brown". CP at 133

9. After hearing Brown's message, Tahraoui was shocked and frightened. He called Brown immediately and tried to explain to him that he bought the hitch and he (Brown) should hear his side of the story before deciding to arrest him for something he did not do. Brown told him that he must return the hitch before he catches him. Also, Tahraoui tried to remind Brown that a warrant or probable cause is needed for the arrest. Brown responded that he does not need anything to arrest him. To prove his point, Brown asked Tahraoui for his address so he can come to his home and arrest him. However, Tahraoui refused to answer his request. CP at 133

10. Brown made some contact with other police agencies in an effort to locate Tahraoui and arrest him. Brown was able to gather private and personnel information about Tahraoui such as his home and work address, what car or truck he owns and other things. Subsequently, that information was given to Pate so he can help locate Tahraoui. CP at 134

11. Later that day, Pate telephoned Tahraoui and told him that he was given a lot of information about him and he will be waiting for him at his work place until he gets back the hitch. As a

result of this revelation, Tahraoui become more afraid and was worried that Pate may attack him if he goes to work. CP at 134

12. On May 12, 2008, Tahraoui contacted the Pierce County Sheriff several times to complaint about Brown's misconduct with him. However, Tahraoui could not get anyone to help him with his complaint. CP at 133

13. Hours later, Respondent Lieutenant Rustin Wilder ("Wilder") telephoned Tahraoui to investigate his Complaint. Tahraoui complained to Wilder about Brown bias and mishandling of the theft claim. He told Wilder that Brown wants to arrest him without investigation or a good faith belief that he stole the hitch from Pate. Wilder assured Tahraoui that he will investigate his complaint and get back to him with an answer. CP at 133

14. Afterward, and according to the police report, wilder setup a ruse to arrest Tahraoui. He telephoned Tahraoui and asked him to come down to the South Hill precinct and fill out a statement about his complaint. Tahraoui become suspicious and asked wilder if he is going to be arrested. At first, Wilder try to hide his intention, but few minutes after, he informed Tahraoui that his is facing arrest for multiple crimes including theft and extortion. Wilder told Tahraoui

that he was lying in his complaint and Brown had every right to arrest him. CP at 133, see also CP at 140-141

15. Without any further investigation, and less than 30 hours after the theft claim, Wilder recommended to the Pierce County Prosecutor's office to charge Tahraoui with felony in Superior Court, even though the hitch is not worth more than \$100. However the prosecutor's office declined to do so. CP at 134

16. On May 13, 2008, Tahraoui contacted the Pierce County Executive office to complain about his growing problem with the Pierce county Sheriff. However, Tahraoui was advised by the executive assistant that the executive office has no control over the Sheriff and can not review its decision. The assistant explained that the Sheriff is an elected position and the Department is an independent agency from Pierce county Executive. CP at 134

17. On May 22, 2008, Defendants Deputies Montgomery Minion ("Minion") and Foster travel to Tahraoui's work Place in Kent, King County, to arrest him on theft charge. However, Tahraoui was not found and kept himself out of reach. CP at 134

18. Defendant Minion telephoned Tahraoui and told him that he was charged with theft and he will be arrested and better for him to return the hitch to Pate.

18. For the following weeks and months, Tahraoui was fearful from the imminent arrest he was facing and did not know to whom else to complain. He limited his movement and driving activities to the minimum and did not travel to Pierce County to avoid arrest. CP at 134

19. For financial reason, Tahraoui was unable to hire an attorney to resolve the theft claim. He hoped that his problem with the Sheriff will go away over time if he is not arrested. CP at 134

20. On March 4, 2009, Tahraoui received a criminal complaint charging him with theft in Pierce County District Court. He contacted the prosecutor office and asked them to drop the charge against him based on the lack of probable cause in the case and Brown's misconduct. But they refused to do so. CP at 134

21. On March 13, 2009, Tahraoui was arraigned on the theft charge and pleaded not guilty. And in subsequent hearings, the Court dismissed with prejudice the charges against Tahraoui on May 5, 2009. CP at 135

22. On July 11, 2011, Tahraoui filed a lawsuit against Respondent in Pierce County Superior Court for various federal and state claims. See Amended complaint CP at 84

23. In November 2011, Respondents removed Tahraoui's action to Federal Court.

24. On February 13, 2012, U.S. District judge dismissed all Tahraoui's federal claims and reminded the balance of the case on state claims to Pierce County Superior Court.

25. On March 29, 2013, the trial court granted Respondents' CR 12(c) motion and dismissed Tahraoui's action in its entirety.

26. On April 29, 2013, Tahraoui filed a timely notice of appeal to this court.

27. On February 10, 2015, this Court dismissed all Tahraoui's claims and reminded the case to Superior Court on the issue of malicious prosecution.

28. On September 30, 2016, the trial Court granted Respondents' motion for summary judgment and later their attorneys' fees and costs.

