IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

CASE NO. 11-10379

LUKE FRAZIER,

DIVISION: H

Plaintiffs,

vs.

THE HANOVER INSURANCE GROUP, INC., a Foreign Corporation, and MICHAEL ARLINE, JR., an individual,

Defendants.
_____/

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND/OR MOTION FOR JUDGMENT IN ACCORDANCE WITH PRIOR MOTION FOR DIRECTED VERDICT AND MOTION FOR NEW TRIAL

Defendants, THE HANOVER INSURANCE GROUP, INC. ("Hanover") and MICHAEL ARLINE, JR. ("Arline"), through undersigned counsel, and pursuant to Rules 1.480 and 1.530 of the Florida Rules of Civil Procedure, file their Motion for Judgment Notwithstanding the Verdict and/or Motion For Judgment in Accordance with Prior Motions for Directed Verdict and Motion for New Trial, stating:

INTRODUCTION AND FACTUAL BACKGROUND

As the Court will recall, this lawsuit was filed against Defendants after Plaintiff's prosecution by the State of Florida, and subsequent acquittal, for insurance fraud arising out of an insurance claim filed with Hanover by his then-girlfriend, Marovic Grant ("Grant"), after an October 10, 2009 motor vehicle accident. The case presents questions regarding the extent of an insurance company's and it Special Investigative Unit ("SIU") employee's liability for complying with their statutory duty under Florida law to report suspicious insurance claims to the Division of Investigative and Forensic Services, formerly known as the Division of Insurance

Fraud ("DIF") and to provide DIF with additional information as requested.[1] As discussed below, in exchange for requiring insurers and their employees to report suspicious insurance claims to DIF, absent fraud, bad faith, or malice, they are protected with broad immunity from liability for complying with the statute or furnishing DIF with requested information. See § 626.989(4)(c), Fla. Stat.

In this case, because there was no legally sufficient evidence presented at trial to show that either Arline or Hanover acted in a manner that can be fairly characterized as fraudulent, in bad faith, or with malice, Defendants are entitled to a judgment in their favor as a matter of law. The evidence Plaintiff relied on throughout trial to establish fraud, bad faith, and malice was legally insufficient since the fact that Arline inadvertently mischaracterized the passenger-side of Grant's vehicle as the "left side" rather than the "right side" in his SIU Report was unintentional and, as clearly testified to by Tom Eberhart, had no significance at all in DIF's independent fraud investigation against Plaintiff, which the trial evidence showed was already underway as a result of a separate consumer complaint made months earlier by the other party involved in the October 10, 2009 accident, Wendy Williams. Perhaps if the trial evidence showed that DIF's referral of Plaintiff to the Hillsborough State Attorney on insurance fraud charges was based, even in part, on Arline's mistaken description of the location of the vehicle damage, Plaintiff's argument might arguably hold some water. However, given the undisputed trial evidence, there simply was no legally sufficient evidence presented to support the verdict in this case.

[1] Pursuant to § 626.989(6), Fla. Stat., "any insurer, agent, or other person licensed under the code, or an employee thereof, having knowledge or who believes that a fraudulent insurance act or any other act or practice which, upon conviction, constitutes a felony or a misdemeanor under the code, or under s. 817.234, is being or has been committed shall send to the Division of Investigative and Forensic Services a report or information pertinent to such knowledge or belief and such additional information relative thereto as the department may require."

Plaintiff originally filed a two-count lawsuit against Hanover and Arline for abuse of process and malicious prosecution alleging that Defendants, with malice and intent to injure him, caused an investigation by DIF and thereafter his arrest on charges of insurance fraud knowing that the accusations made to DIF were false and without probable cause. Defendants denied the allegations and, among other defenses, asserted they were immune under § 626.989(4)(c) and were not the legal cause of Plaintiff's criminal prosecution. Plaintiff dismissed the abuse of process claim on the eve of trial and proceeded only on the malicious prosecution claim. Trial was held between February 14-16, 2022 and resulted in a verdict in Plaintiff's favor in the amount of $121,750.00.[2]

As laid our below, it is Defendants' position that there never should have been a trial in this case and the defense was entitled to judgment in its favor as a matter of law on several distinct legal grounds. Pursuant to Rule 1.480(b), Defendants herein renew their directed verdict motion and now ask the Court to enter judgment in their favor notwithstanding the verdict because: (1) Plaintiff failed to present evidence proving three necessary elements of malicious prosecution, including legal causation, lack of probable cause and malice and (2) Plaintiff failed to present any evidence that Defendants acted fraudulently, in bad faith, or with malice when reporting and providing requested information to DIF and thus pursuant to § 626.989(4)(c), they are immune from civil liability for the allegation made against them by Plaintiff.

Alternatively, Defendants request a new trial since the jury's verdict is contrary to the manifest weight of the evidence.

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[2] The verdict was broken down as follows: $ 120,000 in past pain and suffering damages; $0 in future pain and suffering damages; and $1,750.00 in expenses, including reasonable attorney's fees. See Verdict Form attached as ***Exhibit A***.

EVIDENCE AT TRIAL

At trial, the jury heard about a minor motor vehicle accident on October 10, 2009 at a toll plaza on the Suncoast Parkway in Tampa, Florida involving Plaintiff, who was driving his then-girlfriend's vehicle ("The Grant Vehicle"), and Wendy Williams. The extent of the damage to the Grant Vehicle as a result of this accident and who was at fault for it—and inconsistent statements made by Plaintiff regarding these issues—form the underpinnings of the insurance fraud charges in this case.

A. Conflicting Versions of the Accident and the Damage to the Grant Vehicle.

The Grant Vehicle was insured by Hanover. The trial evidence showed that within several days of the accident—believing Plaintiff was entirely at fault—Wendy Williams made a claim with Hanover and provided a $1,330.00 estimate for minor damage to the right rear fender of her vehicle. The Hanover claim notes, which were in evidence at trial, state that Williams told Hanover that the accident was Plaintiff's fault and occurred when Plaintiff swerved into her Sunpass lane. Plaintiff told Williams at the scene that the accident occurred because he was merging into the Sunpass lane and Grant yanked the steering wheel toward the pay lane and he yanked back, causing the Grant Vehicle to strike Williams' vehicle. Williams stated in a recorded statement upon reporting the accident to Hanover—and throughout this entire dispute—that the Grant Vehicle sustained minor damage to the front driver-side bumper and fender, which is the left side of the vehicle.

After Williams made her claim on October 12, 2009, Hanover tried repeatedly to contact Plaintiff and Grant to discuss the accident, but its calls and letters went unanswered.[3] It was not

[3] According to the claim notes, calls were made to Grant or Frazier on October 12th, 14th, 16th, 20th, 22nd, and 29th 2009 and letters were sent to Grant requesting she contact Hanover about the accident.

until November 5, 2009 that Plaintiff first contacted Hanover about the loss and provided a recorded statement to Hanover giving a totally different version of the accident. The claim notes state that Plaintiff told Hanover the impact occurred when the vehicles approached the toll plaza and Williams' vehicle accelerated and hit the Grant Vehicle, causing it to be pushed to the right where it struck some yellow posts by the toll booth entrance. In contrast with Williams' version, Plaintiff reported the points of impact and damage being not only to the driver-side, but also the passenger-side of the Grant vehicle.

At trial, the jury saw photos taken by Hanover on November 11, 2009, showing extensive damage to the passenger-side of the Grant Vehicle. Based on these photos and Plaintiff's recorded statement, Hanover determined the accident was partially or totally Wendy Williams' fault and, as a result, on November 12, 2009, sent her a letter, which was an exhibit at trial, advising it would be looking to her or her insurance company to re-pay Hanover for the $4,667.51 paid to repair the Grant Vehicle.

After receiving Hanover's subrogation letter, Wendy Williams adamantly contested Plaintiff's version of the accident insisting there was no damage at all to the passenger-side of the Grant Vehicle after the accident. Hanover's claim notes show that Williams contacted them in the beginning of February 2010 to ask Hanover to make a fraud referral and told them that she had a recording of Plaintiff admitting fault for the accident and that the damages claimed to the Grant Vehicle were not from the accident. The claim notes indicate that on February 9, 2010, after viewing Williams' video of Plaintiff admitting fault for the accident, the matter was referred to Hanover's SIU division for further investigation of possible fraud. It was at this time that Arline became involved.

B. Arline's Investigation.

As part of his SIU investigation, Arline interviewed Wendy Williams for an hour-and-a-half on February 11, 2010 and his 37-page recorded interview was in evidence at trial as a defense exhibit. During the interview, Williams told Arline her version of how the accident occurred and was adamant there was no impact or damage to the passenger-side of the Grant Vehicle. She also claimed that when she went to call the police at the scene, Plaintiff asked her not to because neither he nor Grant had an insurance card with them and he did not want to get a ticket. She agreed that because it was such a minor accident, they could just exchange insurance information. Williams told Arline that to make her feel more comfortable with her decision not to call the police, Plaintiff agreed Williams could record him stating that he hit her vehicle and that neither he nor Grant were injured.

