NO. 43394-4-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

GREGORY R. HART,

Respondent,

v.

CITY OF LAKEWOOD, a municipal corporation; CITY OF LAKEWOOD POLICE DEPARTMENT, a municipal corporation; and CITY OF LAKEWOOD PARKS DEPARTMENT, a municipal corporation,

Appellants.

RESPONSE BRIEF OF APPELLANT CITY OF LAKEWOOD

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I. INTRODUCTION

Gregory Hart picked up a City-owned gate from the area adjoining Wards Lake Park in Lakewood, Washington and took it to his home. After receiving a 911 dispatch reporting that a person was seen dismantling the gate, Lakewood Police located the gate on Mr. Hart's property and arrested him for theft and malicious mischief. During the course of the Lakewood Police Department's investigation, independent witnesses reported that Mr. Hart damaged the gate before he took it. The City of Lakewood prosecuted Mr. Hart for Theft in the third degree and malicious mischief in the third degree.

On July 3, 2007, the City of Lakewood Municipal Court determined that there was probable cause to support the charges against Mr. Hart. After a full trial, a jury convicted Mr. Hart of theft in the third degree. Mr. Hart appealed this conviction to the Pierce County Superior Court, which granted his appeal and ordered a retrial. On retrial, Mr. Hart was acquitted of the theft charge. Mr. Hart then filed this lawsuit alleging, among other claims, malicious prosecution and intentional infliction of emotional distress (outrage). After oral argument on Defendant's Motion for Summary Judgment, the trial court dismissed each of these claims. Mr. Hart appeals that decision.

II. COUNTERSTATEMENT OF MATERIAL FACTS

It is undisputed that on May 21, 2007, Mr. Hart picked up a gate

from the area adjoining Wards Lake Park in Lakewood, Washington. (CP 171; CP 345.) The following facts are also undisputed: a city employee called 911 to report that Mr. Hart was damaging and dismantling that gate (CP 174-175); witness Thomas Highland told the Lakewood Police Officer Greg Richards that he observed Mr. Hart take the gate away with a trailer (CP 175); Mr. Highland told Officer Richards that Mr. Hart bragged about breaking the gate and taking it away (CP 175); witness Edwin Wance told the Lakewood Police that Mr. Hart admitted to "pull[ing] the gate down (CP 183);" Mr. Hart admitted he did not like that the gate was at the park (CP 175); and Mr. Hart admitted to taking the gate (CP 175).

Additionally, the Lakewood police officers had information that the gate was located on City of Lakewood property, the City had recently re-installed the gate, and Mr. Hart admitted that the gate was City property. (CP 174-175.) Lakewood police officers arrested Mr. Hart, and the City of Lakewood later charged Mr. Hart with one count of malicious mischief in the third degree and one count of theft in the third degree. (CP 159.)[1]

Mr. Hart's Statement of the Case excludes the most important information material to his malicious prosecution claim. On July 3, 2007, the City of Lakewood Municipal Court determined that there was probable

[1] Mr. Hart's declaration (CP 129-46) references statements allegedly made by Mary Dodsworth. These statements are hearsay and should not be considered at summary judgment or on appeal. ER801 and 802. Regardless, the alleged statements are immaterial to the issue of probable cause.

cause to support the charges against Mr. Hart. (CP 159). The court docket explicitly states: "DETERMINATION FOR PROBABLE CAUSE ESTABLISHED." (*Id.*) Additionally, during the course of those proceedings, Mr. Hart filed a motion to dismiss, based in part on his assertion that the City possessed insufficient evidence of its ownership of the gate to support its prosecution. (CP 49-63.) The criminal court denied Mr. Hart's motion to dismiss and the case proceeded to trial. (CP 49-63; CP 161-63.)

III. ARGUMENT

A. Standard of Review.

The purpose of summary judgment is to avoid useless trials. *Almy v. Kvamme*, 63 Wn.2d 326, 329, 387 P.2d 372 (1963). Summary judgment is proper when "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 that the moving party is entitled to judgment as a matter of law." CR 56(c). In a summary judgment proceeding, the moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "[A] party moving for summary judgment can meet its burden by pointing out to the trial court that the non-moving party lacks sufficient evidence to support its case." *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993).

