

IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY
21ST JUDICIAL DISTRICT AT FRANKLIN

FILED 3-13 2015
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DEBBIE McMILLIAN BARRETT

RONNIE GORDON,

Plaintiff,

v.

TRACTOR SUPPLY COMPANY,

Defendants.

Case No. 2010-246

JURY DEMANDED

MEMORANDUM OPINION AND ORDER

INTRODUCTION

This matter is before the Court on Tennessee Tractor Supply Company's ("TSC") Motion for Summary Judgment, heard by the Court on January 23, 2015. As alleged in his Third Amended Complaint ("TAC"), filed November 26, 2014, plaintiff Ronnie Gordon seeks to recover losses he allegedly sustained arising out of or related to an incident on May 15, 2009, at the Lenoir City TSC store. Mr. Gordon has asserted claims against TSC for (i) assault and battery, (ii) false imprisonment, (iii) malicious prosecution, and (iv) negligent supervision. TSC has moved for summary judgment in its favor on all claims asserted by Mr. Gordon. For the reasons set out in this memorandum, the Court finds that partial summary disposition of this case is appropriate.

FACTUAL BACKGROUND

On May 14, 2009, an African-American male, accompanied by an accomplice who was also African-American, passed a bad check, in the amount of \$8,762.84¹, for the purchase of a mower and trailer at the Lenoir City TSC store.² Neither the person who actually passed the check, nor the accomplice who remained in the truck used to transport the mower and trailer

¹ The fraudulent check was purportedly drawn on the account of Griffith's Plumbing Contractors, LLC at First Tennessee Bank. The check was made payable to "TSC" and was signed by "Thomas Griffith." Stallings Dep. 120:8-121:5.

² It is undisputed by the parties that the man who passed the check on May 14, 2009, was not Ronnie Gordon.

away from the store, were known to any of the store employees. TSC employees did not know the \$8,762.84 check was worthless until the following morning on May 15, 2009, when First Tennessee Bank, the bank on which the check was purportedly drawn, declared the check to be fraudulent.³

On the afternoon of May 15, 2009, after TSC store employees learned the \$8,762.84 check was fraudulent, Mr. Gordon, an African American man, visited the same store and inquired about the price of a different mower and trailer. Tosha Nicole Scott, a store employee who had been present the day before, identified Mr. Gordon as the person with the man who passed the bad check. Other store employees also claimed to recognize Mr. Gordon from security video recordings that they had reviewed earlier that day, and notified the district manager, Jim Sewell, who happened to be present in the Lenoir City TSC store on May 15, 2009. Mr. Sewell then directed another employee to contact the police, and attempted to stop Mr. Gordon from leaving the store. While doing so, Mr. Sewell momentarily blocked Mr. Gordon's exit from the store, placed his hands on Mr. Gordon and unsuccessfully tried to detain Mr. Gordon inside the store premises.

Mr. Gordon walked out of the store and into the parking lot, where he was followed by Mr. Sewell and other TSC employees, all of whom attempted, unsuccessfully, to detain Mr. Gordon. The efforts to detain Mr. Gordon included attempting to prevent him from getting inside his pickup truck, and holding onto the truck door to prevent Mr. Gordon from closing it. These efforts were unsuccessful and Mr. Gordon drove away from the store before the police arrived.

When the Lenoir City police arrived on the scene, Mr. Sewell and other employees made statements to the police related to the incident. The record in this case contains the written statements given to the police by TSC employees, Mr. Sewell and Lisa Scharff, describing the

³ TSC's employee, Paul Stallings, testified that he was instructed by his store manager, Lisa Scharff, to confirm with First Tennessee Bank, whether the check presented on May 14, 2009, for the purchase of the mower and trailer, was valid. Stallings Dep. 124:15-126:20.

suspect of the May 15, 2009 incident. It also includes a written statement by TSC employee, Austin Neuschafer, describing the May 15, 2009 suspect's truck. Those statements are as follows⁴:

Black Male, 40±, Short, 5'9", Thick glasses driving white P/U Truck, Carolina plates.
hit me when I asked him to stop. He ran from store, I followed to get license plate, he threatened to shoot me, pulled a box cutter and said I will cut you mother f---
....
He left at a high rate of speed.

Jim Sewell, Statement to Lenoir City Police, May 15, 2009.

Black male 5, '8" or 5, "9" approximately 45 years old. Gentleman from last night that stole a UTV + trailer[sic] came back today to buy a trailer[sic] and mower. Guy tried to leave and we followed him to get his license plate. The guy hit my District Manager in the arm and tried to jump in the truck. He told my district manager he would cut him. The guy had a box knife. He then stated he would shoot all of us.

Lisa Scharff, Statement to Lenoir City Police, May 15, 2009.

92 – up ford F- series Pickup, extended cab very-Dark tint rear window.
Likely a diesel – Black smoke exhaust.
colorful Arizona I Believe it said plate.
Rear Bumper heavily Bent in middle – chrome had some ground clearance.
All – White.
I saw the Above described vehicle exiting thru the entrance lane beside Autozone and left in a mad rush and Drove fast and carelessly in the Direction near I-75 intersection

Austin Neuschafer, Statement to Lenoir City Police, May 15, 2009.

