22CA0625 Montgomery v Walmart 06-01-2023

COLORADO COURT OF APPEALS

Court of Appeals No. 22CA0625
Arapahoe County District Court Nos. 20CV148, 20CV184, 20CV209, 20CV217, 21CV1 & 21CV235
Honorable Peter F. Michaelson, Judge

William Montgomery,

Plaintiff-Appellant,

v.

Walmart, Inc. and Alberto Carlos Cordero Duarte,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division I
Opinion by JUDGE GROVE
Dailey and Gomez, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced June 1, 2023

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¶ 1 Plaintiff, William Montgomery, appeals the district court's judgment in favor of defendants, Walmart Stores, Inc., and Albert Carlos Cordero Duarte (collectively, Walmart). We affirm.

I. Background

¶ 2 This consolidated case is one of several in which Montgomery has gone to Denver-area Walmart stores to, as the district court put it, "sting[]" them "so he can sue them for false arrest." The cases generally follow the same pattern: Montgomery buys items from the store (or enters the store with items that he has previously purchased), declines a bag "for environmental reasons," and then walks out of the store carrying the items in his hand and without a visible receipt. If he is stopped and asked for his receipt, he refuses to provide it until after he is detained, and in some cases arrested.

¶ 3 After some of these encounters (including the incidents underlying this appeal), Montgomery has sued Walmart and/or its employees for, among other things, false imprisonment, malicious prosecution, and defamation. *See Montgomery v. Walmart Stores, Inc.*, (Colo. App. No. 21CA0359, May 12, 2022) (not published pursuant to C.A.R. 35(e)) (*Montgomery I*).

¶ 4 Montgomery has also filed many federal civil rights lawsuits against law enforcement officers who have taken action against him on suspicion of shoplifting. *See, e.g.*, *Montgomery v. Calvano*, No. 21-1134, 2022 WL 1132212 (10th Cir. Apr. 18, 2022) (unpublished opinion); *Montgomery v. Cohn*, Civ. Case No. 22-cv-000111-PAB-MEH, 2023 WL 2366732 (D. Colo. Mar. 3, 2023) (unpublished order); *Montgomery v. Holweger*, 529 F. Supp. 3d 1212, (D. Colo. 2021); *Montgomery v. Cruz*, Civ. A. No. 20-cv-03189-PAB-MEH, 2023 WL 1437878 (D. Colo. Feb. 1, 2023) (unpublished order); *Montgomery v. Lore*, Civ. Case No. 21-cv-02553-PAB-MEH, 2023 WL 2423325 (D. Colo. March 9, 2023) (unpublished order); *Montgomery v. Anderson*, Civ. A. No. 21-cv-03191, PAB-MEH, 2022 WL 3584895 (D. Colo. Aug. 22, 2022) (unpublished order).

¶ 5 Based on our review of the record and the district court's summary judgment order, the consolidated cases before us in this appeal are generally similar to those cited above. In each incident, all of which Montgomery audio recorded, store employees stopped Montgomery when exiting a Walmart while carrying merchandise in his hands or on his person (but not in a bag) and asked for his receipt. Even though he had receipts for his purchases,

Montgomery refused to provide them. Walmart's loss-prevention officers then called the police, who responded, and in some cases, detained and/or arrested Montgomery on suspicion of shoplifting. Only then did Montgomery produce receipts demonstrating that he had purchased, rather than stolen, the items he was carrying.

¶ 6 Montgomery sued Walmart in six different cases. Only one complaint is in the record before us (and even that one has virtually no detail), but in a case management order consolidating five of the cases, the district court categorized each case as a separate "claim for relief." The case management order listed the "claims for relief" as follows:

- Claim 1: 2020CV148: False imprisonment;
- Claim 2: 2020CV184: Malicious prosecution;
- Claim 3: 2020CV209: False imprisonment, assault, and defamation;
- Claim 4: 2020CV217: Malicious prosecution; and
- Claim 5: 2021CV1: False imprisonment, defamation, false arrest, and malicious prosecution.

¶ 7 A sixth case (Claim 6: 2021CV235) alleging false imprisonment and slander was added at some point after the cases were

consolidated. The complaint for Claim 6 does not appear in the record, but the parties addressed it in their summary judgment briefing.