Once the movant's initial burden has been met, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Rathvon v. Columbia Pac. Airlines*, 30 Wn. App. 193, 201, 633 P.2d 122 (1981). The non-moving party "may not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists." *Las v. Yellow Front Stores*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992). "Additionally, any such affidavit must be based on personal knowledge admissible at trial and not merely on conclusory allegations, speculative statements or argumentative assertions." *Id.* Summary judgment is reviewed *de novo*. *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 383, 198 P.3d 493 (2008); *Osborn v. Mason County*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006).

B. The City of Lakewood Is Entitled to Prosecutorial Immunity.

To the extent Mr. Hart's claims are based upon the City of Lakewood's decision to initiate or continue a prosecution against him, the City of Lakewood is entitled to prosecutorial immunity. In *Imbler v. Pachtman*, 424 U.S. 409, 422-23, 96 S. Ct. 984 (1976), the United States Supreme Court recognized the long-standing common law immunity enjoyed by prosecutors acting within the scope of their duties. The Court explained the policy behind the immunity as follows:

> The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the

> prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case .... The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded and we would have moved away from the desired objections of stricter and fairer law enforcement.

Id. at 423 (internal citations omitted). The Court went on to extend this common law absolute liability under 42 U.S.C. § 1983 for "initiating a prosecution and in presenting the State's case." *Id.* at 424, 431.

Washington Courts recognize this same quasi-judicial absolute prosecutorial immunity. *Creelman v. Svenning*, 67 Wn.2d 882, 884, 410 P.2d 606 (1966). The Court explained:

> While it is true that a prosecuting attorney acting in a matter which is clearly outside of the duties of his office is personally liable to one injured by his acts, a prosecuting attorney ... is not liable for instituting prosecution, although he acted with malice and without probable cause, if the matters acted on are among those generally committed by the law to the control or supervision of the office and are not palpably beyond authority of the office. The

> doctrine of exemption of ... quasi-judicial officers ... is founded upon a sound public policy, not for the protection of the officers, but for the protection of the public and to insure active and independent action of the officers charged with the prosecution of crime, for the protection of life and property.

Anderson v. Manley, 181 Wn. 327, 331, 43 P.2d 39 (1935). Furthermore, the Court found that this policy also requires immunity for the state or county who would otherwise be liable for any harm under a theory of vicarious liability. *Creelman*, 67 Wn.2d at 885. This Court should affirm dismissal of Mr. Hart's malicious prosecution and outrage claims to the extent that they encompass alleged conduct of any City of Lakewood prosecuting attorney.

C. The Trial Court Properly Dismissed Mr. Hart's Malicious Prosecution Claim.

To the extent that Mr. Hart's malicious prosecution claim is based upon the conduct of any Lakewood police officer, that claims was also properly dismissed. In order to maintain an action for malicious prosecution, a plaintiff must plead and establish five essential elements: (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. *Hanson v. Snohomish*, 121 Wn.2d 552, 558, 852 P.2d 295 (1993). "Although all elements must be proved, malice and want of probable cause constitute the gist of a malicious prosecution action." *Id.*

1. The Criminal Court Conclusively Established Probable Cause.

Probable cause to initiate criminal proceedings is a ***complete defense*** to a claim of false arrest or malicious prosecution. *Hanson*, 121 Wn.2d at 558; *Peasley v. Puget Sound Tug & Barge*, 13 Wn.2d 485, 499, 125 P.2d 681 (1942); *Wood v. Kesler* 323 F.3d 872, 881 (11th Cir., 2003). Moreover, under the doctrine of collateral estoppel, or issue preclusion, a plaintiff is barred from re-litigating an issue that was previously decided. *Shoemaker v. City of Bremerton*, 107 Wn.2d 504, 507, 745 P.2d 858 (1987). The requirements for application of collateral estoppel are:

> (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

Malland v. State Dept. of Retirement Systems, 103 Wn.2d 484, 489, 694 P.2d 16 (1985).

On July 3, 2007, the trial court undisputedly established probable cause. Additionally, Mr. Hart moved the court to dismiss the claims

against him on the basis that the City failed to establish ownership of the gate, and the trial court denied that motion as well. These final decisions are identical to those now raised by Mr. Hart in this civil lawsuit. Probable cause has been conclusively and finally established. The issue cannot be re-litigated and the trial court's finding is a complete bar to Mr. Hart's malicious prosecution claim. The Court should affirm the trial court's dismissal of Mr. Hart's malicious prosecution claim for want of probable cause.