Arline reviewed and obtained a copy of Williams' recording of Plaintiff admitting he hit her for Hanover's file. He also drove to the toll plaza to see if there were any posts in the vicinity that could make the type of damage to the passenger-side of the Grant Vehicle Plaintiff reported and determined there was not. He reached out to both Plaintiff and Grant for an interview, but neither would speak to him.

Arline spoke briefly with Grant on February 23, 2010 and told her, when she was hesitant, that he needed to speak with her about the insurance fraud complaint made by Williams. Grant returned Arline's call on February 26, 2010 and agreed to meet him on March 8, 2010 to clear up the matter. Arline's SIU report dated March 10, 2010 at 8:37 a.m., which was in

evidence at trial, states that, during this call, Grant confessed to and apologized for misrepresenting the extent of the damage caused to her vehicle in the accident with Williams.[4]

When Grant failed to appear for their meeting, Arline called her and, when she did not answer, left a message advising that based on her admission that the damages caused in the accident with Williams were incorrectly reported as well as the other evidence, he would be making recommendations to the claim department and filing a report with DIF regarding the loss.

Arline's March 10, 2010 report recommended Hanover afford Williams PD Liability coverage for the loss and concluded there was overwhelming evidence that Plaintiff and Grant misrepresented the extent of the damage to the Grant Vehicle from the accident with Williams and who caused the accident. As support for this conclusion, Arline's report referred to Plaintiff's recorded confession of liability to Williams at the scene and Grant's admission to him of inaccurately reporting the damage to her vehicle in the accident with Williams. It further states that the yellow paint transfer on the Grant Vehicle's passenger-side, which was inaccurately described in the report as the vehicle's left side, did not appear to be caused by a collision with a motor vehicle as originally reported by Plaintiff, but rather from contact with a concrete pole or barrier, which was not present at the toll plaza.

After complying with his and Hanover's statutory duty to report to his findings to DIF, Hanover closed its SIU investigation. No criminal charges were filed by Hanover and no further actions were taken in the matter until Arline received a letter from a DIF detective, Tom Eberhart, in August of 2010 requesting Hanover's entire SIU and claim file, which advised

[4] Arline's Report, which was in evidence, inaccurately refers to the falsely reported damage to the passenger-side of the Grant vehicle as the "left side" rather than the "right side." As stated above, throughout trial, Plaintiff placed a great emphasis on this inaccuracy and argued that Arline's mistake justified a finding that Defendants acted fraudulently, in bad faith, and with malice.

Eberhart was conducting an investigation after a consumer complaint made by Wendy Williams to DIF.

C. <u>Wendy Williams' Complaint to DIF Causes a DIF Investigation to be Opened</u>.

The evidence at trial showed unequivocally that Arline's reporting of the incident to DIF did not result in DIF's investigation or subsequent referral to the state attorney. Instead, as Tom Eberhart clearly testified, it was Wendy Williams' TIP Report, filed two months before Arline's report, which caused a DIF case to be opened and his investigation to begin.

Tom Eberhart testified at trial that he had no contact with Defendants throughout his investigation except to request their file. He was adamant that he conducted his own independent investigation to determine if probable cause existed to refer the matter to the state attorney, which included interviewing Wendy Williams himself and going to the toll plaza to see if there was something there that could have transferred the yellow paint that could be seen on the passenger-side of the Grant Vehicle in the damage photos. Eberhart also himself located and spoke with additional witnesses, who were not previously identified by Hanover.

Tom Eberhart testified that after doing his own independent investigation, he determined there was probable cause to conclude that Plaintiff and Grant had misrepresented that the Grant Vehicle sustained damage to the passenger-side in the accident with Wendy Williams. As a result, he referred the matter to Hillsborough County State Attorney's Office, who came to the same conclusion and brought insurance fraud charges against Plaintiff for making a false insurance claim in relation to the accident with Wendy Williams.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND MOTION FOR JUDGMENT IN ACCORDANCE WITH PRIOR MOTIONS FOR DIRECTED VERDICT

Defendants filed a written directed verdict motion on February 15, 2022[5] and argued this motion in court on February 16, 2022 after the close of the evidence. See Written Motion for Directed Verdict, attached as ***Exhibit B*** and Trial Excerpt of Directed Verdict, attached as ***Exhibit C***. Pursuant to Rule 1.480(b), when a motion for directed verdict is made at trial, and is, for any reason, not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Defendants herein renew their directed verdict motion and move for judgment notwithstanding the verdict.

A. Defendants are Entitled to a JNOV Because Plaintiff Did Not Prove Three Essential Elements of a Malicious Prosecution Action—Legal Cause, Lack of Probable Cause and Malice.

Florida law is well settled that a malicious prosecution action requires the plaintiff to prove ***all*** of the following six elements: (1) a criminal or civil judicial proceeding was commenced against the plaintiff; (2) the proceeding was instigated by the defendant in the malicious prosecution action; (3) the proceeding ended in the plaintiff's favor; (4) the proceeding was instigated with malice; (5) there was an absence of probable cause for the proceeding; and (6) the plaintiff was damaged. See Jallali v. Christiana Trust, 297 So. 3d 580, 584 (Fla. 4th DCA 2020) (citing to Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1355 (Fla. 1994) where the Florida Supreme Court prescribed the elements of a malicious prosecution claim); see also Alvarez-Mena v. Miami-Dade County, 305 So. 3d 63, 67 (Fla. 3d DCA 2019) (quoting from Miami-Dade County v. Asad, 78 So. 3d 660, 664 (Fla. 3d DCA 2012)); Alterra Healthcare Corp.

[5] Following the verdict, this Court entered an order denying Defendants' Motion for Directed Verdict on February 22, 2022, attached as ***Exhibit D***. Pursuant to Fla. R. Civ. P. 1.480(b), these issues can be re-raised through this post-trial motion.

v. Campbell, 78 So. 3d 595, 602 (Fla. 2d DCA 2011); Pearce v. U.S. Fidelity and Guar. Co., 476 So. 2d 750, 752 (Fla. 4th DCA 1985).

The absence of any one element necessary to prove malicious prosecution is fatal to a plaintiff's claim. See Mancusi, 632 So. 2d at 1355 ("The failure of a plaintiff to establish any one of these six elements is fatal to a claim of malicious prosecution"); see also Alterra Healthcare Corp., 78 So. 3d at 602; Pearce, 476 So. 2d at 752; Northwest Fla. Home Health Agency v. Merrill, 469 So. 2d 893, 899 (Fla. 1st DCA 1985).

Here, Defendants were entitled to a directed verdict, and are now entitled to a JNOV, because there was no evidence presented of three essential elements of malicious prosecution—legal cause, lack of probable cause, and malice.

1. No Evidence of Legal Causation.

To prove legal cause in a malicious prosecution case, the general rule is that if the defendant merely gives a statement to the proper authorities, leaving the decision to prosecute entirely to the uncontrolled discretion of the officer or if the officer makes an independent investigation, the defendant is not regarded as having instigated the proceeding. See Orr v. Belk Lindsey Stores, Inc., 462 So. 2d 112, 114 (Fla. 5th DCA 1985); see also Alterra Healthcare Corp., 78 So. 3d at 603 (in a malicious prosecution action, legal causation is established where a defendant gives information to authorities which he knows or should know to be false which is the determining factor in inducing officer's decision"); Burger v. Time Ins. Co., Inc., 162 F.3d 1111, 1112 (11th Cir.1998)(applying Florida law to affirm summary judgment for insurer on malicious prosecution claim where insurer turned over its SIU file to DIF, which in turn referred the matter to the state attorney since the rule applied that malicious prosecution does not lie where a defendant merely gives a statement to the proper

authorities, leaving the decision to prosecute entirely to them); Dorf v. Usher, 514 So. 2d 68, 69 (Fla. 4th DCA 1987) (affirming summary judgment for defendant on malicious prosecution claim and concluding that where the evidence shows a defendant gave a statement of fact to the authorities and left the decision to prosecute solely in the hands of the authorities, who had the opportunity to conduct an independent evaluation, he cannot be regarded as having instituted the criminal action).