¶ 8 After the cases were consolidated, and as relevant here, Walmart moved to dismiss Claim 3.[1] The court granted the motion in a written order, concluding that it was barred by the statute of limitations. Montgomery does not challenge that order on appeal, so we do not consider it further.

¶ 9 Both parties later moved for summary judgment on the remaining Claims. In a detailed written order, the court granted Walmart's motion and denied Montgomery's. As relevant here, the court ruled as follows:

- Montgomery abandoned the cause of action for false arrest in Claim 5.
- Walmart was entitled to summary judgment on the false imprisonment causes of action in Claims 1, 5, and 6

[1] Walmart's motion to dismiss Claim 3 is not in the record before us. Nor is Montgomery's response, if any was filed. But the court's order granting Walmart's motion to dismiss Claim 3 with prejudice is part of the appellate record.

because the undisputed facts showed that its employees "would have reasonable grounds . . . to find probable cause existed to detain and question Montgomery in order to ascertain whether he had committed a theft by, in a reasonable manner, asking to see his receipts."

- Walmart was entitled to summary judgment on the malicious prosecution causes of action in Claims 2, 4, and 6 because he failed to allege the elements that were necessary for him to prevail.[2]
- Walmart was entitled to summary judgment on Montgomery's defamation causes of action in Claims 5 and 6 because the employees' statements were protected by qualified privilege,[3] and "Montgomery has

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[2] We note that the court's consolidation order indicated that Montgomery's Claim 5 also included a malicious prosecution cause of action. Because the complaint for Claim 5 is not in the record before us, we cannot confirm that this is accurate. However, assuming that Claim 5 included a malicious prosecution cause of action, the court's summary judgment order did not specifically rule on it. On appeal, however, Montgomery does not address this omission or otherwise suggest that he was entitled to relief on that specific cause of action. We therefore consider it abandoned.

[3] The district court erroneously referred to the qualified *privilege* associated with statements involving matters of public concern as

shown no evidence to overcome the presumption that there was an absence of malice."

II. Standard of Review

¶ 10 We review de novo a district court's order granting summary judgment. *Westin Operator, LLC v. Groh*, 2015 CO 25, ¶ 19.

¶ 11 Summary judgment is appropriate when the pleadings and supporting documents fail to establish a genuine issue of material fact, and there is a clear showing that the moving party is entitled to summary judgment as a matter of law. *Salas v. Grancare, Inc.*, 22 P.3d 568, 571 (Colo. App. 2001). The moving party bears the burden of showing the absence of a genuine issue of fact. *Id.* The nonmoving party is entitled to the benefit of all favorable inferences that may be drawn from the undisputed facts. *Martini v. Smith*, 42 P.3d 629, 632 (Colo. 2002). If the moving party meets its initial burden, the burden shifts to the opposing party to show that a genuine dispute of material fact exists. *Rome v. Mandel*, 2016 COA 192M, ¶ 18. "[T]he nonmoving party may not rest on mere

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qualified *immunity*. Walmart repeats this mistake in its answer brief.

allegations or demands in its pleadings but must provide specific facts demonstrating a genuine issue for trial." *Rocky Mountain Expl., Inc. v. Davis Graham & Stubbs LLP*, 2018 CO 54, ¶ 27.

III. False Imprisonment

¶ 12 The district court rejected Montgomery's false imprisonment causes of action (which appeared in Claims 1, 5, and 6) on two distinct grounds: (1) Montgomery was not confined because he "knew that he could escape without causing an unreasonable risk of harm to him[self] . . . by merely presenting his receipt to Walmart employees"; and (2) in each case, "Montgomery entered a Walmart store with the intent to and then actually acted in a manner intended to provoke Walmart employees into believing he was concealing property of the store," thus triggering the "shopkeepers' privilege" created by section 18-4-407, C.R.S. 2022. We agree with both facets of the court's reasoning.

¶ 13 First, when faced with this precise question in *Montgomery I*, the division affirmed the district court's conclusion that "showing the receipt was a reasonable means of leaving the store, and Montgomery was aware of that fact." *Montgomery I*, slip op. at 5. As support for this proposition, the *Montgomery I* division relied on

a comment to section 36(2) of the Restatement (Second) of Torts, which says that "it is unreasonable for one whom the actor intends to imprison to refuse to utilize a means of escape of which he is himself aware merely because it entails a slight inconvenience." Restatement (Second) of Torts § 36 cmt. a (Am. L. Inst. 1965).