These are the only statements given by TSC employees to the police or other prosecutorial authorities in connection with this matter.

An officer with the Tennessee Highway Patrol arrested Mr. Gordon approximately twenty (20) minutes after leaving the TSC store parking lot. The Loudon County Grand Jury subsequently indicted Mr. Gordon with criminal responsibility for the facilitation of a felony⁵

⁴ These statements are provided verbatim.

⁵ Count 2 of the indictment alleges that Mr. Gordon "knowing that another intended to commit a felony and did knowingly furnish substantial assistance in the commission of the felony, to-wit: forgery and theft, after another person had committed or attempted to commit the crime of forgery and theft."

and aggravated assault. The State of Tennessee later dismissed the facilitation of a felony charge,⁶ and Mr. Gordon was acquitted of the aggravated assault charge.

UNDISPUTED MATERIAL FACTS

1. The parties have stipulated that the Lenoir City TSC store's surveillance videos for May 14, 2009, and May 15, 2009, are an accurate depiction of the relevant events on those two dates.
2. On May 14, 2009, a man wearing a blue baseball cap passed a fraudulent check in order to steal a Trail Wagon Utility Vehicle (the "UTV"), and a trailer at the Lenoir City TCS store. Sewell Dep., 13:6-10, Sept. 18, 2013.
3. The surveillance video for May 14, 2009, at timestamp 16:45:19.55, shows a passenger wearing a black shirt (the "Second Man") at the side of the truck. The truck was driven to the store by the person in the blue baseball cap who passed the bad check. Further, at timestamp 16:47, the video shows the two men on the driver's side of the truck, shortly before the truck pulls out of the parking lot with the trailer and UTV. Consequently, two men were involved in perpetrating the May 14, 2009 theft.
4. TSC's employee, Tosha Scott, saw the Second Man seated in the driver's seat while she assisted with loading the UTV and trailer onto the truck. On May 15, 2009, Ms. Scott identified Mr. Gordon to Mr. Sewell as the Second Man. Ms. Scott's identification of Mr. Gordon was incorrect inasmuch as he was elsewhere on May 14, 2009.⁷
5. The district manager, Mr. Sewell, was away from the Lenoir City store on May 14, 2009, and therefore, had no personal knowledge of the events that occurred that day. He was informed on May 15, 2009, that a fraudulent check was used to purchase equipment the prior day. Sewell Dep. 15:4-20.

⁶ This charge was dropped the morning of the start of the criminal trial. There is nothing in the record to determine why this charge was dismissed although Plaintiff's counsel stated at the hearing on this motion that a necessary State witness failed to appear.

⁷ "On May 14, 2009, Mr. Gordon was at my shop all day until approximately 3:00pm." Mike Dennison Aff. Dec. 29, 2014.

6. On May 15, 2009, Mr. Gordon came into the Lenoir City TSC store. Soon after Mr. Gordon entered the store, a store employee told Mr. Sewell that Mr. Gordon was one of the men involved in passing the bad check on May 14, 2009. Sewell Dep. 20:1-13.
7. Mr. Sewell then went to the front of the store to investigate, and while doing so instructed another employee to call the police.⁸ Sewell Dep. 22:8-16.
8. When he arrived at the front of the store, Mr. Sewell attempted to prevent Mr. Gordon from leaving. The surveillance video for May 15, 2009, at timestamp 14:13, shows Mr. Sewell trying, but failing, to stop Mr. Gordon by using a degree of physical force that included placing his hands on Mr. Gordon's chest as if to block or impede him.
9. After Mr. Gordon left the store to get in his truck, Mr. Sewell pursued him into the parking lot in an attempt to prevent him from leaving. For purposes of this motion, Mr. Gordon's description of the events at the store, as set out in his deposition testimony beginning at page 140:1 to 160:25 are taken as true.
10. Mr. Gordon was able to get in his truck and drive away. However, a short time later, he was arrested by an officer of the Tennessee Highway Patrol.
11. Shortly after Mr. Gordon left the store, the Lenoir City police arrived to conduct an investigation and interview witnesses.
12. For the purposes of this motion, the parties agree to consider as true, Mr. Gordon's allegation that the statements made to the police by TSC employees contained false information. Specifically, taken as true for this motion, TSC employees incorrectly told the police that Mr. Gordon was attempting to write a check on May 15, 2009, and that Mr. Gordon shoved Mr. Sewell at the front exit of the Lenoir City TSC store.
13. The District Attorney General for Loudon County presented Mr. Gordon's case to the grand jury. The grand jury issued an indictment for aggravated assault and criminal responsibility

⁸ Neither of the parties in this case has identified exactly which employee called the police.

for facilitation of a felony. The indictment for aggravated assault alleges that Mr. Gordon “intentionally, or knowingly did cause an assault to Jim Sewell, by use or display of a deadly weapon, to-wit: a box cutter, in violation of Tennessee Code Annotated 39-13-102.”

