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Shauna Hodges v. Gibson Products Company, dba Gibson's Discount Center, a Utah corporation, and Chad Crosgrove, an individual : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

SHAUNA HODGES, Plaintiff-Respondent, vs. GIBSON PRODUCTS COMPANY, dba GIBSON'S DISCOUNT CENTER, a Utah corporation, and CHAD CROSGROVE, an individual, Defendants-Appellants.	:	Case No. 20929

RESPONDENT'S BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE JOHN A. ROKICH, DISTRICT JUDGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions & Statutes:

Other Authorities:

STATEMENT OF THE CASE

A. Nature of the Case. Defendant Gibson Products Company (hereinafter "Gibsons") and, specifically, the manager of its West Valley store, defendant Chad Crosgrove, (hereinafter "Crosgrove") accused plaintiff Mrs. Shauna Hodges, a part-time bookkeeper at the West Valley store, of stealing approximately $580 from receipts received on September 3, 1981 (Ex. 3). The defendants made the accusations to the West Valley Police Department on September 9, 1981 (Ex. 3), but failed to make a full and fair disclosure of all the facts they knew concerning the alleged crime. (R. 611-22, 842-54; Ex. 3). Mrs. Shauna Hodges was arrested on a charge of theft (Ex. 4) and trial was set for May 12, 1982. During the interim, Gibsons suspended Mrs. Hodges from her employment. (R. 863).

On March 18, 1982, Gibsons allowed Mr. Crosgrove to resign his employment when he admitted stealing and embezzling from the West Valley store cash and goods worth between $9,000 and $18,000. (R. 588, 861). Gibsons failed to inform the prosecuting attorney of Crosgrove's thievery until the eve of trial. (R. 686-87; Ex. 15). Immediately upon learning of this criminal conduct, the prosecutor successfully moved to dismiss all charges against Shauna Hodges. (R. 686-87; Exs. 6 & 15).

Shauna Hodges brought this action for malicious prosecution and intentional infliction of emotional distress against both defendants and for wrongful termination against defendant Gibsons. (R. 2-11). Gibsons counterclaimed for conversion of the money missing from the West Valley store's receipts of September 3, 1981. (R. 22-23).

The case was tried to a jury, the Honorable John A. Rokich presiding, on July 9-13, 1985. The jury found Gibsons and Crosgrove liable for malicious prosecution and also found Gibsons liable for wrongful termination. The jury awarded Mrs. Hodges $70,000 in compensatory damages and $7,000 in punitive damages from Gibsons and $10,000 in compensatory damages and $1,000 in punitive damages from Crosgrove. The jury also found that Mrs. Hodges was not liable to Gibsons for conversion. (R. 464-66).

B. Statement of the Facts. On September 17, 1981, Shauna Hodges was arrested and charged with theft of $577, a third degree felony, from Gibsons West Valley store on September 4, 1981. (R. 924-26; Ex. 4 & 5). Trial was set for May 12, 1982. (R. 107) In the interim, her chief accuser, Crosgrove, the manager of the Gibsons West Valley store where she was employed, admitted to stealing merchandise and cash worth over $9,000. (R. 589, 861). Gibsons kept this information from the Salt Lake County Attorney who was prosecuting the action until the very eve

of trial. (R. 107). When the County Attorney learned that "the chief witness against Mrs. Hodges had been fired for embezzlement," he successfully moved to have the case dismissed. (R. 687; Exs. 6 & 15).

On September 4, 1981, the Thursday before Labor Day, Shauna Hodges was employed as a part-time bookkeeper at the Gibsons West Valley store; (R. 903) Chad Crosgrove was the manager of that store. (R. 774-75). During the day of September 3, 1981, cash register number four, at the front checkout, had been used. (R. 785). At the end of the evening, following normal procedures, all of the money was taken from each register, except for $100 which remains in each register drawer for use the next day. (R. 777-78). The normal procedure was to take all of the "detail tapes", cash (except for $100) and "voids" out of the registers and put them in a separate cloth sack marked with that register's number. (R. 777-81). The "detail tapes" list a complete record of what was "run" on the register for that day. (R. 780). A "Z" tape, which is a total for each register, was also run out of the machine and kept separate from the register bags. (R. 777, 780).

The sacks from all of the registers were then placed at the "service desk" at the front of the store (R. 782) and then all were placed in one large paper sack (R. 786-87). The "Z" tapes were also placed loose in the same

large paper sack. (R. 786-77). "Z" tapes sometimes were "run" only from those registers which had been used during the day, (R. 784) and sometimes were run also from registers that were not used. (R. 907-08). The large paper sack containing the money sacks and two tapes was then locked in the safe for the evening. (R. 793).

Crosgrove claimed that on the evening of September 3, 1981, he put the large paper sack containing all the money sacks and the "Z" tapes in the safe. (R. 793). Crosgrove then left the store between 9:10 and 9:55 when all the other employees had left the store. (R. 793).

There is no written record kept of what registers are used during the day. The only way to determine if a register had been used during the day is if there was a money sack or a used "Z" tape in the large paper sack or to ask some individual with personal knowledge. (R. 783-88). If the large paper sack did not contain a money sack or a "Z" tape for a particular register, one would have to assume that the register had not been used, unless one had personal knowledge to the contrary. (R. 785-86).