In Dorf, 514 So. 2d at 69, the basis upon which the summary judgment was affirmed was affidavit testimony from an assistant state attorney that the decision to prosecute the plaintiff was based on an independent investigation, with no outside interference or persuasion from the defendant. Likewise, in Hickman v. Barclay's Intern. Realty, Inc., 16 So. 3d 154, 155 (Fla. 4th DCA 2009), the court relied on the analysis in Dorf to affirm a summary judgment in the defendant's favor in a malicious prosecution action and concluded there were no material fact issues remaining on legal causation where the evidence was undisputed that before filing charges against the plaintiff, the officer in charge investigated the case thoroughly and interviewed both parties, obtained other documents and statements, and submitted the report to the state attorney's office. Moreover, the state attorney made independent determinations that a good faith basis existed to prosecute without any pressure from the defendant. Id.

The same situation exists here where the trial evidence shows that—as a matter of law—Defendants did not instigate and were not the legal cause of Plaintiff's prosecution for insurance fraud. As laid out above, and made absolutely clear from Tom Eberhart's testimony, Defendants' reporting to DIF did not cause an investigation to commence since, by that time, DIF's investigation was already underway as a result of Wendy Williams' earlier complaint, which was filed two months before Arline's report was filed.

Moreover, Eberhart testified at length about his independent investigation, where he interviewed Wendy Williams, reached out to both Plaintiff (who refused to speak to him and referred him to his criminal attorney) and Grant to try to speak with them, and found other witnesses, who offered additional support for his independent determination that there was probable cause to conclude that Plaintiff and Grant falsely reported their claim.

The trial evidence showed that DIF opened its file because of Wendy Williams' consumer complaint and then conducted its own independent investigation into her allegations of fraud by Plaintiff and Grant. Eberhart stated clearly at trial that neither Arline nor anyone else at Hanover influenced or actively participated in DIF's investigation in any way. He made clear that nothing that Defendants did or did not do—including having a typo in their report–was a determinative factor in DIF's decision to refer the matter to the state attorney nor did Defendants play any role at all in the state attorney's decision to prosecute Plaintiff. As a matter of law, Defendants were not the legal cause of Plaintiff's prosecution.

2. Plaintiff Did Not Establish A Lack of Probable Cause.

Probable cause has been defined in the context of malicious prosecution as "[a] reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense for which he is charged." See Metropolitan Dade County v. Norton, 543 So. 2d 1301, 1302 (Fla. 3d DCA 1989) (quoting from Thomson McKinnon Securities, Inc., 534 So. 2d 757 (Fla. 3d DCA 1988)); Heard v. Mathis, 344 So. 2d 651, 656 (Fla. 1st DCA 1977) (citing to Goldstein v. Sabella, 88 So. 2d 910 (Fla. 1956) that probable cause in a malicious prosecution action is defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves

to warrant a cautious person in the belief that the person accused is guilty of the offense charged).

"[I]f probable cause does exist in a case the cause of action for malicious prosecution will not lie." Southland Corp. v. Bartsch, 522 So. 2d 1053, 1055 (Fla. 5th DCA 1988); see also Thomson McKinnon Securities, Inc., 534 So. 2d at 759 ("It is settled law in Florida that an absence of probable cause for the commencement or continuance of an original criminal or civil judicial proceeding is an essential element in an action for malicious prosecution").

In considering whether Plaintiff met his burden to establish a lack of probable cause, it must be kept in mind that the dismissal, acquittal, or a verdict of not guilty in the underlying criminal proceeding does not equate to a lack of probable cause. See Thomson McKinnon Securities, Inc., 534 So. 2d at 759; see also Phelan v. City of Coral Gables, 415 So. 2d 1292, 1294 (Fla. 3d DCA 1982) ("[T]he determinative factor as to the existence of probable cause as an element of a malicious prosecution action is whether the suit was brought without reasonable prospect of success. Acquittal or dismissal of the charges . . . does not by itself establish improbability of the suit"); Duncan v. Germaine, 330 So. 2d 479, 481 (Fla. 4th DCA 1976) (recognizing ultimate exoneration of the plaintiff is not at all controlling on the question of the absence of probable cause in a malicious prosecution case).

The question of probable cause in a malicious prosecution action is a mixed question of fact and law. When the facts relied on to show probable cause are in dispute, their existence is a question of fact for the determination of the jury; but their legal effect when found or admitted to be true, is for the court to decide as a question of law. See Mem'l Hosp.-W. Volusia, Inc. v. News–Journal Corp., 729 So. 2d 373, 381 (Fla. 1999) (quoting Alamo Rent–A–Car, 632 So. 2d at 1357); see also Northwest Fla. Home Health Agency, 469 So. 2d at 900-01(citing to City of

Pensacola v. Owens, 369 So. 2d 328 (Fla. 1979) for proposition the sufficiency of the evidence to prove want of probable cause is a question of law for the court where the facts material to that issue are not in dispute); Dorf, 514 So. 2d at 68 ("Although some of the facts may be in dispute, the trial court correctly found that there was no dispute with respect to the material facts on those elements. Probable cause then became a question of law for the court").

Here, the trial court erred in failing to direct a verdict for Defendants on the malicious prosecution claim because the evidence clearly showed that there was probable cause for Arline to conclude that Plaintiff engaged in insurance fraud by misrepresenting how the accident with Wendy Williams occurred, who was at fault for the accident, and the damages caused to the Grant Vehicle in the accident so as to trigger Defendants' obligation to report its findings to DIF under § 626.989(6), Fla. Stat. Specifically, the evidence available to Arline included, among other things, a recording of Plaintiff at the accident scene admitting that he hit Wendy Williams' vehicle and a confession from Grant that the damages to her vehicle had been inaccurately reported. Arline repeatedly reached out to both Plaintiff and Grant during the SIU investigation to get their version of events, but neither would submit to an interview.[6] Given the available evidence, Arline was obligated under § 626.989 report his findings to DIF, who thereafter conducted its own investigation and also determined probable cause existed, as a result, referred the case to the state attorney. See Southland Corp., 522 So. 2d at 1056 (the trial court erred in submitting the question of malicious prosecution to the jury where an assistant state attorney and the arresting officer testified there was probable cause to arrest the plaintiff for stealing a pack of gum, and plaintiff admitted he stole the gum, thus establishing probable cause existed as a matter of law).

[6] At trial, Plaintiff admitted he received Arline's calls requesting to speak with him about the fraud allegations being made by Wendy Williams, but stated he did not want to speak with him and had already given his version of events to Hanover in his recorded statement.

This case is comparable to Northwest Fla. Home Health Agency, 469 So. 2d at 895-97 where the First District reversed a jury verdict in a malicious prosecution case brought by a nurse against her supervisor and employer for reporting the nurse's conduct to the Department of Business Regulation Board of Nursing, which—like here—was done pursuant to a statutory obligation. Among the grounds to reverse the verdict was a determination by the appellate court that the trial court erred in denying the defendants' motion for directed verdict given the plaintiff's failure to establish the lack of probable cause, which was found to be a question of law. Id. at 900-01. In response to the plaintiff's argument that a jury issue existed with respect to probable cause since the plaintiff denied the charges brought against her, the court explained that the question is not guilt or innocence, but whether the defendants "had a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious person to conclude that the department should be informed." Id. at 901. The Northwest Fla. Home Health Agency court continued "[f]or this reason the truth or falsity of the charges is not a decisive material fact. The undisputed evidence of the obligation to report possible violations under the circumstances shown is a sufficiently strong objective manifestation of probable cause to make this decision one for the court." Id.

The same conclusion should be reached here since the information with which Arline was presented during his SIU investigation created an obligation under § 626.989(6) for Defendants to report its findings to DIF. As a matter of law, Plaintiff cannot and did not establish lack of probable cause.

3. Plaintiff Did Not Establish Malice.

Plaintiff also failed to present sufficient evidence to prove the essential element of malice. Here again, the analysis used in Northwest Fla. Home Health Agency, 469 So. 2d at 901-

02, should be considered and is instructive. There, the court concluded that when considering the malice element of a malicious prosecution claim in the context of a party who is statutorily obligated to report certain information to an administrative agency and is protected from civil liability for doing so,[7] a showing of actual malice—rather than legal or inferred malice—is required. Because there was no evidence that the defendants intended to or were motivated by a desire to harm the plaintiff—as opposed to comply with their statutory obligation to report the circumstances of her termination—there was insufficient evidence presented to establish malice.

The same conclusion must be reached here where there was absolutely no evidence at trial that Defendants had any ill will toward Plaintiff or that the reporting to DIF was brought about from an intent to harm him as opposed to complying with their statutory duty to report under § 626.989(6), Fla. Stat. Arline repeatedly tried to reach out to both Plaintiff and Grant throughout his fraud investigation to understand their side of the story, but they refused to speak with him. Because there was no evidence presented to establish that Defendants were motivated by a desire to harm Plaintiff or that they presented knowingly false conclusions to DIF in an effort to have him prosecuted for something they knew he did not do, Plaintiff did not prove the requisite malice.