14. The indictment for criminal responsibility for facilitation of a felony was specific to the fraudulent check incident that occurred on May 14, 2009.
15. No employees from TSC testified at the grand jury proceeding. TSC’s employees did not communicate with the Loudon County District Attorney General’s Office regarding any decisions to prosecute Mr. Gordon, to continue the prosecution of Mr. Gordon, or the decision of whether to drop any charges prior to trial. Sewell Dep. 18.
16. The charge of criminal responsibility was dismissed prior to starting trial.
17. Mr. Gordon was tried by a jury and acquitted on the aggravated assault charge.
18. As of May 15, 2009, Mr. Gordon was released on parole from a sentence in the Tennessee Department of Corrections for previous convictions of theft and assault. When he was arrested on May 15, 2009, he was operating a motor vehicle while his driver’s license was suspended. Gordon Dep. 159:19-24. One of the terms and conditions of Mr. Gordon’s parole was that he not leave Davidson County, Tennessee without obtaining prior approval from his parole officer. He had not obtained such approval before going to Lenoir City on May 15, 2009. Subsequent to his arrest, Mr. Gordon was charged with violating conditions of his parole. Following an adjudication of the parole violation charge, his parole was revoked and he was required to serve the balance of his original sentence.

DISCUSSION

A. SUMMARY JUDGMENT STANDARD:

Summary judgment is appropriate only when the moving party can demonstrate that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *see Hannon v. Alltel Publishing Co.*, 270 S.W.3d 1, 5 (Tenn. 2008); *Byrd v. Hall*,

847 S.W.2d 208, 214 (Tenn. 1993). Because the TAC was filed in 2014, it is also governed by T.C.A. section 20-16-101 (effective on claims filed on or after July 1, 2011). The statute provides that a party moving for summary judgment who does not bear the burden of proof at trial is entitled to summary judgment if it either:

(1) submits affirmative evidence that negates an essential element of the non-moving party's claim; or

(2) demonstrates to the court that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim.

T.C.A. § 20-16-101.

Section 20-16-101 was enacted "to return the summary judgment burden-shifting analytical framework to that which existed prior to *Hannan*, reinstating the 'put up or shut up' standard" that the Legislature perceived existed after *Byrd v. Hall*. *Coleman v. South Tenn. Oil, Inc.* 2012 WL 2628617 (Tenn. Ct. App. July 5, 2012). This Court's disposition of this case would be the same under either the statutory standard or the standard articulated in *Hannan*.

B. GORDON'S CLAIMS AGAINST TRACTOR SUPPLY COMPANY

TSC moved for summary judgment on several grounds. It argues that the undisputed facts in this case show that it had probable cause to attempt to detain Mr. Gordon and call the police. TSC also argues that the undisputed facts show that after making statements to the police, TSC employees were not involved any further in the arrest or indictment of Ronnie Gordon. Thus, TSC argues, the undisputed facts do not support Mr. Gordon's claims.

TSC also relies upon the statutory immunity granted to merchants by T.C.A. 40-7-116(c) which provides civil immunity to a merchant "who detains, questions or causes the arrest of any person suspected of theft ... if the merchant...(1) Has reasonable grounds to suspect that the person has committed or is attempting to commit theft; (2) Acts in a reasonable manner under the circumstances; and (3) Detains the suspected person for a reasonable period of time." The Tennessee Court of Appeals has construed the terms "reasonable grounds" used in T.C.A. 40-7-

116(c)(1) to equate to probable cause. *Brown v. SCOA Industries, Inc.* 741 S.W.2d 916 (Tenn. Ct. App. 1987). “Probable cause signifies simply that the prosecutor had a good faith belief, based on the facts and circumstances known at the time, that the accused was guilty of the offense charged.” *Id.* at 919.⁹

The task of this Court is now to apply the foregoing to the undisputed facts of this case in order to determine whether TSC is entitled to summary judgment as a matter of law.

1. Assault and Battery

A civil action for assault consists of two elements: (i) an intentional attempt or the unmistakable appearance of an intentional attempt to do harm to or to frighten, another person; and (ii) the present ability or the unmistakable present ability to do that harm or to cause that fright. *Huffman v. State*, 200 Tenn. 487, 292 S.W.2d 738 (1956); *Hughes v. Metropolitan Gov’t of Nashville*, 340 S.W.3d 352 (Tenn. 2011). An actionable civil battery is any intentional, unlawful, and harmful or offensive physical contact by one person with another person. See. *Restatement (Second) Torts*, Sec. 18.

In this case, Mr. Gordon claims that he was assaulted by TSC’s employees as he attempted to leave the store on May 15, 2009, and that during the course of this alleged assault, he suffered physical contact inflicted by TSC’s employees causing him damages in the nature of an abrasion to his shin and bumping his head.

a. Merchant Immunity

TSC counters that it enjoys immunity conferred by the Merchant Immunity Statute which provides as follows:

A merchant, a merchant’s employee or agent, or a peace officer who detains, questions or causes the arrest of any person suspected of theft shall not be

⁹ While there appears to be no Tennessee appellate decision on point, the general common law is that the determination of whether a merchant had probable cause to detain a customer suspected of theft, for purposes of a statute granting such merchant civil immunity, is measured by an objective standard. Some jurisdictions hold that when the merchant relies upon information supplied by other employees, the merchant is obligated first to determine the reliability of the information reported by such employees. See generally, *Construction and effect, in false imprisonment action, of statute providing for detention of suspected shoplifters*, 47 A.L.R.3d 998 (1973).

criminally or civilly liable for any legal action relating to the detention, questioning or arrest if the merchant, merchant's employee or agent, or peace officer:

- (1) Has reasonable grounds to suspect that the person has committed or is attempting to commit theft;
- (2) Acts in a reasonable manner under the circumstances; and
- (3) Detains the suspected person for a reasonable period of time.