The next morning, Crosgrove opened the store alone at approximately 8:30 a.m., before any other employees arrived. (R. 799-800). He also was alone when he opened the safe shortly after opening the store. (R. 829). Sometime after 9:00 a.m., Shauna Hodges, following her normal

procedure, reported to work and obtained the paper sack from Crosgrove. (R. 831). Mr. Crosgrove took the large paper sack containing the individual money sacks out of the safe. (R. 832). Carrying that sack, he escorted Shauna Hodges to a room upstairs, known as the security room, where she normally performed her duties. (R. 911). He left Shauna Hodges with the sack and the money bags. He never verified to Mrs. Hodges what specific money bags were in the paper sack. (R. 244, 324). The "security room" was not a secure room, but merely an upstairs room, (R. 905, 909) access to which was restricted to the manager, Crosgrove, the assistant manager and the two bookkeepers, including Mrs. Hodges. (R. 910-11).

Mrs. Hodges began to do her work as she always did. She laid out all of the money bags and tapes on a table; she totalled all the checks, cash and other items for each register and placed the figures on the daily report. (R. 906, 911-12). She compared the totals for each register for which she had a money sack to the totals listed on the "Z" tapes. (R. 907, 911-12). Some of the bags contained more cash than was reported on the register tapes. Although Mrs. Hodges could have put this small change in her pocket and no one would have been able to determine that it was missing, she reported on the daily report that each of these registers had excess money. (R. 677; Ex. 8).

Mrs. Hodges then completed the necessary forms for the bank deposit. When her work was accomplished and before leaving the store, she gave the daily report along with the bank deposit, including all money to be deposited, to Mr. Crosgrove at approximately 1:00 p.m. (R. 836, 912). Although company policy required that the bank deposit be made by 3:00 p.m. each day, Mr. Crosgrove, in violation of that policy, delayed making the bank deposit. (R. 838, 1078-79).

Around 4:00 p.m. on September 4, 1981, Mr. Glen Murray, the assistant store manager, who had worked during the daytime hours on September 3, looked at the daily report lying on Crosgrove's desk and saw that cash register number four was not listed. (R. 839-40). Mr. Murray, apparently remembered that register number four had been used the previous day and called the matter to Mr. Crosgrove's attention. (R. 839-40). Mr. Crosgrove verified that the register had been used and that the cash receipts were not listed on the daily report.

At this point, according to Mr. Crosgrove's version of the facts, he either called Mrs. Hodges and then went to the security room, or vice versa. (R. 840-41). Mrs. Hodges came back to the store and Mr. Crosgrove then called the corporate headquarters in Murray. (R. 843). Before Mrs. Hodges returned, Mr. Crosgrove and Mr. Murray, the assistant

manager, found part of the "Z" tape for register four in the wastepaper basket in the security room. (R. 847-48). In his story, Mr. Crosgrove claimed he found checks he identified as being from register number four in the deposit bag while Mrs. Hodges was in the room, (R. 847-48) although this involved a line by line examination of all the detail tapes from each register. (R. 896). He also gave conflicting testimony that he could not identify the checks as being from register four until after Mr. Harris, the corporate accountant, performed an audit. (R. 849). Later in the day, Mr. Crosgrove, with Mr. Murray and Mr. Harris found additional tapes and slips from register four, plus torn deposit slips from Mrs. Hodges' personal checking account in the garbage. (R. 851, 854-55).

According to Mrs. Hodges, when she returned to the store and while in the "security room," Mr. Crosgrove showed Mrs. Hodges that register number four was not reported, that the checks from register number four were included in the deposit for register number six; and, also, he showed her the other tapes and void slips he claimed to have found in the garbage. (R. 917-18).

Mr. Harris testified that he could only locate the checks from register four after a tedious review of the deposit and all of the register tapes at the Murray store, (R. 1052-53; 1057-59; 1095). Additionally, Mr. Harris

testified that the tapes in the garbage can were discovered after he went to the West Valley store. (R. 1056-57).

Certain facts, however, remain clear. Mr. Crosgrove, with or without other employees, checked Mrs. Hodges' work area. Subsequent investigation by Mr. Harris, the internal auditor of Gibsons, revealed that someone had removed the checks and cash from register number four. The checks which had been in register number four, were placed in register number two and a like amount of cash removed. Neither the cash representing the face amount of the checks taken in on register number four, nor the cash taken in on register number four were ever found or recorded on any of the reports. (R. 1052, 1059). Mrs. Hodges consistently claimed that she never received the money sack for register number four from Crosgrove. (R. 912, 915; Ex. 8).

After the Labor Day weekend on Tuesday, September 8th, Gibsons management called Mrs. Hodges to the main office and asked for an explanation. Mrs. Hodges offered no explanation since she had not committed the crime. (R. 918-19). At that meeting, Gibsons offered to allow Mrs. Hodges to resign and let the matter drop if she would pay back the the missing money. (R. 920). Mrs. Hodges, protesting her innocence, refused to pay back the money since she had not taken it. (R. 920).

The next day, three of Gibsons' officers and managers, at the direction of their superiors, at Gibsons, went to the West Valley Police and reported the theft. Each of them testified that they went to the police in their capacity as employees or managers of Gibsons. (R. 596-611, 679-80, 859, 1074).

They spoke to Gene Lyday, a detective at the West Valley Police Department. Mr. Crosgrove identified Mrs. Hodges as the chief suspect. (R. 615; Ex. 3). The story they told the detective was not a full and accurate story. In fact, it was replete with misstatements and omissions. Among other things, no one told Detective Lyday that at that time Mr. Crosgrove had been stealing regularly from the Gibsons West Valley store; (R. 1081) or that it was the assistant manager who discovered that the money was missing. (R. 842, 1080-82). In fact, they told Detective Lyday that it was Mr. Crosgrove who discovered the missing money. (R. 618-19). They also told the detective that it was Mr. Crosgrove who discovered the missing register tapes torn up in the wastepaper basket in the security room. (R. 621). Based on this inaccurate and incomplete information, Detective Lyday completed a sworn information and a probable cause statement supporting the charges against Mrs. Hodges. (R. 621-23; Ex. 3 & 5).