2. *The City of Lakewood Had Probable Cause to Arrest and Charge Mr. Hart with Third Degree Theft and Third Degree Malicious Mischief.*

Even if this Court somehow finds that collateral estoppel does not bars Mr. Hart from re-litigating probable cause, the evidence supports a finding of probable cause as a matter of law. Under Washington law,

> Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed.

State v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227 (1996); *see also*, *Bender v. Seattle*, 99 Wn.2d 582, 597, 664 P.2d 492 (1983). The probable cause standard is not a stringent one; the court must assume the truth of the evidence presented to support probable cause and does not weigh or measure facts against potentially competing ones. *State v. McCuistion*,

147 Wn.2d 369, 382, 275 P.3d 1092 (2012). "When there is conflicting testimony as to whether the police had probable cause to arrest or acted with malice, a factual issue exists and the plaintiff is entitled to have his claim put before the jury." *Bender*, 99 Wn.2d at 594.

The Lakewood police officers arrested Mr. Hart for first degree theft and first degree malicious mischief. However, the exact nature of these originally suspected offenses is immaterial. "[A]n arrest supported by probable cause is not made unlawful by an officer's subjective reliance on, or verbal announcement of, an offense different from the one for which probable cause exists." *State v. Rose*, 175 Wn.2d 10, 19, 282 P.3d 1087 (2012). The City of Lakewood charged Mr. Hart with Theft in the third degree and Malicious Mischief in the third degree, and probable cause supported those final charges. "A person is guilty of theft in the third degree if he or she commits theft of property or services which ... does not exceed seven hundred fifty dollars in value." RCW 9A.56.050(1)(a). "A person is guilty of malicious mischief in the third degree if he or she ... knowingly and maliciously causes physical damage to the property of another." RCW 9A.48.090(1)(a).

It is undisputed that the Lakewood police officers received information from an individual who called 911 and reported that an individual living in the neighborhood "damaged" and "dismantled" a gate leading onto City property. It is also undisputed that Mr. Highland told

Officer Richards that Mr. Hart bragged about breaking the gate, and Mr. Hart admitted to taking the gate. Finally, it was reasonable for the officers to believe that the gate belongs to the City, because it was located on City property. These undisputed facts alone are sufficient to establish probable cause to arrest and probable cause to prosecute as a matter of law.

Of course, probable cause does not need to be based on undisputed facts. The officers and the City merely needed to come forward with reasonably trustworthy information sufficient to warrant a person of reasonable caution to believe that the offenses have been committed. Mr. Hart's contentions that he did not in fact damage the gate and that the gate does not in fact belong to the City are immaterial.

Similarly, Mr. Hart argues that the Lakewood Police Officers lacked probable cause to arrest him, because they somehow failed to adequately investigate the circumstances. This argument also fails. Police officers do not owe Mr. Hart any duty to investigate, and probable cause does not require that officers discover all relevant information before effecting an arrest. *Laymon v. Wash. State Dept. of Natural Res.*, 99 Wn. App. 518, 530, 994 P.2d 232 (2000); *Donaldson v. City of Seattle*, 65 Wn. App. 661, 675, 831 P.2d 1098 (1992). Probable cause only demands that officers come forward with reasonably trustworthy information sufficient to warrant a person of reasonable caution to believe that the offenses have been committed. *State*, 130 Wn.2d at 724.

No reasonable fact finder could consider the evidence collected by the Lakewood Police Department and find a want of probable cause. The City had probable cause to arrest and to prosecute Mr. Hart for third degree theft and malicious mischief, and the Court should therefore affirm the trial court's dismissal of Mr. Hart's malicious prosecution claim for want of probable cause.

3. There Is No Evidence of Fraud, Perjury, or Other Corrupt Means.

Mr. Hart cites *Brin v. Stutzman*, 89 Wn. App. 809, 822, 951 P.2d 291 (1998) for the proposition that, a conviction does not conclusively established the existence of probable cause for the purposes of a malicious prosecution claim if the conviction was obtained by fraud, perjury or other corrupt means. The rule originates comes from the *Hanson* decision, in which the Washington Supreme Court found a conviction to be strong evidence of probable cause to prosecute. *Brin*, 89 Wn. App. at 822; *Hanson*, 121 Wn.2d at 559-60. The Restatement (Second) of Torts also extends the rule to civil proceedings: "a decision by a competent tribunal in favor of the person initiating civil proceedings is conclusive evidence of probable cause." Restatement (Second) of Torts, § 675, cmt. b., see also Restatement (Second) of Tort § 677(1).