B. Defendants are Entitled to a JNOV Because They Are Immune From Plaintiff's Malicious Prosecution Claim Pursuant to § 626.989(4)(c), Fla. Stat.

By way of overview, Florida law provides a detailed statutory scheme that requires insurers in Florida to maintain and designate an anti-fraud unit to investigate and report possible fraudulent insurance acts by insureds. See §§ 626.989, 626.9891. Insurers are statutorily required to adopt an anti-fraud plan, designate at least one employee who is primarily

[7] Like § 626.989, Fla. Stat., the statutory scheme at issue in Northwest Fla. Home Health Agency, also protects those furnishing information to the department with immunity from civil litigation unless the information is furnished "in bad faith or with malice" 469 So. 2d at 901.

responsible for implementing the statutory requirements, and electronically file with DIF a detailed description of the insurer's anti-fraud unit. See § 626.9891(2). An anti-fraud plan must include, among other things, an acknowledgment that the insurer has established procedures for the mandatory reporting of possible fraudulent acts to DIF. See § 626.9891(3). An insurer's failure to comply with these statutory requirements can expose it to penalties. See § 626.9891(8).

In exchange for the statutory obligations imposed on insurers, and their employees, to report possible fraudulent acts to DIF and provide requested information, § 626.989(4)(c), Fla. Stat. cloaks them with immunity from civil action, absent fraud or bad faith. See Pearce v. U.S. Fidelity and Guar. Co., 476 So. 2d 750, 751 (Fla. 4th DCA 1985) (explaining that § 626.989 requires insurers to notify DIF of fraudulent claims it believes are being made, and to supply DIF with such additional relevant information as it may require and in exchange provides immunity from civil liability for statutory compliance). The statute states:

> In the absence of fraud or bad faith, a person is not subject to civil liability for libel, slander, or any other relevant tort by virtue of filing reports, without malice, or furnishing other information, without malice, required by this section or required by the department or division under the authority granted in this section, and no civil cause of action of any nature shall arise against such person:
>
> 1. For any information relating to suspected fraudulent insurance acts or persons suspected of engaging in such acts furnished to or received from law enforcement officials, their agents, or employees;
>
> 2. For any information relating to suspected fraudulent insurance acts or persons suspected of engaging in such acts furnished to or received from other persons subject to the provisions of this chapter;
>
> 3. For any such information furnished in reports to the department, the division, the National Insurance Crime Bureau, the National Association of Insurance Commissioners, or any local, state, or federal enforcement officials or their agents or employees; or
>
> 4. For other actions taken in cooperation with any of the agencies or individuals specified in this paragraph in the lawful investigation of suspected fraudulent insurance acts.

Prior Florida cases have analyzed insurer immunity under § 626.989(4)(c) for reporting suspected fraudulent claims to DIF, which—like here—resulted in DIF conducting an independent investigation and charges being filed against the insured. In Saenz v. State Farm Fire and Cas. Co., 861 So. 2d 64, 66 (Fla. 3d DCA 2003), after questioning an insured's Hurricane Andrew claim, State Farm commenced an SIU investigation and, after the insured failed to provide receipts supporting her claim that she had fully renovated and was residing in her home before the hurricane, reported the potentially fraudulent claim to DIF pursuant to § 626.989(6). Thereafter, an independent investigation by a DIF investigator was conducted, which resulted in the insured's arrest on insurance fraud charges, which were eventually nolle prossed.

After the insured sued State Farm and its SIU investigator for malicious prosecution, the trial court in Saenz entered summary judgment for the defense, which was affirmed by the Third District on grounds that the undisputed record evidence showed that the matter was referred to DIF as a result of the insured's failure to document that her home had been under renovation before Hurricane Andrew and that neither State Farm nor its SIU investigator acted fraudulently or in bad faith in reporting the matter to DIF and thus they were immune from the insured's suit. Id. at 67

This case is virtually identical to Saenz. Upon being told by Wendy Williams that Plaintiff and Grant were fraudulently reporting their claim, the matter was referred to Hanover's SIU to investigate. After an SIU investigation supported Williams' allegations, Hanover did what it was required to do under § 626.989(6) by reporting the suspected fraud to DIF, who, by that point, was already conducting its own independent investigation as a result of Wendy Williams' consumer complaint. Based on DIF's independent investigation, and conclusion that probable

cause existed, the matter was referred to the Hillsborough County State Attorney's Office, who brought charges of insurance fraud against Plaintiff.

No evidence was presented at trial to show that Defendants acted fraudulently, in bad faith or in reckless disregard of Plaintiff's rights. While inevitably Plaintiff will argue that Arline's mistake in reporting the fraudulently claimed damage to the Grant Vehicle as being on the left side rather than the right, this argument lacks merit. First, because it was an inadvertent mistake made by Arline and not done for any improper or malicious purpose. While the report did admittedly misidentify the damage as being on the left side of the Grant Vehicle, when read it context, it is clear that Arline is referring to the passenger-side damage. More importantly, as testified to by Tom Eberhart, the error was completely meaningless and played no part in his investigation. Eberhart was clear he was investigating the cause of the damage to the right side of the Grant Vehicle—or the passenger-side—and that nothing contained in Arline's report, including the mistaken "left side" reference affected how his investigation was conducted. Because the mistake in Arline's SIU Report is not legally sufficient evidence to permit a finding of fraud, bad faith or malice, Defendants are entitled to immunity.

Because they are immune, it was improper for this case to be presented to the jury. Allowing this, or any case like it, to go to trial will inevitably create a chilling effect on the reporting of suspected fraud claims to DIF by insurers and their employees, which is contrary to the purpose of the statute and the legislative mandate to investigate and report possible fraud. Zellermaier v Travelers Indemn. Co. of Illinois[8], 739 N.Y.S.2d 922, 923 (Sup. Ct. 2002) (concluding that a broad reading of immunity for reporting fraud will have the effect of encouraging parties who know or suspect fraudulent activity to report this to the insurance

[8] The Third District cited to Zellermaier in Saenz, 861 So. 2d at 67 when discussing why State Farm ad it SIU employee were entitled to immunity.

department, which will serve to discover potential fraud, deter abusive behavior and appropriately punish false claims and that a contrary narrow reading of immunity will tend to make individuals more cautious in reporting insurance fraud and thus discourage these reports, which is contrary to the natural import of the statute). Defendants are entitled to immunity from this lawsuit and are now entitled to a judgment notwithstanding the verdict.

MOTION FOR NEW TRIAL

Although believing that a judgment notwithstanding the verdict is the proper remedy in this case, Defendants alternatively move for a new trial on the basis that the jury's verdict is contrary to the manifest weight of the evidence.

Defendants are entitled to a new trial because, as laid out above, no evidence was presented to prove three of the necessary elements of malicious prosecution under Florida law nor did Plaintiff establish that Defendants acted fraudulently or in bad faith in conducting their investigation arising out of the October 9, 2009 accident and thereafter reporting and furnishing information to DIF. The jury ignored or misunderstood the jury instructions with which it was instructed with respect to the requisite elements of malicious prosecution and immunity under § 626.989. It is a judge's duty to grant a new trial and he should always do so if the jury has been deceived as to the force and credibility of the evidence or influenced by considerations outside the record. Smith v. Brown, 525 So. 2d 868 (Fla. 1998); see also see also Dep't of Corr. v. Romero, 524 So. 2d 1032, 1033 (Fla. 5th DCA 1988) (new trial is required where verdict is against manifest weight of evidence); Diaz v. Certified Marine Indus., Inc., 346 So. 2d 1211 (3d DCA 1977) (when a trial court concludes that a verdict is against the manifest weight of the evidence, and thereby unjust, a new trial is required). "The trial judge should grant a new trial if the manifest weight of the evidence, is contrary to the verdict. Smith, 525 So. 2d at 869.

In making such a decision, the judge must necessarily consider the credibility of the witness and the weight of all other evidence. Id. The granting of a new trial will be upheld if a review of the evidence discloses that a reasonable person could have concluded that the verdict was against the manifest weight of the evidence. Id. "[W]here there is a conflict of testimony, it is within the province and power of the court to set aside a verdict which does not reach a substantially just conclusion in cases where the conflicts are of such a nature as to give just ground for the belief that the jury acted through prejudice, passion, mistake or any other cause which should not properly control them. This power exists in the court." See Gravette v. Turner, 81 So. 476,478 (Fla. 1919) (citations omitted). "[T]he mere legal sufficiency of the evidence to support a verdict will not preclude the trial court from granting a new trial, where the verdict does not do substantial justice in the case or is against the manifest weight of the evidence." Carney v. Stringfellow, 74 So. 866 (Fla. 1917).