The Salt Lake County prosecutor reviewed the information he was given by Detective Lyday and decided to prosecute Mrs. Hodges for theft. (R. 684; Ex. 5 & 14).

At the probable cause hearing, Crosgrove continued to supply false and misleading information. He did not reveal that he was in the process of stealing money from Gibsons; he swore that it was he who discovered that the money was missing and he neglected to state that it was not him, but his assistant manager Glenn Murray who discovered the discrepancy on the daily report. (R. 842).

Mrs. Hodges was bound over for trial, was taken out in handcuffs and told to report to pretrial services at least once a day. (R. 927-29). Trial was scheduled for May 11, 1982.

During that interval, Mrs. Hodges was undergoing severe emotional distress. Her family had been going to a social worker for some time to deal with problems with her son. As soon as the arrest occurred, Mrs. Hodges began seeing the clinical social worker for individual therapy for the severe depression and severe emotional distress induced by the trauma of having been accused of a crime. (R. 935-49).

It was during that same interval when Gibsons discovered that Mr. Crosgrove the accuser of Mrs. Hodges, had stolen between $9,000 and $18,000 in cash and

merchandise from the Gibsons West Valley Store. (R. 599, 861). This thievery had been going on since prior to September 3-4, 1981. (R. 862). Mr. Crosgrove would remove merchandise from the store after all the employees had left. (R. 900-02). Also, he would steal cash by some complicated process whereby he delayed submitting the bank deposits for the store for several days, similar to the way he delayed submitting the bank deposit on September 4, 1981. (R. 862). The Gibsons management discovered this by an audit of their books and records and on March 18, 1982, allowed Mr. Crosgrove to repay $9,000 of the money he had stolen and resign. (R. 599, 861; Ex. 19). The Gibsons management never reported the theft to the West Valley Police and made no attempt to prosecute Mr. Crosgrove. (R. 601). They allowed him to cut a deal, the same deal they had offered to Mrs. Hodges. (R. 601). However, unlike Mrs. Hodges who did not commit a crime, Mr. Crosgrove had committed the crime and took advantage of the deal rather than face the criminal justice system. (R. 861-62).

The Gibsons management never informed the Salt Lake County prosecutor who was prosecuting the case against Mrs. Hodges that Crosgrove, Mrs. Hodges' chief accuser, was stealing left and right from the West Valley store. (R. 60). As Mr. Harris explained: He "only [did] what was directed by the officers of the company" and "it was not

[his] responsibility" to inform the prosecutor or the police about this exculpatory evidence. (R. 1081-82). However, two days before trial, one of Gibsons' management employees, Mr. Birch, "communicated to the county attorney that the charges would be dropped." (R. 644-46, 721-24). As soon as the county prosecutor learned that his star witness had been caught with his hands in the till, he moved to have the case dismissed. (R. 686, Ex. 15). As the prosecutor testified: "According to the information, the only person [sic] who had access to the money was Mr. Crosgrove and Mrs. Hodges . . ." (R. 696). The day after the case was dismissed, Gibsons fired Mrs. Hodges claiming that she had failed to follow proper procedures. (R. 953-54; Ex. 27).

Thereafter, Mrs. Hodges continued to suffer great emotional distress manifesting itself in various ways, including great tension at home and a significant weight gain. She continued to seek psychological therapy from the clinical social worker. Also, she attempted to obtain other employment. Despite the fact that she had a great deal of experience, she was unable to obtain any employment as a bookkeeper, or in any other capacity. The false accusation and the wrongful termination notice continued to haunt her, as it still haunts her. (R. 935-53).

C. Summary of Arguments.

1. The evidence adduced at trial demonstrates that defendants Gibsons and Crosgrove caused the institution of criminal proceedings against plaintiff Shauna Hodges who was not guilty of the offense charged and that they did so without probable cause and primarily for a purpose other than that of bringing Mrs. Hodges to justice and the criminal proceedings against Mrs. Hodges were terminated in her favor. Additionally, because both defendants refused to inform the prosecuting attorney until the eve of Mrs. Hodges criminal trial that there was substantial exculpatory evidence which they had knowledge of for some time, they are liable for continuing malicious prosecution.

2. Gibsons terminated plaintiff on the basis of a false criminal accusation which it knew to be false. That action violated the public policy of the state and, thus, Gibsons is liable for wrongful termination of the plaintiff.

3. Both defendants' actions against Mrs. Hodges in procuring the initiation of a criminal action against her were done maliciously, wantonly and with reckless disregard for the rights of Mrs. Hodges and subjects them to punitive damages.

4. Plaintiff was not required to plead the exact dollar amount of her special and general damages. Since plaintiff's complaint placed defendants on notice of the

type and nature of the special damages claimed, the instructions submitted by the court to the jury concerning damages were correct.

ARGUMENT

I.

THE JURY'S VERDICT THAT BOTH GIBSONS AND CROSGROVE ARE LIABLE TO MRS. HODGES FOR MALICIOUS PROSECUTION COMPORTS WITH UTAH LAW AND IS SUPPORTED BY THE EVIDENCE

Restatement of Torts, Second, §653, succinctly sets out the elements of a cause of action for malicious prosecution:

> A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if
>
> (a) He initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and
>
> (b) The proceedings have terminated in favor of the accused.