While Mr. Hart accurately cites the law, it is inapplicable in this case. The City need not rely upon any prior conviction to establish

probable cause. The trial court conclusively found probable cause on July 3, 2009, a decision that now collaterally estops Mr. Hart from re-litigating the issue here.

Moreover, Mr. Hart has not presented any evidence that the City of Lakewood engaged in any fraud, perjury or other corrupt means. Not only did the criminal trial court find probable cause, but Mr. Hart did not conduct any discovery on this issue. He relies solely on his own unsupported speculation about why they City chose to pursue the charges against him. Mr. Hart must do more than rely on his own unsupported allegations. CR 56(c). Further, that the prosecutor did not ultimately obtain a conviction on either charge is immaterial. Indeed, such a rule would subject a City to malicious prosecution claims any time a criminal case results in anything short of a conviction.

Additionally, fraud requires proof of (1) the representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff. *Adams v. King County*, 164 Wn.2d 640, 662, 192 P.3d 891 (2008).

The City of Lakewood owns and maintains the park where the gate was located, and despite the fact that the City no longer possesses

documentation proving possession of the gate, it is reasonable to assume the gate is City property. Indeed, when police questioned Mr. Hart about the gate, he admitted that he knew the gate was City property and planned to return it. Mr. Hart also bragged that he had broken the gate and taken a portion of it. No one speaking for the City ever made knowingly false statements about the gate, nor is there evidence that anyone relied upon any false statements to their detriment. Certainly, in the course of his criminal proceedings, Mr. Hart moved the court to dismiss the claims against him based upon an insufficiency of evidence, and the court denied his motion. There is no fraud or corruption here.

Even if this Court finds that "fraud, perjury or other corrupt means" can negate a finding of probable cause and support a malicious prosecution claim, Mr. Hart did not present any such evidence at summary judgment. He cannot simply rely upon the fact that a jury ultimately found him not guilty. The Court should affirm the trial court's dismissal of Mr. Hart's malicious prosecution claim for want of probable cause.

4. Mr. Hart Cannot Prove Malice.

In order to establish a malicious prosecution claim, Mr. Hart must not only prove want of probable cause. He must also prove malice. *Hanson*, 121 Wn.2d at 558. Whether the City of Lakewood actually owned the gate Mr. Hart took from the park is immaterial. The question here is whether the City maliciously instituted or continued prosecution

against Mr. Hart for theft or malicious prosecution.

Independent witnesses told the Lakewood Police Department that Mr. Hart damaged and took a gate from City property, Mr. Hart admitted to taking the gate, and the City had probable cause to prosecute Mr. Hart for third degree theft and malicious mischief. Mr. Hart alleges that the City instituted or continued this prosecution with malice, but he has no personal knowledge or evidence bearing on the City's prosecutorial decisions. That the City no longer possesses documentation to prove ownership of the gate is insufficient to establish malice. Government agencies are not required to endlessly maintain documentation of all purchases. And even without proof of ownership, the City reasonably asserted ownership of a gate located on City property. There is simply no evidence of malice, and the Court should affirm the trial court's dismissal of Mr. Hart's malicious prosecution claim accordingly.

D. The Trial Court Properly Dismissed Mr. Hart's Outrage Claim.

To recover for intentional infliction of emotional distress (outrage), a plaintiff prove: "(1) extreme and outrageous conduct; (2) intentional or reckless inflection of emotional distress; and (3) actual severe emotional distress on the part of the plaintiff." *Snyder v. Medical Service Corporation of Eastern Washington*, 145 Wn.2d 233, 242, 35 P.3d 1158 (2001) (internal citations omitted).

Liability exists when the conduct in question is "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 community." *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975); *Restatement of Torts*, § 46 (1965). Whether the conduct complained of is sufficiently extreme to result in liability is a preliminary question for the Court before a claim of outrage can be allowed to go to the jury. *Pettis v. State*, 98 Wn. App. 553, 563, 990 P.2d 453 (1999).