¶ 14 Montgomery disagrees with the division's reliance on this comment, arguing that it applies to "PRE-confinement situations only." Montgomery does not define "pre-confinement," and it is not entirely clear from the context what he intends it to mean. In any event, the illustrations in the Restatement support the *Montgomery I* division's interpretation of the comment. For example, the first illustration in comment a provides as follows: "A locks B, an athletic young man, in a room with an open window at a height of four feet from the floor and from the ground outside. A has not confined B." *Id.* If Montgomery's interpretation of the Restatement were correct, the false imprisonment described in this illustration would be complete, at the latest, when A locks B in the room. But the comment makes clear that, because B has a "means of escape of which he is himself aware" that can be utilized with only "a slight inconvenience," he has not been confined. *Id.*

¶ 15 As the *Montgomery I* division held, the circumstances giving rise to Montgomery's false imprisonment cause of action are directly analogous to the illustrations in the Restatement. In particular, just as the "athletic young man" could escape a locked room with a minimum of inconvenience by exiting through the window, Montgomery could have left the store with his purchased goods in hand simply by showing the receipt that he had concealed on his person. Indeed, as the district court observed, the undisputed facts show that Montgomery was aware that, in each case, he could have resolved the situation merely by showing his receipts. Specifically, the court concluded that the undisputed facts showed that "Montgomery knew that he could escape without causing an unreasonable risk of harm to him[self] . . . or to property by merely presenting his receipt to Walmart employees, and, therefore, his freedom of movement was not actually limited."

¶ 16 Like the *Montgomery I* division, we recognize that reasonableness is a matter usually left to the jury. *See, e.g.*, *Deines v. Atlas Energy Servs., LLC*, 2021 COA 24, ¶ 10 (noting that issues of negligence and proximate cause — both of which involve determinations of reasonableness — "are matters generally to be

resolved by the jury"). However, in the clearest of cases where the "facts are undisputed and reasonable minds can draw but one inference from them," the issue may be resolved as a matter of law. *Gibbons v. Ludlow*, 2013 CO 49, ¶ 13 (quoting *Allen v. Martin*, 203 P.3d 546, 566 (Colo. App. 2008)).

¶ 17 We agree with the district court in this case — and with the *Montgomery I* division's analysis based on substantially similar facts — that no reasonable juror could conclude that being asked to show proof of purchase before leaving a store would constitute confinement for purposes of false imprisonment. As a matter of law, then, for those interactions in which Montgomery was merely asked for his receipt at the exit, he had a reasonable means by which he could exit each of the stores. He simply chose not to avail himself of it.

¶ 18 Second, even if Montgomery was confined without a reasonable means of escape, we agree with the district court the

undisputed facts implicate the "shopkeepers' privilege" established by section 18-4-407.[4]

¶ 19 Section 18-4-407, which is titled "Questioning of person suspected of theft without liability," exempts store employees from civil or criminal penalties if they detain and question suspected shoplifters in a reasonable manner. As relevant here, the statute provides as follows:

> If any person . . . conceals upon his person or otherwise carries away any unpurchased goods, wares, or merchandise held or owned by any store or mercantile establishment, the merchant or any employee thereof or any peace officer, acting in good faith and upon probable cause based upon reasonable grounds therefor, may detain and question

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[4] In *Montgomery I*, the division observed that "Montgomery was not taken to a secluded room, was not forcibly moved within the store, and was not arrested." *Montgomery v. Walmart Stores, Inc.*, slip op. at 7 (Colo. App. No. 21CA0359, May 12, 2022) (not published pursuant to C.A.R. 35(e)). In at least two of the situations here (Claims 4 and 5), Montgomery was escorted to the loss prevention office by a Walmart employee and subsequently handcuffed by responding officers. He later showed his receipts and was released. We are not convinced that escorting Montgomery to the loss prevention office makes any substantive difference to the question whether he had a "means of escape of which he is himself aware," Restatement (Second) of Torts § 36 cmt. a (Am. L. Inst. 1965) — namely, showing his receipt. But to the extent that these circumstances do undermine the applicability of the Restatement, the shopkeepers' privilege applies.