Cf. Shippers' Best Express, Inc. v. Newson, 579 P.2d 1316 (Utah 1978); Kennedy v. Burbidge, 183 P. 325 (Utah 1918). At trial, plaintiff proved by a preponderance of the evidence, each and every one of these elements:

A. The criminal proceedings were terminated in favor of Mrs. Hodges.

Section 659 of the Restatement states in pertinent part:

> Criminal proceedings are terminated in favor of the accused by
>
> . . .
>
> (c) The formal abandonment of the proceeding by the public prosecutor. . .

Restatement of Torts, Second, §659. The authors also explained what is "formal abandonment of the proceedings":

> The rule stated in this Section is applicable, however, to any method other than that of the entry of nolle prosequi, by which a public prosecutor may formally abandon the prosecution of the proceedings as, for example, by a motion to dismiss the complaint.

Id. comment e (emphasis added). See, also, Gowin v. Heider, 386 P.2d 1 (Or. 1963).

In this instance, the prosecutor moved to dismiss the action as soon as he learned the truth about Mr. Crosgrove. (R. 686-87; Ex. 15). That motion was granted and the criminal proceeding was terminated favorably for Mrs. Hodges. (Ex. 6).

B. The defendants procured the initiation of criminal proceedings against Mrs. Hodges without probable cause.

There is no doubt that under Utah law and the facts of this case, Gibsons and Crosgrove are liable for initiating the criminal proceedings against Shauna Hodges. The draftors of the Restatement of Torts Second explained that:

> Criminal proceedings are initiated by making a charge before a public official or body in such form as to require the official or body to determine whether process shall or shall not be issued against the accused.

Restatement of Torts, Second, §653 comment c. Cf. Id. comment d. However, the draftors realized fully that the police and prosecutors are often misled when an accuser fails to make a full and fair disclosure to the authorities. The deceptive accuser is then held responsible.

> Influencing a Public Prosecutor. A private person who gives to a public official information of another's supposed criminal misconduct, of which the official is ignorant, obviously causes the institution of such subsequent proceedings as the official may begin on his own initiative, but giving the information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer if it is left entirely to his discretion to initiate the proceedings or not.
>
> . . .
>
> If, however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving the false information. In order to charge a private person with responsibility for the initiation of proceedings by a public official, it must therefore appear that his desire to have the proceedings initiated, expressed by direction, request or pressure of any kind, was a determining factor in the official's decision to commence the

> prosecution, or that the information furnished by him upon which the official acted was known to be false.

Id. comment g (emphasis added).

Utah law recognizes that a full and fair disclosure of the facts made to the prosecuting attorney presents a good defense to an action for malicious prosecution. As noted in the comments to the Restatement, however, it is necessary that there be a full and fair disclosure of all material facts. See, Potter v. Utah Driv-Ur-Self System, Inc., 11 Utah2d 133, 355 P.2d 714, 716 (1960); Wendelboe v. Jacobson, 10 Utah2d 344, 353 P.2d 178, 181 (1960); Cottrell v. Grand Union Tea Co., 5 Utah 2d 187, 299 P.2d 622, 623 (1956); cf. Perkins v. Stephens, 28 Utah2d 436, 503 P.2d 1212 (1972).

Whether a defendant has made a full and fair disclosure is, however, a question of fact properly left to the jury. As this Court wrote in Cottrell v. Grand Union Tea Co.:

> The critical point of inquiry is this: Considering all of the evidence, could reasonable minds fairly say that they were not convinced by a preponderance of the evidence that the defendants made a full and truthful disclosure of the material facts to the county attorney?

Id., 299 P.2d at 623.

The evidence produced at trial shows without a doubt that there was no full and fair disclosure to Detective

Lyday or the prosecuting attorney. In fact, the story told to Detective Lyday and subsequently relied upon by the prosecutor, subtly, but effectively, removed the prime suspect from consideration.

Mr. Crosgrove, when he went to the West Valley Police Department, for obvious self-serving reasons, failed to tell the detective that he, for some time, had been stealing money and merchandise from the store. (R. 862). Clearly, this was a material fact. Although it was the assistant manager who serendipitously discovered that the receipts from register number four were not on the daily report, all the Gibsons employees, Mr. Harris, Mr. Cornett, as well as Mr. Crosgrove, incorrectly informed Detective Lyday that it was Mr. Crosgrove who discovered that the money was missing. (Ex. 3; R. 618-19, 842, 1075-76).[1] Additionally, they told Detective Lyday, falsely, that Mr. Crosgrove discovered all of the evidence in the security room wastepaper basket. (R. 621, 846; Ex. 3). If there had been a full and fair disclosure of all of the material facts to Detective Lyday, there would have been a different prime suspect.

[1]In fact, Mr. Crosgrove made the same misstatement in his sworn testimony at the probable cause hearing. (R. 842). Furthermore, Gibsons attempted to tell the same untrue story even after this action was initiated, but finally admitted to the truth. (R. 605).