T.C.A. § 40-7-116(c).

The Court finds that the Merchant Immunity Statute applies to the claims in this case because it provides immunity for "any legal action related to the detention, questioning or arrest" of Mr. Gordon. TSC is vicariously responsible for the actions of its employee, district manager, Jim Sewell, the person Mr. Gordon identifies as being the primary instigator of the attempts to restrain him at the store. The Court finds from the undisputed material facts, that Mr. Sewell had reasonable grounds to suspect that Mr. Gordon was the Second Man. He was identified to Mr. Sewell as the Second Man by Ms. Scott, who saw the Second Man in person the day before. Furthermore, Mr. Gordon resisted Mr. Sewell's efforts to detain him, although Mr. Gordon explains his non-compliance with Mr. Sewell's demands. Mr. Gordon's lack of cooperation, however, contributed to Mr. Sewell's reasonable suspicion, which is measured by an objective standard from Mr. Sewell's perspective.¹⁰

Nevertheless, the Court finds there are disputed issues of material fact with respect to whether TSC's employees acted in a reasonable manner under the circumstances when they pursued Mr. Gordon into the parking lot and attempted to physically prevent him from getting into his truck. Mr. Gordon testified that he would have remained at the store and answered TSC's questions had TSC's employees behaved in a less aggressive manner. It is up to a jury to resolve this dispute of fact and determine the reasonableness of TSC's conduct under the circumstances.

¹⁰ A suspect's flight from a peace officer may be considered in determining probable cause for a warrantless arrest. CJS Arrest, Sec. 35; *accord State v. Williams*, 638 S.W.2d 417 (Tenn. Crim. App. 1982); *Couch v. State*, 566 S.W.2d 288 (Tenn. Crim. App. 1978).

Consequently, TSC is not entitled to summary dismissal of Mr. Gordon's claim for assault and battery.

b. Vicarious Liability

Under Tennessee law, "an employer may be liable for the torts committed by his or her employees while performing duties within the scope of employment." *White v. Revco Discount Drug Centers, Inc.*, 33 S.W.3d 713, 718 (Tenn. 2000). In order to hold an employer liable under this doctrine, however, a plaintiff must demonstrate "(1) that the person who caused the injury was an employee; (2) that the employee was on the employer's business; and (3) that the employee was acting within the scope of his employment when the injury occurred." *Tennessee Farmers Mutual Insurance Co. v. AM. Mutual Insurance Co.*, 840 S.W.2d 933, 937 (Tenn. Ct. App. 1992).

In determining whether an act is within an employee's scope of employment in a particular case, Tennessee courts have adopted the test set out in the Restatement (Second) of Agency. See e.g., *Hughes v. Metro Government of Nashville and Davidson County*, 340 S.W.3d, 352, 363 (Tenn. 2011) citing *Kelly v. La. Oil Refining Co.*, 167 Tenn. 101, 66 S.W.2d, 997, 998 (1934); *Tennessee Farmers Mutual Insurance Co. v. Am. Mutual Liability Insurance Co.*, 840 S.W.2d 933, 938 (Tenn. Ct. App. 1992). The Restatement and the reported cases set out the following tests for determining whether an act by an employee was within the employee's scope of employment:

- (1) Conduct of the servant is within the scope of employment if, but only if:
 - (a) it is of the kind he is employed to perform;
 - (b) it occurs substantially within the authorized time and space limits;
 - (c) it is actuated at least in part, by a purpose to serve the master; and
 - (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.
- (2) Conduct of the servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time and space limits, or too little actuated by a purpose to serve the master.

Restatement (Second) Agency §228. Each of these requirements must be satisfied for the conduct of the servant to be within the scope of employment. Although this issue is generally a question of fact, it is a question of law when the facts are undisputed and cannot support conflicting conclusions. *Tennessee Farmers Mutual Ins. Co.*, 840 S.W.2d at 937.

In this case, it is undisputed that on May 15, 2009, Mr. Sewell, acting as the district manager, had another TSC employee notify the police that someone identified as one of the men who passed a fraudulent check the day before, was again in the store. It is further undisputed that Mr. Sewell tried to prevent Mr. Gordon from leaving the store. It is also undisputed that while Mr. Sewell and other TSC employees did not identify Mr. Gordon to the police by name, they did identify him by description.