In determining whether the conduct was sufficiently extreme, a court must consider the following factors:

> (a) the position occupied by the defendant; (b) whether plaintiff was peculiarly susceptible to emotional distress, and if defendant knew this fact; (c) whether the defendant's conduct may have been privileged under the circumstances; (d) the degree of emotional distress caused by a party must be severe as opposed to constituting mere annoyance, inconvenience or the embarrassment which normally occur in a confrontation of the parties; and (e) the actor must be aware that there is a high probability that his conduct will cause severe emotional distress and he must proceed in a conscious disregard of it.

Birklid v. The Boeing Co., 127 Wn.2d 853, 867, 904 P.2d 278 (1995).

Furthermore, even "an intent which is tortuous or even criminal, or ... intended to inflict emotional distress, or even ... characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort" is insufficient to prove outrageous and

extreme conduct. *Birklid*, 127 Wn.2d at 867, citing *Restatement (Second) of Torts*, § 46 cmt. d. Mr. Hart must meet an extremely high burden to establish a *prima facie* case of outrage. Mr. Hart cannot meet this burden as a matter of law. He cannot establish any "extreme and outrageous" behavior, and he cannot establish any inappropriate "intentional or reckless" conduct.

The City made its prosecutorial decisions based upon reasonable reliable information collected by the Lakewood Police Department, and the trial court established a finding of probable cause as a matter of law. Prosecuting an individual after establishing probable cause for the prosecution cannot possibly constitute "outrageous" conduct. Moreover, looking to the *Birklid* factors, Mr. Hart was subjected to the type of emotional distress reasonably expected from any criminal prosecution. The City was not aware of any exceptionally high risk of emotional distress, nor did the City proceed in any conscious disregard of some heightened risk. More importantly, prosecutors enjoy absolute immunity for initiating prosecutions and presenting their case. Mr. Hart may have been ultimately acquitted of the charges, but so too are other individuals prosecuted through our criminal justice system. Prosecutors cannot be held to an impossible standard of 100% conviction rates.

Finally, there is absolutely no evidence that the City made its decisions for any improper or malicious motive. For all of these reasons,

the Court should affirm the trial court's dismissal of Mr. Hart's outrage claim as a matter of law.

IV. CONCLUSION

The Lakewood Police Department collected reasonably trustworthy information upon which to believe that plaintiff Gregory Hart committed third degree theft and third degree malicious mischief. Independent witnesses informed Lakewood police officers that Mr. Hart damaged a gate located on City property and took it home. The City of Lakewood charged Mr. Hart, and on July 3, 2009, the City of Lakewood Municipal Court found probable cause to support the theft and malicious mischief charges as a matter of law. The City is immune from any allegations based upon the prosecutor's conduct, and Mr. Hart is collaterally estopped from re-litigating the issue of probable cause.

The Court should now affirm the trial court's dismissal of Mr. Hart's malicious prosecution claim, because probable cause has already been established and because there is no evidence of malice. The Court should also affirm the trial court's dismissal of Mr. Hart's outrage claim, because the City of Lakewood's decisions to initiate and continue with Mr. Hart's prosecution were not "outrageous."

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Respectfully submitted this 15th day of October, 2012.

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COURT OF APPEALS
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GREGORY R. HART, Respondent/Cross-Appellant, v. CITY OF LAKEWOOD, a municipal corporation; CITY OF LAKEWOOD POLICE DEPARTMENT, a municipal corporation; and CITY OF LAKEWOOD PARKS DEPARTMENT, a municipal corporation, Appellants/Cross-Respondents.	No. 43304-4-II Superior Court No. 11-2-09538-5 DECLARATION OF SERVICE

I, LAURA M. PHILLIPS, hereby declare:

That I am a citizen of the United States and the State of Washington, living and residing in King County in said State; that I am over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness therein; that I caused a copy of the RESPONSE BRIEF OF APPELLANT CITY OF LAKEWOOD to be delivered on October 15, 2012 to the following in the manner described:

ORIGINAL

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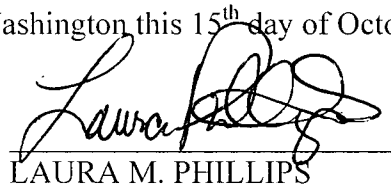
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 15th day of October, 2012.



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