The exact same issues were faced by the Oregon court in Lampos v. Bazar, Inc., 527 P.2d 376 (Or. 1974). In that case, plaintiff initiated an action for malicious prosecution after he had been accused by his employer of stealing two tires from its store, arrested and charged with theft. Defendant alleged, as here, that it could not be liable for initiating the action because it had made a full and fair disclosure. However, the defendant's employees failed to tell the grand jury that the plaintiff, when confronted with the accusation, had produced a copy of a receipt which he claimed showed that he had purchased the tires and had made a down payment of $5. The Oregon court, relying upon Varner v. Hoffer, 267 Or. 175, 515 P.2d 920 (1973) and Restatement of Torts Second §666, comment g, found that the full and fair disclosure question was to be left to the jury to decide. Lampos, 527 P.2d at 383. In that case, the court allowed the jury's finding against the defendant to stand. Id.

Additionally, the defendants here failed to make a full and fair disclosure after the action was initiated. The jury was instructed in this case as follows:

> If you find that the defendants learned of the facts which tended to exculpate the plaintiff on the charges and that the defendants did not inform the authorities of such exculpatory facts, then you may consider that as a factor establishing malicious prosecution.

Jury Instruction No. 38. (R. 437).

In Lampos v. Bazar, Inc., the defendant learned of the exculpatory evidence after they had spoken to the county attorney, but prior to the time they testified before the grand jury. The court, relying on Restatement of Torts, Second, §662, comment f and §655 noted that under such circumstances, one who later learns of exculpatory facts may still be liable for malicious prosecution. Lampos, 527 P.2d at 3 5. See, also, Rogers v. Hill, 576 P.2d 328, 333 (Or. 1978).

In this case, two months prior to the date set for trial, Gibsons learned of a major piece of exculpatory evidence. Mrs. Hodges' prime accuser was indeed a thief and stealing from the West Valley store. (R. 549). Nonetheless, no one at Gibsons bothered to inform the prosecutor until the very eve of trial. (R. 600-01). In short, they withheld this exculpatory evidence allowing the prosecution to go forward for some time until it reached a point where they were going to be the subject of ridicule and public embarrassment. This fact alone allowed the jury to find Gibsons liable for continuing malicious prosecution.

There is an abundance of evidence demonstrating that both defendants procured the initiation of the criminal proceedings against Mrs. Hodges without probable cause. Restatement of Torts, Second, §662 states:

> One who initiates or continues criminal proceedings against another has probable cause for doing so if he correctly or reasonably believes
>
> (a) that the person whom he accuses has acted or failed to act in a particular manner; and
>
> (b) that those acts or omissions constitute the offense that he charges against the accused; and
>
> (c) that he is sufficiently informed as to the law and the facts to justify him in initiating or continuing the prosecution.

For the defendants to have had probable cause, they must have had both a reasonable belief in the guilt of Mrs. Hodges, as well as a subjective belief. See, Gustafson v. Payless Drug Stores Northwest, Inc., 525 P.2d 118, 120 (Or. 1974); Hryciuk v. Robinson, 213 Or. 542, 326 P.2d 424 (1958); cf. Potter v. Utah Driv-Ur-Self System, Inc., 11 Utah 2d 133, 355 P.2d 714, 717 (1960).

The fact that the circuit court , after a hearing, found that there was probable cause to detain Mrs. Hodges and bound her over for trial is not conclusive proof that there was probable cause for initiating criminal proceedings against plaintiff. In Olsen v. Independent Order of Foresters, 7 Utah2d 322, 324 P.2d 1012 (1958) this Court found the fact that a magistrate bound over the accused for trial did not show that there was probable cause to initiate the proceedings. In fact, if the probable cause hearing was

tainted with false testimony, as here, then the probable cause hearing has no tendency whatsoever to show that there was probable cause. As the court ruled in Gowin v. Heider, 386 P.2d 1 (Or. 1963).

> [I]f [the indictment] was procured by false testimony of the defendant in an action for malicious prosecution it has no tendency whatever to establish probable cause.

Id. at 9. Moreover, the fact that the defendants did not make a full and fair disclosure of all material facts to the authorities is evidence that the defendants initiated the proceedings without probable cause. See, Id., at 9; Restatement of Torts, Second, §662(c).

The defendants' own actions may be used as evidence to show a lack of probable cause.

> The termination of the proceedings in favor of the accused at the instance of the private prosecutor who initiated them, or because of his failure to press the prosecution, is evidence of a lack of probable cause.

Restatement of Torts Second, §665(1).

Here, Gibsons own employee, Mr. Birch, acknowledges that it was he who informed the prosecutor that the charges would be dropped. (R. 644-46, 722-23). The Restatement requires that in order to determine the existence of probable cause:

> One who initiates or continues criminal proceedings against another has probable cause for doing so if he correctly or reasonably believes
>
> . . .
>
> (c) that he is sufficiently informed as to the law and the facts to justify him initiating or continuing the prosecution.

Restatement of Torts, Second, §662. In Comment j to that section, the draftors wrote:

> In summary, it may be said that the defendant has probable cause only when a reasonable man in his position would believe, and the defendant does in fact believe, that he has sufficient information as to both facts and the applicable law to justify him in initiating the criminal proceeding without further investigation or verification.

Similarly, this Court explained in Cottrell v. Grand Union Tea Co., 5 Utah 2d 187, 299 P.2d 622 (1956):

> The defendant's agents were businessmen, who either were or should have been, entirely familiar with the facts and circumstances, and should have been acting with caution and circumspection in regard to a matter so serious as charging plaintiff with a felony.

Id. at 626.

In this action, there is an abundance of evidence to demonstrate that there was no probable cause for the defendants to initiate this proceeding. First, defendant Crosgrove clearly had exculpatory information which he

withheld from the police.[2] Gibsons eventually informed the prosecutor that the charges would be dropped. (R. 644-46, 722-23). Mr. Crosgrove even told one witness that he did not believe that Shauna Hodges took the money. (R. 704-05, 714).