In this case, the jury did not do substantial justice and the verdict finding that Plaintiff proved a malicious prosecution case is against the manifest weight of the evidence, as no reasonable person could have returned this verdict. Most notably, as laid out above, evidence and trial testimony, including that of Tom Eberhart, confirmed that Defendants were not the legal cause of Plaintiff's prosecution for insurance fraud and that Defendants did not instigate Plaintiff's arrest and/or prosecution. The manifest weight of the evidence demonstrated that probable cause existed for Hanover, DIF and the state attorney to believe that Plaintiff engaged in insurance fraud. As discussed above, despite this evidence, this Court erroneously refused to direct the verdict in favor of Defendants. This error led the jury to ignore the jury instructions and improperly render a verdict in Plaintiff's favor on his claim for malicious prosecution without sufficient evidence to do so. Consequently, a new trial is required.

CONCLUSION

Based upon the foregoing facts and legal authorities, Defendants, HANOVER INSURANCE GROUP and MICHAEL ARLINE, respectfully requests that this Court enter an order granting the relief requested herein.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Electronic Mail and via the Florida Court's E-Filing Portal on this 2nd day of March, 2022 to: Kerry C. McGuinn, Jr., Esquire, Rywant, Alvarez, Jones, Russo & Guyton, P.A., 109 Brush Street, Suite 500, Tampa, Florida 33601 at kmcguinn@rywantalvarez.com; and acalderon@rywantalvarez.com.

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BY: ***/s/ Sharon C. Degnan***
SHARON C. DEGNAN
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GREGORY J. PRUSAK
Florida Bar No.: 0749028

Exhibit A

ORIGINAL

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA CIVIL DIVISION

LUKE FRAZIER,

Plaintiff,

v.

CASE NO.: 11-CA-010379
DIVISION: H

THE HANOVER INSURANCE GROUP, INC., a Foreign Corporation, and MICHAEL ARLINE, JR, an individual,

Defendants.

_____/

VERDICT FORM

We, the jury, return the following verdict:

1. Did the Defendants, The Hanover Insurance Group and Michael Arline Jr., act in fraud or bad faith in the investigation arising out of the October 10, 2009 accident and file reports and/or furnish information with malice?

YES ✓ NO _____

If your answer to question 1 is NO, your verdict is for the Defendants, and you should not proceed further, except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, please answer question 2.

2. Did Luke Frazier prove by the greater weight of the evidence that the Hanover Insurance Group and Michael Arline Jr. prosecuted him by instituting or continuing an action against him and that such prosecution was a cause of loss, injury or damage to Luke Frazier?

YES ✓ NO _____

If your answer to questions 2 is NO, your verdict is for the Defendants, and you should not proceed further, except to date and sign this verdict form and return it to the courtroom. If your answer to question 2 is YES, please answer questions 3 and 4.

3. What is the total amount of LUKE FRAZIER'S damages for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a disease or physical defect and loss of capacity for the enjoyment of life sustained in the past and to be sustained in the future?

a. In the past $ 120,000

b. In the future $ 0

Please answer question 4.

4. What are the reasonable expenses, including lawyers' fees, necessarily incurred by Luke Frazier in the proceeding complained of?

$ 1,750

TOTAL DAMAGES FOR LUKE FRAZIER: $ 121,750
(add lines 3a, 3b, and 4)

SO SAY WE ALL, this 16th day of February, 2022.

Kelli Nam
FOREPERSON

Exhibit B

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

CASE NO. 11-10379

LUKE FRAZIER,

DIVISION: H

Plaintiffs,

vs.

THE HANOVER INSURANCE GROUP, INC., a Foreign Corporation, and MICHAEL ARLINE, JR., an individual,

Defendants.
_____/

DEFENDANT'S MOTION FOR DIRECTED VERDICT

COMES NOW the Defendants, THE HANOVER INSURANCE GROUP, INC. (hereinafter, "Hanover") and MICHAEL ARLINE, JR. (hereinafter, "Michael Arline"), by and through the undersigned counsel, hereby files their Motion for Directed Verdict, and would state as follows:

FACTS/BACKGROUND

1. This is the Defendants Motion for Directed verdict based on a jury trial that commenced on February 14, 2022 in Hillsborough County Circuit Court.

2. The Plaintiff, Luke Frazier has filed the above-styled lawsuit against the Defendants, Hanover and Michael Arline. The lawsuit seeks damages based on alleged claims for malicious prosecution which arise out of an underlying motor vehicle accident that occurred on October 10, 2009 on Suncoast Parkway in Tampa, Florida.

3. The evidence at trial was as follows:

4. The subject October 10, 2009 motor vehicle accident involved vehicles driven by Plaintiff, Luke Frazier and another driver identified as Wendy Williams. The vehicle driven by Mr. Frazier was owned by Marivic Grant, who was insured by Hanover.

5. Wendy Williams testified at trial that Luke Frazier admitted at the scene of the accident that he was at fault, and he agreed to a cell phone video taken by Wendy Williams wherein he said he hit Wendy's car. In the brief video, Mr. Frazier described the damage as a "little scuff". Further, in the video Mr. Frazier did not describe any damage to the right side of Ms. Grant's vehicle.

6. Wendy Williams promptly reported the 10/10/09 accident to Hanover on 10/12/09, and an estimate of $1,330.00 was issued for the minor damage to Ms. Williams' right rear fender.

7. Despite multiple phones calls to Grant and Frazier by Hanover, no statement was made by the Plaintiff until 11/5/09, when Mr. Frazier gave a recorded statement to Hanover. In the 11/5/19 statement Mr. Frazier now described a collision between two vehicles approaching the same toll plaza lane. He never mentioned the cell phone video and his other admissions of fault made to Wendy Williams. In addition, at trial he now claimed that the impact from the Williams vehicle forced the Grant vehicle into a barricade at the toll plaza causing considerable damage to the right side of the vehicle, including yellow paint transfer marks.

8. Based Mr. Frazier's 11/5/09 statement, Hanover determined that the accident was caused in whole or in part Wendy Williams, and that the PD was $4667.51.

9. Thereafter, Hanover sent a subrogation letter dated November 12, 2009 to the other driver, Wendy Williams, putting her on notice of a claim, as well as Hanover's intent to seek reimbursement for the $4,667.51 payment.

10. After receiving the November 12, 2009 subrogation letter, the other driver, Wendy Williams strongly contested the Plaintiff, Luke Frazier's version of the accident and told Hanover that her vehicle was in fact rear ended by the Plaintiffs' vehicle at the time of the accident. She also told Hanover that she had a videotape of Mr. Frazier admitting fault for the accident. Ms. Williams testified at trial that she walked around the Grant vehicle at the scene and that there was no damage to the right side of the Grant vehicle.

11. Ms. Williams subsequently filed an insurance fraud claim to DFS and Hanover. Based on the foregoing, the evidence at trial showed that Hanover assigned the case to the Defendant, Michael Arline from its SIU division to investigate the allegations of insurance fraud, to take a recorded statement from the other driver, Wendy Williams, and to conduct a further investigation regarding Mr. Frazier's version of the October 10, 2009 accident.

12. Pursuant to Florida law, in particular F.S. §626.9891(1)(a), an insurer, such as Hanover has a statutory duty to "Establish and maintain a unit or division within the company to investigate possible fraudulent claims by insureds or by persons making claims for services or repairs against policies held by insureds.

13. Accordingly, the Defendants, Hanover and Michael Arline had a statutory duty to investigate "possible" insurance fraud claims after receiving notice from the other driver, Wendy Williams which indicated that the facts regarding liability and damages for the October 10, 2009 motor vehicle accident made by Luke Frazier were false.

14. Thereafter, in an effort to discharge his statutory duty under F.S. §626.9891(1)(a), the Defendant, Michael Arline testified that he took a recorded statement from Wendy Williams on February 11, 2010. On pages 6 and 13 of the recorded statement, Ms. Williams told Mr. Arline that the vehicle driven by the Plaintiff, Luke Frazier rear ended her vehicle and that Mr. Frazier admitted in a cell phone recording that I hit Wendy's car.

15. In a further effort to discharge his statutory duty under F.S. §626.9891(1)(a), the Defendant, Michael Arline testified that he reviewed the video taken by Ms. Williams and he also made an attempt to interview the insured, Marivic Grant on February 23, 2010. Thereafter, in a telephone call on February 26, 2010, Ms. Grant agreed to give a statement to Mr. Arline on 3/8/10. He then made an appointment to interview Ms. Grant on March 8, 2010, but she failed to appear for the appointment.

16. At trial Luke Frazier admitted that he also received a phone call from Mike Arline on 2/23/10 about the SIU investigation, but he intentionally chose not to return the call or to give a statement to Mr. Arline.