29. On October 28, 2016, Tahraoui filed a timely notice of appeal to this Court.

E. ARGUMENT

1. Standard of review of summary judgment

This court reviews summary judgment orders de novo, performing the same inquiry as the trial court. *Kruse v. Hemp*, 121 Wash.2d 715, 722, 853 P.2d 1373 (1993). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The Court views all facts most favorably for the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wash.2d 16, 26, 109 P.3d 805 (2005).

2. Tahraoui's claim for malicious prosecution should not be dismissed because Material issues of fact still exist to whether Respondents acted in good faith, and made a fair and full disclosure, of relevant facts known to them, to the Prosecuting attorney

The trial court improperly dismissed Tahraoui's claim for malicious prosecution without providing any explanation to his decision. The trial court disregarded Tahraoui's argument that specific facts supported by the record show that Respondents failed to act in good faith and did not make a fair and full disclosure of all known material facts to the prosecutor before charges were filed.

To succeed on a claim for malicious prosecution in Washington, the plaintiff must allege and prove the following:

(1) that the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) that there was want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5) that the plaintiff suffered injury or damage as a result of the prosecution.

Clark v. Baines, 150 Wn.2d 905, 911, 84 P.3d 245 (2004).

Although all elements must be proved, malice and want of probable cause constitute the gist of a malicious prosecution action. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 852 P.2d 295 (1993).

Respondents argued that probable cause exists as a matter of law in this case because they made in good faith a fair and full disclosure of all material facts known to them to the prosecuting attorney. Tahraoui, however, provided facts disputing the existence of probable cause which preclude summary judgment thus the issue should be decided by the jury.

In *Bender v. City of Seattle*, 99 Wash.2d 582, 593 (1983), the court held that:

“the fact that these independent findings of probable cause were made and the prosecution proceeded for a time—standing alone—is not sufficient to defeat the tort claim; if it were, it would swallow the cause of action.. But Washington cases have long held that probable cause is

deemed established as a matter of law with respect to a given defendant if it clearly appears that the defendant provided the prosecuting attorney with a full and fair disclosure, in good faith, of all the material facts known to him or her, and the prosecutor thereupon preferred a criminal charge and caused arrest.

- a. Respondents' failure to act in good faith when they investigated the theft claim was a direct cause for the prosecutor to file charges against Tahraoui.

Tahraoui argues that specific facts exist to support the claim that Respondents failed to act in good faith.

The record shows Respondent Brown concluded that Tahraoui stole the trailer hitch and should be arrested without any meaningful investigation. Brown arrived at Pate's house after a 911 call, at 12:01 pm, and at 12:07 pm, he decided that Plaintiff should be arrested for the theft of the trailer hitch. (CP at 132) Brown spent less than 6 minutes investigating Pate's claim and examining the victim/witness "Pate", who did not witness the theft claim and was not at the house at that time. In these circumstances, Brown did not, and could not have conducted a meaningful investigation in less than 6 minutes, that can lead a reasonably prudent officer to believe in good faith that a crime has been committed. Brown did not act in good faith to gather sufficient evidence to evaluate the truthfulness of Pate's claim. Furthermore, Brown did not want to

hear Tahraoui's testimony and his explanation to how he obtained the hitch. (CP at 132) Brown did not act in good faith when he deliberately failed to ask or examine Shelly, Pate's step father, who was the only witness for the theft claim and was authorized by Pate to conduct the garage sale on his behalf.

Respondent Wilder was mad at Tahraoui because he complained about Brown's actions, later wilder setup a ruse to arrest Tahraoui (CP at 133 and 141). Wilder justified his action based entirely on the probable cause established by Brown. Tahraoui made it clear to Wilder that Brown threaten to arrest him without even want to hear his side of the controversy. In this situation, Wilder could not have acted in good faith when he failed to conduct an independent investigation of Tahraoui's claim. CP at 140-141

- b. Respondents' failure to make a fair disclosure of relevant facts known to them, was a direct cause for the prosecutor to file charges against Tahraoui

Brown disregarded Tahraoui right by conducting a bias criminal investigation against him. Because of bias and malice, Brown accepted Pate's accusation as truth without any further investigation, and discredited any explanation by Tahraoui. Without any probable cause, Brown made a false claim to the prosecutor

that Tahraoui committed theft. Brown never disclosed to the prosecutor that his finding was based only on Pate's claim, and that he refused to hear Tahraoui's explanation on how he acquired the hitch.

Again, the record shows that at 12:01 pm, Brown arrived at Pate's house after "911" call. And less than 6 minutes later, at 12:07 pm, he called plaintiff and left him a message, threatening him with arrest if he did not return the trailer hitch to Pate. Brown stated:

"Hafid, this is Deputy Brown with the Pierce County Sheriff's Department. You took the trailer hitch from Eric (Pate) from his house. I'll bet that you will return the hitch before I get my hand on you and put you in the Pierce County Jail. If you want to contact me call 911 and ask for Deputy Brown". CP at 132.