C. These defendants initiated the criminal proceedings for an improper purpose.

Restatement of Torts, Second, §668 states:

> To subject a person to liability for malicious prosecution, the proceedings must have been initiated primarily for a purpose other than that of bringing an offender to justice.

Comment e to that section reads:

> The only proper purpose for which criminal proceedings can be instituted is that of bringing an offender to justice and thereby aiding in the enforcement of the criminal law.

Comment g goes on to explain:

> One who initiates the proceedings to force the accused to pay money or to turn over land or chattels to the accuser, does not act for a proper purpose. This is true although the money is lawfully owed to the accuser or the thing in question has been unlawfully withheld or taken from him, so that relief might have been secured in the appropriate civil proceedings.

Similarly, this Court has held that initiating criminal proceedings to force an accused to pay money is

[2]There is no doubt that Crosgrove was acting on behalf of Gibsons when he told his "story" to Detective Lyday. (R. 596). Therefore, Gibsons is liable for his actions. See, Coombs v. Montgomery Ward & Co., 119 Utah 407, 228 P.2d 272 (1951).

improper, even if the money is lawfully owed. Haas v. Emmett, 28 Utah 2d 138, 459, P.2d 432,433 (1969).

Furthermore, §669 of the Restatement of Torts, Second, reads:

> Lack of probable cause for the initiation of criminal proceedings in so far as it tends to show that the accuser did not believe in the guilt of the accused, is evidence that he did not initiate the proceedings for a proper purpose.

Here there was ample evidence to show that the defendants did not have a proper purpose. Mr. Crosgrove did not reveal all of the true facts to the prosecutor or to the police. His purpose was obvious: to district attention from himself. Again, Gibsons is liable for his actions.

Moreover, Gibsons independent actions show that they had an ulterior motive other than bringing an offender to justice. When they had an admitted thief on their hands, Crosgrove, they did not bring that offender to justice. (R. 599-601). But after Mrs. Hodges refused to "buy" her innocence, and only after she refused, they then went to the West Valley Police. (R. 920). Finally, when Gibsons did learn of the exculpatory evidence in March, 1982, they did not turn that over to the police. Is that a corporation interested only in justice?[3]

[3]Defendants also claim that they were prejudiced because certain jury instructions used the word "guilty" rather than "liable". If anything, this would aid the defendants since the burden of proof standard in a "criminal action" is much

II.

PUBLIC POLICY REQUIRED THE COURT TO RECOGNIZE A CAUSE OF ACTION FOR WRONGFUL DISCHARGE IN THIS CASE

In Utah, generally, an employee is free to quit her employment at any time and an employer is free to discharge the employee at any time with or without cause. See, e.g., Bihlmaier v. Carson, 603 P.2d 790 (Utah 1979). However, this court has recognized that there are exceptions to the employment at will doctrine. In Bihlmaier v. Carson, the court wrote:

> In the absence of some further express or implied stipulation as to the duration of the employment or of a good consideration in addition to the services contracted to be rendered, the contract is no more than an indefinite general hiring which is terminable at the will of either party.

Id. at 792. See, also, Held v. American Linen Supply Co., 6 Utah2d 106, 307 P.2d 210, 211 (1957). Recently, in Rose v. Allied Development Co., 34 Utah Adv.Rep. 29 (Utah 1986), the court reaffirmed that exceptions to the at will doctrine exist. In that opinion, the court noted that "the employer's absolute right to discharge employees has been

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greater than in a civil action. See, State v. Starks, 627 P.2d 88 (Utah 1981)(beyond reasonable doubt standard). If the jury's minds were referred to a "criminal guilt-innocence context", appeal brief at 18; it benefitted the defendants. This Court will not reverse a jury verdict if the instructions constitute harmless error. See, e.g., Rowley v. Graven Brothers & Co., 26 Utah 2d 448, 491 P.2d 1209 (1971); Universal Investment Co. v. Carpets, Inc., 16 Utah 2d 336, 400 P.2d 564 (1965). Additionally, the jury was instructed properly on the burden of proof. (R. 407-09).

somewhat limited by subsequent federal and state legislation" expressing general public policy. Id. at 30. In its opinion, the court noted two examples: the Civil Rights Act of 1964, 14 U.S.C. §2000e-2(a)(1) which prohibits the discharge of employees based on race, color, religion, sex or national origin; and also Utah Code Ann. §34-35-6 (1953) which similarly prohibits the discharge of employees based on race, color, religion, sex, national origin, age or handicap. Rose v. Allied Development Co., at 30.

Other courts have recognized on a regular basis that an employment at will contract may be modified by a public policy exception when an employee is discharged for reasons violative of the public policy. See, e.g., Wehr v. Burroughs Corp., 438 F.Supp. 1052 (E.D.Penn. 1977) (Pennsylvania's employment at will doctrine recognizes the public policy exception and allows a cause of action for wrongful termination of employment based on age on the grounds that it violates the public policy of the State of Pennsylvania).

In Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983) plaintiff's secretary was forced to resign after it was discovered that she had had an affair with plaintiff who was married and a manager of one of defendant's divisions. At that time, plaintiff was allowed to keep his position. Shortly after her resignation was

obtained, she filed a sex discrimination claim against Dun & Bradstreet. The defendant requested Brockmeyer to file a written report about the events which led to his former secretary's resignation. Figuring he would become a scapegoat for the allegedly discriminative actions, plaintiff refused and also told defendant that, if called to testify, he would tell the truth.