17. Based on all of the foregoing, including his interview with Wendy Williams, and visit to the toll plaza, Mr. Arline decided to report the matter to the State of Florida's Division of Insurance Fraud on March 10, 2010. The key issues were false reporting of liability and false reporting of damage to the right side of the Grant vehicle.

18. Mr. Arline admitted that report had some typos and that he inadvertently misidentified that the disputed damage was to the left side versus the right side.

19. However, the totality of his investigation showed that the disputed claim was in fact was related to the right side of the Grant vehicle, as identified in Wendy Williams' 37 page statement given to Mr. Arline on 2/11/09.

20. No evidence of fraud, willful concealment, or an intent to injure the Plaintiff with knowingly false information was shown at trial on the part of Mike Arline. A few typos is not intentional fraud.

21. Wendy Williams also continued with her fraud complaint against Luke Frazier to the State of Florida.

22. After sending the TIP report to DSG on March 10, 2009. The evidence at trial showed that neither Hanover nor Mike Arline took any further action for the next 5 months and no criminal charges were ever filed by the Defendants against Luke Frazier. This fact was un-refuted at trial.

23. Thereafter on August 16, 2010 Mike Arline received a letter from DFS Detective, Tom Eberhart. The letter [exhibit 3] confirmed that DFS was investigating the fraud claim based on a complaint by Wendy Williams.

24. In the same August 16, 2010 letter, the Defendant, Michael Arline was instructed to produce the complete Hanover file to DFS regarding Wendy Williams fraud claim investigation.

25. Tom Eberhart testified at trial that he conducted his own independent fraud investigation for DFS, located and interviewed new witnesses not mentioned in the Hanover file.

26. Mr. Eberhart testified that he received no help or input from Mike Arline in his investigation, and that he made an independent determination that there was probable cause to seek insurance fraud charges against Luke Frazier. He then referred the matter and his file to the State Attorneys office. Luke Frazier was then charged by information by the State Attorney.

27. At Trial, Luke Frazier's Criminal lawyer, Mr. Zaifert testified that the State Attorney determined that there was probable cause to file the information against Luke Frazier

28. Based on the investigation conducted by the Hillsborough County State Attorney's Office, the criminal case against the Defendant, Luke Frazier proceeded to trial on August 1 and 2, 2011, but resulted in a "not guilty" verdict.

29. This lawsuit for malicious prosecution by Luke Frazier against Hanover and Mike Arline followed. However, based on the forgoing trial evidence, Hanover and Arline are entitled to a directed verdict on liability.

MEMORANDUM OF LAW

30. In order to maintain an action for malicious prosecution, the Plaintiff must prove six (6) independent elements against a Defendant: "1) the commencement of a judicial proceeding; 2) its legal causation by the present defendant against the plaintiff; 3) its bona fide termination in favor of the plaintiff; **4) the absence of probable cause for the prosecution;** 5) malice; [and] 6) damages." [See **Hickman v. Barclay's**, 16 So.3d 154 (4 DCA 2009).]

31. Of these elements, "probable cause" is typically considered to be one of the most important elements. Indeed, the Appellate Courts of Florida have held that **the absence of probable cause** for the commencement or continuance of an original criminal proceeding is an essential element in an action for malicious prosecution. [See **Thomson McKinnon v. Light**, 534 So.2d 757 (3 DCA 1988).]

32. The existence of probable cause is a question of law for the court. [See **City of Pensacola v. Owens**, 369 So.2d 328 (Fla. 1979).]

33. In the instant case, the Plaintiffs have offered no evidence which indicates that the Hillsborough County State Attorney did not have probable cause to bring actions for insurance fraud against the Plaintiff, Luke Frazier.

34. In fact his own lawyer, Mr. Zaifert conceded that the State Attorney needed to make a determination of probable cause to file the information.

35. Although the Defendant, Luke Frazier was acquitted, the subsequent acquittal of a Defendant is of no consequence in determining whether there was probable cause for the underlying arrest.

36. In fact, "probable cause does not require overwhelmingly convincing evidence, but only "reasonably trustworthy information." [See **Marx v. Gumbinner**, 905 F.2d 1503 (11 Cir 1990); and **Thomson McKinnon** Supra at p. 759.]

37. The Appellate Courts of Florida have further held that a "Complainant" such as the Defendant, Michael Arline is not considered to be the legal cause of a prosecution of a defendant once the State Attorney reviews the file, conducts an investigation, and decides to proceed with a prosecution against that defendant. [See **Hickman** Supra at p. 155-156 *affirming Summary Judgment in favor of the Defendant in a suit for malicious prosecution*.]

38. At trial, the testimony proved that DFS conducted an independent investigation and then determined that there was probable cause to prosecute Luke Frazier for insurance fraud related charges.

39. Similarly, in **Dorf v. Usher**, 514 So.2d 68 (4 DCA 1987), the Appellate Court held that the filing of an action by the State is evidence that there was 'reasonable grounds to prosecute despite an acquittal', and precluded a subsequent action against the Complainant/Defendant for malicious prosecution. [See **Dorf** Supra at p. 69 *affirming Summary Judgment in favor of the Defendant in a suit for malicious prosecution.*]

40. Again, at trial the Plaintiff did not offer any evidence which showed that there wasn't probable cause for the arrest and prosecution of Luke Frazier.

41. Likewise, the Plaintiff have not offered any evidence at trial which suggested that the prosecution by the Hillsborough County State Attorney's Office was instigated by these Defendants as defined by Florida law.

42. In this regard, the Appellate Court has clearly held that an insurance representative is not considered to be the cause of the commencement of criminal proceedings by virtue of the fact that the insurance representative sends his file to the Florida Division of Insurance Fraud, based on an investigation. [See **Pearce v. U.S. Fidelity**, 476 So.2d 750 (4 DCA 1985).]

43. In affirming a Summary Judgment in favor of the insurer and adjuster, the Fourth DCA held that these statutory insurance employees are cloaked with immunity under F.S. §626.989(6). The Appellate Court further held "the charge here was malicious prosecution. That prosecution may have been based in part on informal communication, but that communication is indistinguishable from information furnished in compliance with the statute *(i.e., 626.989(6))*. **The statute immunizes the insurer and its employees from such a suit."** [See **Pearce** Supra at 753 *emphasis added*.]

44. Based on this factual history, and in accordance with the legal authority provided in the **Hickman v. Barclay's**, **Dorf v. Usher**, **City of Pensacola v. Owens**, and **Pearce v. U.S. Fidelity**, as well as the intent of F.S. §626.989(6), the Plaintiff Luke Frazier cannot maintain a valid claim for malicious prosecution against the Defendants, Michael Arline or Hanover.

45. Therefore, the Defendants, Hanover and Michael Arline are entitled to a Directed Verdict in their favor as to the malicious prosecution claim filed by Marivic Grant and Luke Frazier.

46. Finally, it must be noted that the Defendants, Hanover and Michael Arline have statutory immunity under F.S. §626.989(4)(c) when reporting claims of possible insurance fraud. F.S. §626.989(4)(c) states: **"In the absence of fraud or bad faith, a person is not subject to civil liability for libel, slander, or any other relevant tort by virtue of filing reports, without malice, or furnishing other information, without malice, required by this section or required by the department or division under the authority granted in this section, and no civil cause of action of any nature shall arise against such person. . ."**

47. In the instant case, no evidence has been submitted by the Plaintiffs which indicates that Hanover's SIU Investigator, Michael Arline committed a "fraud" by referring a possible insurance fraud claim to the State of Florida in accordance with his statutory duty under F.S. §626.9891, even if the report had a few inadvertent typos.

48. While some of Mr. Arline's entries admittedly contained typos [*left instead of right*], a mistake does not constitute the deliberate type of fraud or concealment of known facts against a third party to circumvent statutory immunity.

49. Again, the other driver, Wendy Williams likewise filed her own fraud claim with the State of Florida which essentially indicated that Luke Frazier had obtained insurance proceeds by giving a false liability description regarding the cause of the October 10, 2009 motor vehicle accident, and for claiming unrelated damages to the right side of the Grant Vehicle. Tom Eberhart from DFS was admittedly investigating her fraud claim against Luke Frazier.

50. Since Wendy Williams filed her own separate claim for insurance fraud with DFS against Luke Frazier, the Plaintiff cannot meet the 'but for test" for the initiation of criminal charges as required under Florida law.

51. Furthermore, the Plaintiff failed to offer any evidence at trial that Michael Arline acted deliberately to injure Luke Frazier by filing knowingly false information to DFS. Therefore 'malice' as defined in the jury instructions cannot be established.

52. Most importantly, the record at trial demonstrates that Mr. Arline never made a recommendation for a criminal prosecution of the Plaintiff, Luke Frazier.