> such person, in a reasonable manner for the purpose of ascertaining whether the person is guilty of theft. Such questioning of a person by a merchant, merchant's employee, or peace or police officer does not render the merchant, merchant's employee, or peace officer civilly or criminally liable for slander, false arrest, false imprisonment, malicious prosecution, or unlawful detention.

¶ 20 In *J.S. Dillon & Sons Stores Co. v. Carrington*, 169 Colo. 242, 247-48, 455 P.2d 201, 203 (1969), our supreme court noted that the "intent of the statute" is "to afford under certain circumstances a degree of protection to the person who stops and questions another for the purpose of ascertaining whether such other person is guilty of shoplifting but who it later develops is actually not guilty of any shoplifting." Accordingly, the statute

> affords under certain circumstances a degree of protection from and against claims based on slander, false arrest, false imprisonment, malicious prosecution and unlawful detention to one who acting in good faith and upon probable cause based upon reasonable grounds questions another for the purpose of ascertaining whether or not the person thus questioned is guilty of shoplifting.

Id. at 248, 455 P.2d at 203.

¶ 21 In *Carrington*, the supreme court observed that "the evidence on this particular issue [i.e., whether the store employees were

justified in questioning the plaintiff about his purchases] was not in dispute," and thus it was able to "conclude that as a matter of law the defendant's agents acted in good faith and upon probable cause based upon reasonable grounds."[5] *Id.* at 248, 455 P.2d at 204.

¶ 22 The undisputed facts here lead us to the same conclusion. As the district court noted, "Montgomery sought to create circumstances which would result in Walmart employees reasonably believing he was committing a crime in their presence." That conclusion is confirmed not only by Montgomery's description of his actions, but also by own statements made to store employees and responding officers — which included his admissions that he

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[5] To be sure, the court in *J.S. Dillon & Sons Stores Co. v. Carrington*, 169 Colo. 242, 244, 455 P.2d 201, 202 (1969), did conclude that there were disputed facts concerning the plaintiff's other tort claims, which arose from his allegations that he was "forcibly and violently seized and assaulted" and "subjected to great indignities, humiliation and disgrace," both of which led to him to suffer complications from a previous surgery. As best we can tell from the record before us, Montgomery did not pursue any causes of action other than false imprisonment, malicious prosecution, and defamation. In contrast to the claims that were remanded for further consideration in *Carrington*, the facts underlying those claims that might implicate the shopkeepers' privilege are undisputed, and thus amenable to resolution as a matter of law.

was conducting a "sting," and that "he came to the store and planned on suing."

¶ 23 Accordingly, even if Montgomery was "confined" by the store employees, those employees are immune from liability for false imprisonment under section 18-4-407. The district court therefore properly granted summary judgment on these causes of action in Walmart's favor.

IV. Malicious Prosecution

¶ 24 Montgomery's Claims 2, 4, and 5 sought relief for malicious prosecution.[6] We agree with the district court's conclusion that Walmart was entitled to summary judgment on these claims.

¶ 25 At the threshold, without the complaint or any relevant citations to the record, we are unable to discern the basis for malicious prosecution as asserted in Claim 5. We therefore do not

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[6] The court's summary judgment order states that Claims 2, 4, and 6 include malicious prosecution claims, but the order consolidating Montgomery's cases reflects that cause of action only in Claims 2, 4, and 5. The complaint underlying Claim 6 is not in the record, but Walmart's summary judgment motion states that it asserted claims of false imprisonment and defamation. Consistent with this description, Montgomery's description of "facts unique to Claims #1 and #6" in his opening brief does not describe any acts that could give rise to a malicious prosecution cause of action.

consider it further. *See Cikraji v. Snowberger*, 2015 COA 66, ¶ 10 ("[W]e will not comb the record for facts supporting plaintiff's arguments that were not cited in his brief.").[7]

¶ 26 A claim of malicious prosecution requires the plaintiff to establish the following factors:

> (1) A criminal case was brought against the plaintiff.
>
> (2) The criminal case was brought as a result of oral or written statements made by the defendant.
>
> (3) The criminal case ended in favor of the plaintiff.
>
> (4) The defendant's statements against the plaintiff were made without probable cause, or, if the complaint was filed with probable cause, the defendant continued to prosecute the criminal action after he no longer had probable cause to believe the plaintiff guilty.