Three days after the defendant settled the claim with the former secretary, plaintiff Brockmeyer was fired. At that time he was offered $8,500 if he would sign a release agreeing not to sue Dun & Bradstreet. He refused.

At trial, the jury was instructed that a terminated employee can recover damages from his or her employer "when the discharge violated clear and specific public policies or when the discharge is retaliatory or is motivated by bad faith or malice." Id. at 837. While the court found in that particular instance that defendants' behavior did not violate the fundamental public policy as expressed in the constitution or statutes, the court did recognize that "a wrongful discharge is actionable when the termination clearly contravenes the public welfare and gravely violates paramount requirements of public interest." Id. at 840.

Other states have recognized the exact same cause of action, for the same reasons. In Petermann v. Teamsters Local 396, 174 Cal.App.2d 184, 344 P.2d 25 (1959) the court

recognized that the employee is wrongfully discharged if he is fired because he refuses to commit perjury at the direction of the employer. In Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) the court held that the employee is wrongfully discharged when an employer fires the employee for filing a workmen's compensation claim. In Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) the court allowed a cause of action for wrongful discharge as one public policy exception to the employment at will doctrine when the employee was fired for complying with statutory jury duty service.

The court wrote:

> We conclude that there can be circumstances in which an employer discharges an employee for such a socially undesirable motive that the employer must respond in damages for any injury done.

Id. 536 P.2d at 515.

In Palmateer v. International Harvester Co., 85 Ill.2d 124, 421 N.E.2d 876 (1981) the court allowed the cause of action for wrongful discharge when the employer fired the employee because the employee supplied information about another employee to the local law enforcement authorities. The court stated:

> No specific constitutional or statutory provision requires a citizen to take an active part in ferreting out and prosecution of crime, but public policy nevertheless favors citizen crime fighters.

Id. 421 N.E.2d at 880.

The Oregon court also recognized that a wrongful discharge action may be brought when an employee is fired for filing a workman's compensation claim. Brown v. Transcon Lines, 284 Or. 597, 588 P.2d 1087 (1978). And in Thompson v. St. Regis Paper Co., 102 Wash.2d 219, 685 P.2d 1081 (1984), the Washington Court wrote:

> We join the growing majority of jurisdictions in recognizing the cause of action in tort for wrongful discharge if the discharge of the employee contravenes a clear mandate of public policy.

Id. at 1089. See, also, Wiskotoni v. Michigan National Bank-West, 716 F.2d 378 (6th Cir. 1983) where wrongful discharge verdict in favor of plaintiff was upheld when plaintiff was fired for appearing, purusant to a subpoena, and testifying before a grand jury.

In Savodnick v. Korvettes, Inc., 488 F.Supp. 822 (E.D.N.Y. 1980) the court found that an employee's action for "wrongful firing" stated a cause of action when he alleged that he was terminated solely to deprive him of his pension benefits. The court there found that there was a strong public policy in New York favoring the protection of integrity in pension plans and that to allow the action of the employer would be a violation of that public policy. See, also, Kovalesky v. A.M.C. Associated Merchandising Corp., 551 F.Supp. 544 (S.D.N.Y. 1982); Vigil v. Arzola, 102

N.M. 682, 699 P.2d 613 (N.M. App. 1983).

Article I §7 of the Utah Constitution expressly declares that "no person shall be deprived of life, liberty, or property without due process of law." Similarly, Article I §12 invests the accused in a criminal action of certain rights which cannot be violated under any circumstances. Likewise, it is the public policy of this state, and this nation, that an accused is presumed innocent until proven guilty beyond a reasonable doubt. See, e.g., State v. John, 586 P.2d 410, 412 (Utah 1978).

Utah statutes similarly recognize that it is the policy of the state that a person be allowed to exercise his right to work. Utah Code Ann. §34-34-2 specifically states, in part:

> The exercise of the right to work must be protected and maintained free from undue restraints and coercions.

Cf., Utah Code Ann. §34-24-1 (prohibiting blacklisting).

In this case, the jury was instructed that there existed a very narrow and specific exception to the employment at will doctrine. Instruction No. 43 (R. 442) stated:

> Plaintiff was free to quit her employment with defendant at any time, and defendant was free to discharge plaintiff at any time without cause. However, if you find from a preponderance of the evidence that the plaintiff was discharged on the basis of a false criminal accusation known to defendant Gibsons

> Products Co. to be false, then you may find the defendant Gibsons Products Co. guilty of wrongful discharge of the plaintiff.

This instruction requiring that the plaintiff should not suffer in her employment on the basis of a false criminal accusation which is known to the employer to be false is even narrower than the public policy presuming innocence until proven guilty. To end the person's employment under these circumstances imposes a penalty for conduct which is not criminal.

Here, the jury found that Gibsons fired the plaintiff on the basis of a false accusation which it knew to be false. There was an abundance of evidence to support this finding.

At the time of Mrs. Hodges' arrest, Gibsons suspended her, but did not discharge her from her employment. However, once the company learned the truth about the chief witness and accuser of Mrs. Hodges, and once it learned that at its instigation, the charges would be dismissed, Gibsons immediately fired Mrs. Hodges. The jury's verdict on this issue must be sustained.[4]

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[4]Even if the Court finds there is no cause of action for wrongful termination under these outrageous facts, it must sustain the general jury verdict on damages if it upholds the jury verdict in favor of the plaintiff for malicious prosecution. See, Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 835 (Utah 1984); Leigh Furniture and Carpet Co v. Isom., 657 P.2d 293, 301-02 (Utah 1982). Even though a "special verdict" form was submitted to the jury, the damage portion of that verdict form was clearly the equivalent of a general verdict when they found in favor of plaintiff on more than one cause of action. (R. 464-66).