The court concludes that on the undisputed facts, the employees at the TSC store, including Mr. Sewell, were acting within the course and scope of their employment at TSC when they tried to prevent Mr. Gordon from leaving, called the police, and made statements identifying Mr. Gordon as the Second Man. This conclusion follows for several reasons. First, the undisputed facts establish that Mr. Sewell was employed as the district manager on May 15, 2009. Second, his job responsibilities at TSC included reducing the amount of theft at stores within his district. Finally, while it is undisputed that TSC training materials tell employees not to use physical force to detain shoplifters, his attempt to prevent Mr. Gordon from leaving is neither unforeseeable nor unexpected so as to be outside of the scope of his duties. For these reasons, TSC is not entitled to summary judgment with respect to Mr. Gordon's assault and battery claim.

2. False imprisonment.

The tort of false imprisonment is the unlawful violation of the personal liberty of another. It is an intentional and unlawful restraint, confinement, or detention that compels the person to stay or go somewhere against the person's will. It is not enough for a plaintiff to feel mentally

restrained by the actions of the defendant. The evidence must establish a restraint against the plaintiff's will, as where one yields to force, to the threat of force or to the assertion of authority. *Newsom v. Thalhimer Bros., Inc.*, 901 S.W.2d 365 (Tenn. Ct. App. 1994).

In this case, Mr. Gordon alleges that TSC is liable not only for whatever happened on the premises of the Lenoir City TSC store on May 15, 2009, but also for his arrest by the Tennessee Highway Patrol, and the subsequent confinement he was required to serve in the Tennessee Department of Corrections when his parole was revoked. The Court disagrees.

TSC is not vicariously liable for the actions of the State of Tennessee that resulted in Mr. Gordon being ordered to serve the balance of his sentence. No agency, employment, joint venture or other relationship exists between TSC and the State of Tennessee sufficient to make TSC vicariously liable for these actions by state authorities. Moreover, it is undisputed that Mr. Gordon violated his parole in at least two respects unrelated to the actions of TSC, i.e., driving on a suspended license and leaving the county without permission from his parole officer.

With respect to what TSC may arguably be responsible for related to the actions of its employees on the store premises on May 15, 2009, it is undisputed that Mr. Gordon was not in fact restrained, confined or detained at the TSC store by TSC employees. Further, Mr. Gordon's own deposition testimony is that the TSC employees tried to restrain him against his will, but that they did not succeed. Gordon Dep. 152:19-21. A defendant cannot be liable for the tort of false imprisonment when there has been no imprisonment-false or otherwise. Such is the state of affairs in the present case.

Whether TSC's unsuccessful efforts to detain Mr. Gordon were reasonable under the circumstances is a question for the jury to determine in connection with the claim for assault and battery. Otherwise, TSC's decision to attempt to question Mr. Gordon, after he was identified, albeit erroneously, as the Second Man, is subject to immunity from suit pursuant to T.C.A. section 40-7-116(c). Further the undisputed material fact that Mr. Gordon was not detained at the

TSC store, and his deposition testimony that he was never held against his will at the TSC store, compels a summary dismissal of the false imprisonment claim in this case.

3. Malicious Prosecution

Mr. Gordon alleges that TSC is liable for malicious prosecution because its employees called the police after the May 15, 2009, incident. He alleges that TSC's employees lacked probable cause to accuse him, and the actions taken by TSC employees were motivated by racial animus.¹¹

In order to establish the essential elements of malicious prosecution, Mr. Gordon must prove that, a) the criminal proceeding against him related to this matter was terminated in his favor, b) the prior criminal proceeding was instituted without probable cause, and c) TSC brought such prior criminal action with malice. *Roberts v. Fed. Exp. Corp.*, 842 S.W.2d 246, 247-48 (Tenn. 1992) (citations omitted). "A showing of lack of probable cause will give rise to a rebuttable presumption of malice. A showing of malice, however, raises no presumption of lack of probable cause." *Sullivan v. Young*, 678 S.W.2d 906, 911 (Tenn. Ct. App. 1984) (citations omitted).

a. Criminal Proceeding Terminated in Favor of the Accused

The Tennessee Supreme Court, in *Himmelfarb v. Allain*, 380 S.W.3d 35 (Tenn. 2012), held that the voluntary dismissal of a lawsuit under Rule 41, Tenn. R. Civ. P., without more, does not qualify as a termination in the plaintiff's favor sufficient to support a claim for malicious prosecution of a civil action. The Court held that only a disposition on the merits can satisfy the requirement that the maliciously prosecuted claim be terminated in the tort-plaintiff's favor.

¹¹ In responding to a properly supported motion for summary judgment, such as the one filed by TSC in this case, a non-moving party may not merely rely upon its pleadings in order to show a genuine dispute of material fact. Rather, the non-moving party must show, by reference to the evidence in the record that indicates disputed material facts. *Holland v. City of Memphis*, 125 S.W.3d 425, 428 (Tenn. Ct. App. 2003) (internal citations omitted) (citing *Staples v. CBL & Assocs.*, 15 S.W.3d 83, 89 (Tenn. 2000); *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998)).