53. Instead, the Defendant, Michael Arline was required to report the possible insurance fraud to the State of Florida's and was then required to produce the Hanover file to DFS.

54. Again, the record evidence at trial demonstrated that the State's DFS division requested Mr. Arline's entire file, and then Mr. Eberhart and DFS conducted its own investigation, made an independent finding of probable cause. DFS subsequently referred the matter to the Hillsborough County State Attorney's Office where a probable cause determination was made against Luke Frazier for insurance fraud related crimes.

55. Under very similar circumstances, the Appellate Courts of Florida have held that an SIU investigator was completely immune to a civil lawsuit. [See **Saenz v. State Farm**, 861 So.2d 64 (3 DCA 2003).]

56. In **Saenz v. State Farm**, an insured, Barbara Saenz brought an action for malicious prosecution and bad faith against its insurer, State Farm after State Farm reported a potentially false homeowner's claim to the Department of Insurance under F.S. §626.989(6).

57. During a subsequent investigation conducted by the Department of Insurance's Fraud Division, false receipts were discovered and the matter was then referred to the Dade County State Attorney's Office which arrested Ms. Saenz for theft. In response to the arrest, Saenz submitted an affidavit which attempted to explain the alleged false receipts. Based on the foregoing, the State Attorney nolle prossed the charges. [See **Saenz** Supra at p. 65-66.]

58. Due to the nolle prosse, the insured, Barbara Saenz then brought an action for malicious prosecution and bad faith against State Farm.

59. However, the Trial Court entered a Summary Judgment in favor of State Farm which found that this insurer and its SIU Investigator, Richard Goldsmith had complete statutory immunity under F.S. §626.989. [See **Saenz** Supra at p. 66-68.]

60. Here the Third DCA noted that State Farm's SIU investigator originally submitted documentation to the Department of Insurance which suggested possible insurance fraud on the part of the insured, Ms. Saenz.

61. Thereafter, the Department of Insurance conducted its own independent investigation and determined that a fraud had been committed. Based on the foregoing, the matter was referred to the State Attorney which subsequently found probable cause to arrest the insured, Barbara Saenz for theft. [See **Saenz** Supra at p. 66-68.]

62. Although the charges were later dismissed, a valid claim for malicious prosecution was not permitted. A Summary Judgment was entered on the malicious prosecution claim because State Farm and Richard Goldsmith were entitled to immunity under F.S. §626.989.

63. In affirming the Summary Judgment entered in favor of State Farm and its SIU Investigator, Richard Goldsmith, the Third DCA noted that ". . . the fact that the State Attorney's Office declined for whatever reason to proceed with its prosecution against Saenz does not vitiate its initial probable cause in the fraud matter." [See **Saenz** Supra at p. 66-68.]

64. In accordance with the legal authority contained in the **Saenz v. State Farm** case, the subsequent acquittal of Luke Frazier likewise does not vitiate the probable cause determination made by the Hillsborough County State Attorney's Office.

65. Therefore, in accordance with the authority provided in **Saenz v. State Farm** and **Pearce v. U.S. Fidelity**, the Defendants, Hanover and Michael Arline are entitled to Directed Verdict on both probable cause, and on complete immunity from this civil lawsuit for malicious prosecution as defined under FS 626.989.

WHEREFORE the Defendants, THE HANOVER INSURANCE GROUP, INC. and MICHAEL ARLINE, JR. would respectfully request that this Honorable Court enter a Directed Verdict in their favor and against the Plaintiff, Luke Frazier on all issues of liability.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **February 15, 2022**, I electronically filed the foregoing with the Florida Court's E-Filing Portal and sent via Email to: Kerry C. McGuinn, Jr., Esq., *Rywant, Alvarez, Jones, Russo & Guyton, P.A.*, 109 Brush Street, Suite 500, Tampa, FL 33601 (Email designation: kmcguinn@rywantalvarez.com, acalderon@rywantalvarez.com).

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Exhibit C

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY
GENERAL CIVIL DIVISION

LUKE FRAZIER,

Plaintiff,

v.

CASE NO: 11-CA-010379
DIVISION: H

THE HANOVER INSURANCE GROUP, INC., a Foreign Corporation and MICHAEL ARLINE, JR., an individual,

Defendants.

EXCERPTS FROM TRIAL PROCEEDINGS

DEFENDANTS' MOTION FOR DIRECTED VERDICT

BEFORE THE HONORABLE EMMETT LAMAR BATTLES

DATE: FEBRUARY 16, 2022

LOCATION: GEORGE EDGECOMB COURTHOUSE
800 E. Twiggs Street
Courtroom 502
Tampa, Florida

REPORTED BY: JUANITA ANNETTE BUTLER
Stenographic Court Reporter
Integra Reporting Group, LLC
Notary Public, State of Florida
Commission No. GG 940248
Expires: December 21, 2023

APPEARANCES:

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Attorney for Defendants

ALSO PRESENT:
LUKE FRAZIER, PLAINTIFF
MICHAEL ARLINE, DEFENDANT

I N D E X

EXCERPTS FROM TRIAL PROCEEDINGS

DEFENDANTS MOTION FOR DIRECTED VERDICT

THE COURT: Go ahead, briefly.

MR. PRUSAK: Yes. Good morning, Your Honor.

This is Defendants, Mike Arline and Hanover's, motion for directed verdict. As you know, we've been in trial for the last two days on this claim for malicious prosecution. The defense would note that one of the most essential elements in maintaining an action for malicious prosecution is that there was a lack of probable cause for the initiation of the prosecution in the first place.

The evidence in this case has shown, through the testimony of Detective Tom Eberhart that the Department of Financial Services conducted its own separate independent investigation in furtherance of a complaint actually made by Wendy Williams, the other driver involved in the underlying accident on October 10, 2009.

Mr. Eberhart testified to the jury that he made the determination that there was evidence of insurance fraud related mainly to the fact that the damage to the right side of the vehicle was caused by this crash and should not have been

submitted as part of this insurance claim.

Mr. Eberhart reviewed his probable cause determination with his supervisor. The matter was then sent to the State Attorney's Office, which found probable cause as well after reviewing the documents. And then there was an information issued against Mr. Frazier for insurance fraud and also false information in an insurance claim.

We had Mr. Zaifert, who was actually a witness for the plaintiff, testify. Mr. Zaifert was a former State Attorney and he was familiar with the process.

And he testified to the jury that the State Attorney would have had to have made a probable cause determination to file the information. It was his knowledge as a prosecutor for the state of Florida that they would review all the documentation they had before doing so.

The case law that we have cited in this case includes Dorf v. Usher, 514 So.2d 68, Fourth DCA 1987. There's also Hickman v. Barclay's, 16 So.3d 154, Fourth DCA, Florida, 2009.

All the cases stand for the proposition that if there is probable cause for the prosecution, then there cannot be an action for malicious

prosecution. And the Court even noted -- the case law even notes that even when there's an acquittal, that does not vitiate or eliminate the fact that there was probable cause for the initial prosecution in the case.

In furtherance of that as well, we would also note that the evidence at trial clearly showed that the prosecution that took place in the underlying case based on Mr. Eberhart's investigation, was not a complaint made by Hanover to DFS. It was not criminal charges filed by Hanover or by Mr. Arline. It centered on the actual claim made by Wendy Williams.

And we also know that Mr. Eberhart, in his role with DFS, did his own independent investigation of the case. He found additional witnesses identified as Mr. Kauffman and Ms. Brennan.

The case law is very clear that even if a party did press charges, or even if there's a finding that a party initiated a claim to start out with, if the local authorities, the State Attorney, law enforcement conducts their own independent investigation and then makes a determination that there was probable cause for a

fraud crime or other crime, the original complainant is deemed not to have been the party who initiated the action. This is well longstanding Florida law.

Mr. Eberhart was on the stand, he told the jury that after he requested the entire file from Hanover, which was required to be produced by Florida Chapter 626, he conducted his own independent investigation. He also indicated that he had no input or assistance of any kind from Hanover or from Mike Arline. He conducted a separate, independent investigation.

He also interviewed Wendy Williams and other witnesses that he found during his investigation that took place over a 2-month period in 2010, and that he made this determination that there was probable cause and he filed it up the chain for the prosecution.

We believe that right now, as it stands, the case being closed, all the evidence is in, no evidence was submitted to the jury that they could deliberate on that would show there was no probable cause in this case. We would ask the Court to find, as a matter of law, that based on the evidence that was submitted at trial, most

importantly, from Detective Tom Eberhart, that there is simply no basis for the Court to conclude there was no probable for prosecution. And if there's no probable cause for the prosecution, then there cannot be a valid claim for malicious prosecution.

Secondly, and another key factor here is the case law also supports a finding in favor of the defendant when the law enforcement and State Attorney's Office makes their own independent investigation and decides to issue a probable cause finding for prosecution for a crime.