III

THE JURY WAS PROPERLY INSTRUCTED CONCERNING PUNITIVE DAMAGES

This Court has consistently held that punitive damages may be awarded for conduct which is "willful, malicious or which manifests a reckless indifference toward and disregard for the rights of others." Branch v. Western Petroleum, Inc., 657 P.2d 267, 277-78 (Utah 1982). See, also, Atkin v. Mountain States Telephone and Telegraph, 709 P.2d 330 (Utah 1985); Von Hake v. Thomas, 705 P.2d 766 (Utah 1985); Synergetics v. Marathon Ranching Co., 702 P.2d 1106 (Utah 1985).

In this case there was an excess of sufficient evidence to submit the issue of punitive damages to the jury. First, there is no doubt that there was sufficient evidence to establish that the defendants were liable to the plaintiff for malicious prosecution. Their actions in procuring and continuing the initiation of a criminal proceeding against Shauna Hodges without probable cause and for an improper purpose clearly demonstrates malicious conduct fraught with reckless indifference for the rights of this plaintiff. See, above, Argument, Point I.

Defendants did not make a full and fair disclosure to the police or the prosecuting attorney of all material

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See, e.g., Owens v. McBride, 694 P.2d 590 (Utah 1984). There was no objection to the verdict form. (R. 1120-28).

facts they learned in their investigation of the theft which occurred at the West Valley store. Defendant Chad Crosgrove, as manager of the Gibsons West Valley store, testified falsely under oath and inaccurately at Mrs. Hodges' probable cause hearing. Furthermore, when Gibsons learned of the clearly and undeniably exculpatory evidence that the manager, the person with the best access to the money on the evening of September 3 and the morning of September 4, 1981, had admitted to being a thief and embezzler, it did not make any attempt whatsoever to inform the authorities of this fact. No conduct imaginable could be more outrageous, malicious, willful or done with greater reckless indifference to the rights of this plaintiff.

IV

THE JURY INSTRUCTIONS REGARDING SPECIAL AND GENERAL DAMAGES WAS CORRECT

Defendants complain that Jury Instruction No. 11 (R. 410) and No. 46 (R. 445) did not conform with the pleadings. Defendants attempt to limit plaintiff to $75,000 claiming she asked for only that much. This ignores the actual pleadings. In her complaint, plaintiff alleged that:

> Plaintiff has been injured and suffered damages including, but not limited to, loss of wages, medical expenses, severe emotional distress and mental anguish requiring professional therapy and further pain and suffering at least in the amount of $75,000, the full of extent of which has not been

> determined, and which will be established by proof at time of trial.

(R. 6) (emphasis added).

Similarly, in her prayer for relief, plaintiff prayed for judgment as follows:

> 1. In the sum of $75,000 and such other sums that plaintiff shall establish by proof at the time of trial.

In Cox v. Johnston, 484 P.2d 116 (Col. App. 1971) the Colorado Court of Appeals was faced with a very similar issue. In that case, the plaintiff alleged the nature of his special damages, but not the amount. The defendants contended, as the defendants do here, that since there was no amount pled, plaintiff failed to allege special damages as required by Rule 9(g) of the Colorado Rules of Civil Procedure. The court held that although special damages must be specifically pled in order to recover, "there is no requirement that the dollar amount be specifically pleaded." Id. at 120. Cf. Prince v. Peterson, 538 P.2d 1325 (Utah 1975); Cohn v. J.C. Penney Co., 537 P.2d 306 (Utah 1975).

There is no doubt that plaintiff gave the defendants actual notice of the special damages she would claim at trial. Likewise, there is no doubt that the defendants were apprised of the fact that plaintiff intended to prove compensatory damages, both general and special in an amount in excess of $75,000. Defendants' argument that

they were deprived of adequate notice is totally without merit.

Additionally, there is substantial evidence to prove the amount of damages awarded. It is important to note that the special verdict form (R. 464-66) referred only to compensatory damages and did not distinguish between general or special damages. Plaintiff testified extensively to the severe mental distress she endured as a result of the wrongful actions of the defendants. (R. 936-39). Similarly, plaintiff's husband testified extensively as to the effect and mental distress his wife displayed. (R. 1000-05). Such mental pain and suffering is entitled to compensation. Prince v. Peterson, 538 P.2d 1325, 1329 (Utah 1975).

Likewise, there is substantial evidence showing the amount of attorneys fees plaintiff incurred in defending the criminal action. (R. 931-35; Exs. 24 & 25). There was also extensive evidence detailing the plaintiff's therapy bills which were incurred as a proximate cause of the wrongful acts of the defendants. (R. 935-49; Exs. 18 & 26). Finally, there also was extensive evidence demonstrating the lost wages suffered by plaintiff. (R.-949-57; Exs. 28 & 29). These three items of damages totalled $26,515. (Exs. 18, 24, 25, 26 & 29). In short, defendants' argument that there was insufficient evidence to support the jury's damage

verdict is frivolous.

CONCLUSION

Plaintiff respectfully requests that the verdict of the jury be sustained. This verdict was supported by ample evidence and the jury's thoughtful deliberations should not be disturbed.

DATED: June 18, 1986.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of June, 1986, I caused to be hand-delivered a true and correct copy of the foregoing Respondent's Brief to:

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