In this case, it is clear that Mr. Gordon's acquittal on the aggravated assault charge qualifies as a favorable disposition on the merits. The charge was tried to a jury which returned a verdict of not guilty. The criminal facilitation charge, however, was dismissed without a trial. The record does not disclose the reason for this dismissal. At the hearing on this motion, however, Mr. Gordon's counsel stated that the charge was dismissed because a necessary witness for the State failed to appear for the trial. Such a dismissal is not a disposition on the merits; however, TSC did not advance this argument in support of its motion for summary judgment. Moreover, it is not clear that the Supreme Court would apply the rationale in *Himmelfarb v. Allain* to a tort case alleging malicious prosecution of a criminal action.

For purposes of the case at hand, this Court will consider the Supreme Court's holding in *Himmelfarb v. Allain* as limited to malicious prosecution of civil actions only, and therefore not applicable here. Accordingly, it is clear from the undisputed facts that Ronnie Gordon's criminal charges, related to the incident at the Lenoir City Tractor Supply store concluded in his favor.

b. Lack of Probable Cause

An assessment of probable cause is "an objective determination of the reasonableness of the prosecutor's conduct in light of the surrounding facts and circumstances." *Roberts v. Fed. Exp. Corp.*, 842 S.W.2d 246, 248 (Tenn. 1992). In contrast, "malice concerns the subjective mental state of the prosecutor." *Id.* In *Roberts*, the Supreme Court overturned prior precedent that held that probable cause is a question of law for the court. *Id.* at 247, 249. The *Roberts* court held "that where reasonable minds can differ as to the existence of probable cause a jury is to decide the issue." *Id.* at 249. Additionally, the *Roberts* court held that where a plaintiff alleges that "a reasonable preprosecution investigation would have revealed certain exculpatory facts" and "and there is evidence to support [the allegation], the jury is to determine the facts a reasonable investigation would have disclosed, and then base its probable cause determination considering those facts." *Id.*

A grand jury indictment is conclusive of the existence of probable cause as a matter of law. *Bovat v. Nissan North America*, M2013-00592-COA-R3CV, 2013 WL 6021458, at *3 (Tenn. Ct. App. Nov. 8, 2013) (citations omitted), *appeal denied* (Mar. 10, 2014).¹² In *Sullivan v. Young*, the court distinguished making a report to law enforcement authorities from invoking the defense of advice of counsel. *Young*, 678 S.W.2d at 912 (Tenn. Ct. App. 1984). The appellate court noted that when invoking the defense of advice of counsel, the defendant “must state not only all material facts within his knowledge but all facts which he had reasonable ground to believe existed at the time of making the statement, or all material facts which he could have ascertained by reasonable diligence.” *Id.* (citation omitted). The court further noted, “there is a marked difference in cases where a person reports what he knows to the police” and the police take control of the investigation. *Id.* (citation omitted). In *Bovat*, the appellate court noted as follows:

An indictment by a grand jury equates to a finding of probable cause. . . . Therefore, Plaintiff cannot prove the first element of a claim of malicious prosecution: that the charge was brought against the plaintiff without probable cause.

The foregoing notwithstanding, ‘even though one has probable cause to initiate criminal charges, there can be liability for the malicious continuation of a criminal proceeding.’ *Pera v. Kroger Co.* 674 S.W.2d 715, 722 (Tenn. 1984). **However, the private person must take an active part in continuing or procuring the continuation of criminal proceedings. *Id.* (citing Restatement (Second) of Torts, 655 (1977)) ‘[W]here the instigator has no control over the case once prosecution has begun, his participation will not subject him to liability’ and, in Tennessee, ‘a private prosecutor does not control the prosecution. This is left in the hands of the District Attorney and of the Court.’ *Id.* at 722-23.**

Bovat, 2013 WL 6021458, at *3 (first citations omitted) (alteration in original) (emphasis added).

In the present case, it is undisputed that TSC never accused Mr. Gordon, by name, as one of the two people who participated in the May 14, 2009, theft. Likewise, it is undisputed that no

¹² In a 2014 decision, a federal district court, applying Tennessee law as to malicious prosecution, noted “earlier cases have ‘declined to adopt a per se rule that the indictment of the accused by a grand jury is evidence that the person who initiated the proceedings has probable cause therefore.’ More recent decisions from the Tennessee Court of Appeals have decided differently.” *Powers v. Wallen*, No. 3:12-CV-96, 2014 WL 1491213, at *14 (E.D. Tenn. Apr. 15, 2014) (citations omitted). The *Powers* court discussed and followed *Bovat* 2013 WL 6021458 and *Crowe v. Bradley Equipment Rentals & Sales*, No. E2008-02744-COA-R3-CV, 2010 WL 1241550, (Tenn. Ct. App. Mar. 31, 2010).

TSC employee ever testified, provided evidence to, or otherwise participated in the grand jury proceedings. Moreover, it is undisputed that the Loudon County grand jury, in due course, returned a true bill indicting Mr. Gordon for the offenses of facilitation of a felony related to the bad check TSC received on May 14, 2009, and aggravated assault related to use or display of a box cutter on May 15, 2009.