Here Brown spent less than 6 minutes investigating the theft claim which included taking statement from Pate and statement from Shawna fore the witness.

In these circumstances, Brown did not, and could not have conducted a fair and meaningful investigation in less than 6 minutes, that can lead a reasonably prudent deputy to believe, in good faith, that a crime has been committed, especially when there is no indication that Tahraoui was violent or presented an eminent

threat to any one, and as such Brown did not have to rush his investigation to make the wrong judgment. Brown was only interested in getting back the hitch to Pate regardless of Tahraoui's repeated claim that he bought the hitch from Shelly.

- c. Respondents' failure to make full disclosure of materials facts was a direct cause for to the prosecutor to file charges against Tahraoui

Respondents failed to advise or at least disclose to the prosecutor that the newly obtained information does not support a theft charge against Tahraoui and Pate's claim could not be verified.

Even after Tahraoui provided Minion with a detailed explanation on how he acquired the hitch and refuted all Pate's accusations, Minion still recommended charges against Tahraoui and ordered him to return the stolen hitch to Pate within 24 hours.

Minion stated:

I told Hafid that the stories by Pate, Brown and Wilder were much different from his and that I was still going to have to submit the case to the prosecutor for charging. I then told Hafid that he had 24 hours to make arrangement with Pate to return the hitch. If he failed to do so, he would be held accountable and the case would be submitted for charging."

Minion's report of May 23, 2008. CP at 145-147

Respondent Minion recommended charges against Tahraoui and falsely accused him with theft when he knew or should have known that Tahraoui was innocent.

3. The Prosecutor's decision to file charges was a direct result of Respondents deliberate false claim that Tahraoui had committed theft

Respondents argued that the Prosecutor is the only one responsible for filing charges against Tahraoui. Defendants' argument should be rejected for the following reasons:

- a. The prosecutor did not investigate the theft claim. There is nothing in the record to suggest that the prosecutor, before filing charges, conducted a criminal investigation in this case; instead the prosecutor relied entirely on the Sheriff's department to investigate the crime, take statements from victims, suspects and witnesses, and examine their credibility. The incident reports supplied by the Sheriff's department were the only evidence for the prosecutor to rely on before filing charges.

- b. It is customary for the Prosecutor to accept Respondents finding that Tahraoui committed theft and follow their recommendation to file charges.

- c. The Prosecutor could not have file charges in this case without the Respondents' request and recommendation that

Tahraoui committed theft. It is customary for the Sheriff's department to make the first determination whether probable cause exist in a case before it gets forwarded to the Prosecutor for charging.

d. The Prosecutor could not have known that Respondents failed to conduct their investigation in good faith or make a full and fair disclosure of all relevant facts known to them.

4. Respondents failed to raise the issue of attorneys fees and costs before the case was dismissed, therefore they should not be entitled to fees and costs

The trial court erred in granting Respondents attorneys' fees and cost after the case was dismissed.

Generally, when a party is seeking attorneys' fees and cost, the court must decide whether said party is entitled to fees and cost, and the amount to be awarded. In the case at bar, the respondents asked the court to enter a judgment for attorneys' fees and cost under RCW 4.84, without even bringing a motion to support such judgment. Defendants claim that their judgment is based on CR 56 (d), however that rule addresses judgment entered under motion for partial summary judgment. CP at 161-162

Defendants brought a motion for summary judgment to dismiss Plaintiff's action. They should have raised the issue of fees

and cost at the time of said motion, or at least ask the court to reserve that issue for a later time, but they failed to do so before the case was dismissed. While the Defendants made their request for the amount of fees and cost within 10 days of entry of judgment as required by the rule, failed to ask the court to decide whether they are entitled to fees and cost before the case was dismissed.

Defendants could not raise new issue after the case has been dismissed. Defendants could have possibly raised the issue of fees and cost on motion for reconsideration.

5. Respondents are not entitled to recover jury fee as cost under RCW 4.84.010 (1)

Even if the Court decide that Respondents should be entitled to attorneys fees and costs under RCW 4.84, they could not recover jury fee under RCW 4.84.010 (1), which is reserved only for filing fees. The trial Court erroneously awarded Respondents \$250.00 as cost for jury demand filing fees pursuant to RCW 4.84.010 (1).

F. CONCLUSION

For the foregoing reasons, Tahraoui respectfully requests that the Court reverse the trial court grant of Respondents' motion

for summary judgment, and the judgment for attorneys' fees and costs.

Dated this 10th day of April, 2017.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, sweeping loop followed by a few smaller strokes, enclosed within a thin, hand-drawn oval border.

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DECLARATION OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on April 10, 2017, I caused to be served true and correct copy of the following document:

- Appellant's opening brief

to the counsel of the record listed below via first class mail and email

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Dated this 10th day of April, 2017.



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