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[7] To the extent that the malicious prosecution cause of action in Claim 5 might have arisen from a theft charge that was later dropped, Walmart would be immune from civil liability under the shopkeepers' privilege. *See* § 18-4-407, C.R.S. 2022. However, we do not apply the shopkeepers' privilege analysis to the malicious prosecution cause of action arising from the harassment charges underlying Claims 2 and 4. Rather, those claims fail because Montgomery failed to establish at least two of the elements of a malicious prosecution claim.

(5) The defendant's statements against the plaintiff were motivated by malice toward the plaintiff.

(6) As a result of the criminal case, the plaintiff suffered damages.

CJI-Civ. 17:1 (2022).

¶ 27 Claims 2 and 4 were based on a harassment charge for using threats and obscenities against a Walmart employee. The charge was dismissed by the prosecution without any decision having been rendered on the merits, but the district court concluded that it nonetheless was based on probable cause irrespective of whether Montgomery did in fact threaten the Walmart employee. The court also concluded that summary judgment was warranted because "there was no evidence that [the harassment] charge was pursued by [the Walmart employee] nor that the statements against Montgomery were supported by malice."

¶ 28 We agree with all of the district court's rationales:

- Montgomery did not establish that the store employee's statements against Montgomery were made without probable cause, nor did he provide any evidence that any of the defendants' statements against him were motivated

by malice. *See Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 858 (Colo. App. 2007) ("[W]hen a response to a motion for summary judgment . . . states conclusions on ultimate issues without including facts that tend to prove or disprove the allegations made in the motion for summary judgment, it is insufficient to give rise to genuine issues of fact.").

- Montgomery presented no evidence that would support a conclusion that the harassment case was dismissed on the merits or that it was terminated under circumstances that fairly imply his innocence.

¶ 29 Accordingly, Montgomery failed to establish at least two of the elements of malicious prosecution in Claims 2 and 4. Summary judgment was therefore proper.

V. Defamation

¶ 30 Finally, Montgomery contends that the court erroneously entered summary judgment for Walmart on his defamation claims, which appeared in Claims 5 and 6. We discern no error.

¶ 31 At the outset, as we have already noted, the shopkeepers' privilege covers defamation. Thus, to the extent that the allegations

of defamation are based on statements made by Walmart employees when they confronted him and asked to see his receipts, Walmart is arguably immune from civil liability because, as we have already concluded, they had probable cause for doing so under section 18-4-407 and, as a matter of law, none of the statements that they made — all of which were focused on whether Montgomery had in fact shoplifted — exceeded the scope of that privilege.

¶ 32 Even if the statements were not covered by shopkeepers' privilege, however, Montgomery's claims of defamation would still fail. Because the statements pertained to potential criminal activity, the statements were matters of public concern. *See Lawson v. Stow*, 2014 COA 26, ¶ 21. And "[w]here a statement relates to a matter of public concern, the speaker's communication is subject to a qualified privilege." *Id.* at ¶ 18. Under this standard, (1) the defamed party must prove the falsity of the statement by clear and convincing evidence, rather than by a mere preponderance; (2) the defamed party must prove that the speaker published the statement with actual malice — that is, with actual knowledge that the statement was false or with reckless disregard for whether the statement was true; and (3) the defamed party must

establish actual damages to maintain the action, even if the statement is defamatory per se. *Id.*

¶ 33 As discussed above, there is no evidence in the record that the Walmart employees were speaking with actual malice when they referred to Montgomery as a shoplifter, told him they needed their products back, or expressed concerns that Montgomery was on drugs. To the contrary, Montgomery deliberately led store employees to believe that he was shoplifting with the express purpose of filing suit for, among other things, defamation and false imprisonment. Based on the undisputed facts in the record, Montgomery is therefore unable to overcome the presumption that the employees' statements were not made with actual knowledge that they were false or with reckless disregard for whether the statements were true. The district court thus properly entered summary judgment on this cause of action.

VI. Conclusion

¶ 34 The judgment is affirmed.

JUDGE DAILEY and JUDGE GOMEZ concur.