If an indictment is procured with false testimony the grand jury indictment can be invalidated as showing probable cause. *Kerney v. Aetna Casualty and Surety Co.*, 648 S.W.2d 247 (Tenn. Ct. App. 1982).¹³ In this case, it is undisputed that Mr. Sewell told one of his employees to call the police after an employee identified Mr. Gordon as the Second Man from the day before. When the police arrived, neither Mr. Sewell nor the other employees of TSC identified Mr. Gordon by name. The Tennessee Highway Patrol arrested Mr. Gordon shortly after the incident on May 15, 2009. The Tennessee Highway Patrol officer who arrested Mr. Gordon was responding to a "Be On the Look-Out" notification, known as a BOLO, issued by the Lenoir City Police.¹⁴ After Mr. Gordon's arrest, the undisputed facts show that neither Mr. Sewell, nor any other employees of TSC testified at the Grand Jury proceedings. It is also undisputed that they had no contact with the Loudon County Attorney General, nor any input into the decision to prosecute Mr. Gordon.

As noted previously, the Grand Jury indicted Mr. Gordon for 1) aggravated assault, alleging that Mr. Gordon assaulted Mr. Sewell with a box cutter, and 2) facilitation of a felony related to the fraudulent check incident on May 14, 2009.

¹³ The *Powers* federal district court, in applying Tennessee malicious prosecution law noted regarding its application of a per se rule that an indictment is evidence of probable cause, that "even applying the authority from the earlier court of appeals cases, this court would reach the same conclusion. Plaintiff needs to show that the grand jury indictment was "procured by fraud, false testimony or other corrupt means" in order to have the indictment deemed insufficient and thus be a bar to a subsequent action for malicious prosecution. *Kerney*, 648 S.W.2d at 252; *Gray*, 1997 WL 379141, at *4 (claim for malicious prosecution failed as plaintiff could not show lack of probable cause because there was no evidence in the record that the grand jury indictment was procured by fraud, perjury, or other corrupt means)." *Powers*, 2014 WL 1491213, at *14.

¹⁴ Mr. Gordon's deposition testimony is that the THP officer stated that he did not know anything about the incident at TSC, but he was pulled over because of the BOLO issued by Lenoir City Police. Gordon Dep. 160:3-4.

For purposes of this motion, it is assumed as true, as Mr. Gordon argues, that TSC employees falsely stated to the police that Mr. Gordon had attempted to write a second fraudulent check on May 15, and falsely stated that he had pushed Mr. Sewell in order to leave the store. The counts in the indictment of Ronnie Gordon, however, did not include any charge that he had attempted to write a fraudulent check on May 15, 2009, or that he struck Mr. Sewell inside the store.¹⁵ Thus, there is no evidence that either of the grand jury indictments were procured by fraud, false testimony, or other corrupt means.

TSC argues that it cannot be vicariously liable for the prosecution of Mr. Gordon for aggravated assault related to the alleged assault of Mr. Sewell with a box cutter. TSC's position is that Mr. Sewell was acting in his own interest, and not in the interest of TSC, when Mr. Sewell told police that Mr. Gordon had brandished a box cutter and threatened to cut Mr. Sewell with it. TSC argues that even if probable cause were lacking, it is not vicariously liable for an action by Mr. Sewell associated with that particular charge because with respect to that aspect of his interaction with the police on May 15, 2009, Mr. Sewell was not acting for the purpose of serving TSC. Rather, he was acting in his own interests as an alleged crime victim. Because the Court concludes that the holding in *Bovatt v. Nissan North America* controls the result on the question of probable cause, the Court finds it unnecessary to decide whether TSC is vicariously liable for Mr. Sewell's claim that Mr. Gordon threatened him with a box cutter.

When viewing the facts in a light most favorable to Mr. Gordon, and giving him the benefit of assuming that TSC's employees meant, in the words of Mr. Gordon's counsel at oral argument, "to blame the [May 14] theft on the first black person who came in the store the next day," his claim of malicious prosecution is due to be dismissed because the record contains no evidence with which he could carry his burden of proof to establish the essential element of the

¹⁵ The record does not contain any summary or evidence regarding the information presented to the grand jury. It is reasonable to conclude, however, that during the course of their investigation law enforcement authorities discovered Mr. Gordon's criminal record, which included previous convictions for a bad check offense and aggravated assault.

absence of probable cause. Stated another way, there is no genuine issue of material fact from which a jury could invalidate the indictment of the grand jury as establishing probable cause as a matter of law. *Bovat v. Nissan North America*, 2013 WL 6021458, at *3.

c. Malice

Mr. Gordon argues that TSC employees were motivated by racial animus in their actions toward him. Mr. Gordon testified that he was not present in Lenoir City on May 14, 2009, and he offered the testimony of Mike Dennison as further proof corroborating his alibi. Mr. Gordon points to contradictions and discrepancies in TSC employees' statements to the police as supporting an inference that those employees were motivated by racial animus, and that this racial animus, alone, is sufficient to defeat TSC's motion for summary judgment. The Court disagrees. At best, an inference of racial animus creates a dispute of material fact as to whether TSC, under the doctrine of *respondeat superior*, brought, or procured the bringing of a criminal prosecution, with malice, against Mr. Gordon. A showing of malice raises no presumption of a lack of probable cause. *Sullivan v. Young*, 678 S.W.2d 906, 911 (Tenn. Ct. App. 1984).

Thus, Mr. Gordon's claim against TSC for malicious prosecution is subject to being summarily dismissed because the undisputed facts are sufficient to show the existence of probable cause as a matter of law.

4. Negligent Supervision.

In support of his negligent supervision claim, Mr. Gordon alleges that TSC "had a duty to exercise a degree of care in the supervision and training of its employees at all of its stores." TAC para. 35. That, TSC "breached a[sic] duty as evidenced by the extreme, outrageous, and reckless conduct engaged in by the manager, assistant manager and various other employees of Store 551 towards [Mr. Gordon]." TAC para. 36. That TSC "has yet to take any significant steps to rectify the insult and injury towards [Mr. Gordon] such as a public apology for and a retraction of the false claims lodged against him." TAC para. 37.

While it is axiomatic that TSC owes a duty of care to various identifiable classes of persons, including customers, such as Mr. Gordon, who patronize its retail stores, it is doubtful that in his Third Amended Complaint Mr. Gordon has articulated a claim on which relief can be granted. In cases such as this, the courts exist to determine whether one party is liable to pay compensation to another. We cannot compel defendants to issue public apologies. To the extent that Mr. Gordon complains about the absence of corrective action by TSC, Mr. Gordon has not sued for affirmative injunctive relief.

The Court has previously determined that Mr. Gordon's assault and battery claim survives TSC's summary judgment motion. In doing so, the Court concludes that Mr. Sewell was acting as TSC's agent for purposes of vicarious liability. The Court has also determined that TSC is entitled to a judgment as a matter of law on Mr. Gordon's false imprisonment and malicious prosecution claims. To the extent that Mr. Gordon's negligent supervision claim embraces those three torts, the Court has already addressed it.

CONCLUSION

Mr. Gordon has alleged that he suffered "personal bodily injury as well as physical damage to the vehicle he was driving" on May 15, 2009, as a result of the Defendant having committed an assault and battery. Notwithstanding the undisputed material facts set out in this memorandum, there exist disputed material facts from which a jury could conclude that the actions of TSC's employees were not reasonable under the circumstances and find TSC liable for assault and battery. Mr. Gordon's damages for assault and battery, if any, are those bodily injuries and property damage proximately caused by TSC's offensive touching. The reasonableness of TSC's actions and the extent of any damages proximately caused by those actions are questions for the jury.

TSC is entitled to immunity pursuant to TCA Sec. 40-7-116(c) with respect to Mr. Gordon's claim for false imprisonment. In addition, the undisputed material facts establish that

Mr. Gordon was not in fact detained or confined by TSC on May 15, 2009, notwithstanding the efforts of TSC's employees to do so. For this entirely separate basis, TSC is also entitled to summary judgment as a matter of law with respect to Mr. Gordon's false imprisonment claim. Finally, TSC is not vicariously liable, as a matter of law, for the action of the State of Tennessee in revoking Mr. Gordon's parole and requiring him to serve the remainder of his sentence of confinement in the Department of Corrections relating to his previous convictions for theft and assault.

Based upon the undisputed material facts, the criminal prosecution of Mr. Gordon for criminal facilitation and aggravated assault was based on probable cause as determined by the Loudon County, Tennessee grand jury. Consequently, an essential element of Mr. Gordon's claim for malicious prosecution of a criminal action cannot be established as a matter of law and TSC is therefore entitled to summary judgment as to that claim.

IT IS THEREFORE ORDERED THAT: Tractor Supply Company's Motion for Summary Judgment is **GRANTED IN PART** consistent with the contents of this memorandum and the claims against Tractor Supply Company for false imprisonment, malicious prosecution and negligent supervision are hereby **DISMISSED**.


IT IS FURTHER ORDERED THAT: Tractor Supply Company's Motion for Summary Judgment is **DENIED IN PART** insofar as Plaintiff's claim for damages proximately caused by assault and battery remain to be resolved at trial.

IT IS FURTHER ORDERED THAT: Pursuant to Rule 56.05, Tenn. R. Civ. P., the undisputed material facts set out in this memorandum (other than item 12) exist without substantial controversy. Material facts that are actually and in good faith controverted are: (1) whether the actions of TSC's employees in attempting unsuccessfully to detain Mr. Gordon from leaving the premises of the TSC store on May 15, 2009, were reasonable under the circumstances; (2) whether the actions of TSC's employees in attempting unsuccessfully to

detain Mr. Gordon from leaving the premises of the TSC store on May 15, 2009, proximately caused Mr. Gordon to sustain bodily injury and property damage; and (3) if so what amount of damages will reasonably compensate Mr. Gordon for those damages.

IT IS FURTHER ORDERED THAT: The Parties shall, pursuant to Tenn. Sup. Ct. Rule 31, engage in good faith mediation of this case within forty five (45) days after entry of this Order.

ENTERED THIS 13th DAY OF MARCH, 2015.


JOSEPH A. WOODRUFF
Circuit Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded via United States mail, first class postage prepaid, via email or facsimile to:

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This the 13 day of March 2015.


CLERK