When that happens, the original complaining party is then deemed not to have been the one who initiated the prosecution. So that's the other element that's required to be proved in a claim for malicious prosecution.

So the defense would contend on behalf of Hanover and Mike Arline that the evidence at trial failed to show that Hanover legally initiated the claim against Mr. Frazier based on the investigation by DFS and Tom Eberhart.

And secondly, there was certainly a probable cause finding by the State Attorney to do this. And again, that was backed up by their own

witness, Mr. Zaifert, who said that in order to bring the charges in the first place, the State Attorney needed to make a finding of probable cause.

And again, the case law was very clear that the mere fact there was an acquittal or even a nol. pros. in the future, does not vitiate the original probable cause. One other case we would cite in regard to that, Your Honor, is Saenz v. State Farm, which had very similar facts as ours in the sense that it involved a claim for alleged insurance fraud.

The investigator from State Farm submitted a claim alleging that there was fraud based on documentation that was not verified in the homeowner's claim. The information was provided to the State Attorney's Office. They reviewed everything independently and made a determination to bring an action against the Saenz.

However, during the case -- during the discovery in the criminal case, additional affidavits were submitted by the defendant, the Saenzes. At that point, the State Attorney decided to file a nol. pros.

Again, the Appellate Court, Third DCA -- this

is 861 So.2d 64, Third DCA, 2003 -- specifically referred to Statute §626.989, which says this provides immunity to an insurance investigator who is complying with the statute and furnishing reports. And the Court also found that the mere fact that the State Attorney later decided to file a nol. pros. of the criminal charges did not vitiate the original probable cause determination made by the State Attorney. Therefore, a summary judgment was entered on the malicious prosecution claim.

Based on all this evidence and facts that we have, Your Honor, the Defendants, Michael Arline and Hanover would move the Court to enter a directed verdict in favor of the defense and against Luke Frazier.

THE COURT: Response.

MR. McGUINN: Thank you, Your Honor.

If I may respond. First, the motion for directed verdict is untimely. The motion for directed verdict should be made at the close of the plaintiff's case, before the defendant puts on its case. That was not done. The motion for directed verdict was not filed or made orally until after the defense rested. So the motion

should be denied as untimely.

Second, Your Honor, as far as the substance of the motion, they're basically rearguing their motion for summary judgment. They're trying to create a Catch 22.

In order for my client to be able to bring a malicious prosecution case, he must be able to prove and he must be able to show that he was criminally charged. To be criminally charged, the State's Attorney follows certain processes and proceedings.

One of those is they show probable cause in a case. Merely because someone said that the State's Attorney showed probable cause does not mean that they get off on a directed verdict for malicious prosecution.

What the Court is required to do is to analyze the record to determine if there's a dispute in the record and there's evidence to support that there was not a reasonable basis for probable cause in the underlying criminal case. Otherwise, my client would be in a Catch 22. We would never be able to prove up this case, Your Honor.

The evidence that the jury heard could find

that there was a lack of a basis for probable cause in the criminal action. First off, Mr. Eberhart testified on the record that the evidence that supports a finding of probable cause that comes out, is only as good as what comes in.

He also testified that he did not have personal knowledge of that evidence or gathering that evidence.

The jury could hear the evidence that Mr. Arline provided at trial and that went into evidence that Tip Sheet provided by Hanover lacked a reasonable basis. It was reckless under the definitions that they have for malice, bad faith, and those things.

The jury could find there was an absence of probable cause based on Mr. Arline's own testimony as to the faulty data that went in and what caused it to come out to the conclusion for probable cause.

Second, Your Honor, I disagree that the case where there was a nol. pros. applies in this case. There was a finding of not guilty. That case can be distinguished. The Court should not grant a motion for directed verdict if there's a

reasonable basis in the record from the testimony at trial that could support a finding that there was a lack of probable cause, Your Honor.

And when you combine the testimony of Mr. Arline as to the information -- the faulty and false information he had in the Tip Sheet, with the testimony of Mr. Eberhart that what comes out is only good as what goes in, the Court could find that there's a lack of probable cause there.

Second, another important issue that has to be addressed is the implication or the suggestion that the State's Attorney only acted on Wendy Williams's complaint, and nothing that Hanover provided.

They've tried to run from that Tip Sheet that Hanover filed with every witness. Mr. Eberhart refuted their testimony.

He was clear in his testimony I asked of him in Cross-Examination and he pushed back against Mr. Prusak in Redirect Examination when they tried to say, Oh, here's your report, all you provided was this other information, you didn't provide that.

He said clearly that the entire file materials, including the Hanover Tip Sheet, were

provided to the State's Attorney. He said that on Cross-Eamination when I asked him that question. And then when Mr. Prusak tried to get him to say the opposite on Redirect, that only the other materials were provided, he pushed back and said, no, the entire file materials would have been provided.

He also, on Cross-Examination, Your Honor, when I asked him what's the sequence of events -- and what I was trying to show was, Wendy Williams did not file her complaint and then the criminal charges followed and then after that Hanover filed the Tip Sheet. That's not what happened.

Wendy Williams filed her Information Tip Sheet. Hanover filed its Information Tip Sheet. And it was after both of those, and the State's Attorney had all those materials, according to Detective Eberhart, when it made the determination.

So for all those reasons, Your Honor, the motion should be denied.

THE COURT: All right. Thank you.

I've listened to you. I'll take some note of the argument that the motion is not timely.

I'll take some note that all the cases you

talked about were basically summary judgment and they dealt with malicious prosecution more related to a little different facts with the state in the nol. pros. case and all of that.

Here's the bottom line. On this motion for directed verdict, I'm going to take that under advisement. This is going to go to the jury. Okay.

MR. PRUSAK: Thank you, Your Honor.

MR. McGUINN: Thank you, Your Honor.

* * *

RENEWED MOTION FOR DIRECTED VERDICT

THE COURT: There was a motion in this case.

MR. PRUSAK: I'll renew the motion for directed verdict, Your Honor.

THE COURT: I want to hear from you very briefly on that and I'll hear from counsel very briefly on that, so the record is clear.

MR. PRUSAK: Yes, Your Honor.

We move for a directed verdict. Basically the evidence as presented at trial did not establish that there was -- it establishes probable cause for the prosecution. There was defining evidence in the record based on the investigation done by DFS, submitted to the State Attorney, which found probable cause to bring the prosecution.

And we also believe that regardless of whether or not there were typos in some of Mr. Arline's reports, that did not meet the standard for fraud or malice. And that the evidence showed that there was an independent investigation by DFS which, likewise, found that there was probable cause to prosecute Mr. Frazier for insurance fraud crimes.

MR. McGUINN: Your Honor, I would

incorporate, by reference, the arguments that I made this morning with respect to the testimony that was heard at trial in opposition to the motion for directed verdict.

I would recap that, Your Honor.

There was testimony that not only Wendy Williams, but also Mr. Arline filed a report with the Department of Fraud Services, that both of those were reports were provided, according to Eberhart, in full to the State's Attorney, and that the charges came after that. The charges came after both the reports.

The jury could have construed the evidence, and there was reasonable evidence to support that there was not a basis for probable cause. What they keep defining as a typo could have been concluded by the jury to have other significance based on the definitions of fraud and malice in the jury instructions that, I would remind the Court, were agreed by both parties, and that those definitions were proposed by counsel for the Defendants, and not myself. The jury, under those definitions, could have found a basis to sustain a verdict and that there was no probable cause.

And for that, and for the other arguments in

the directed verdict, I would request the Court deny the motion.

THE COURT: I will preface this by saying it doesn't matter what I think but of the evidence in this regard. But the Court has to conclude, I think, having listened to the factual presentation in this case, having considered the law, that these were questions -- as we narrowed them and presented them to a jury -- these were questions for a jury and for a jury to decide, and I think that's the guiding light.

So as to the motion for directed verdict, that will be denied.

* * *

(End of Excerpts)

CERTIFICATE OF REPORTER

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

I, JUANITA ANNETTE BUTLER, Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceeding; and that this transcript is a true excerpt from said proceeding.

I FURTHER CERTIFY that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

Dated this 16th day of February, 2022.

JUANITA ANNETTE BUTLER
Stenographic Court Reporter
Notary Public, State of Florida
Commission No. GG 940248
Expires: December 21, 2023

Exhibit D

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA
CIVIL DIVISION

LUKE FRAZIER,

Plaintiffs,
vs.

THE HANOVER INSURANCE
GROUP, INC. a Foreign Corporation
and MICHAEL ARLINE, JR. an individual,

Defendants.
_____/

CASE NO.: 11-CA-010379
DIVISION: H

ORDER DENYING DEFENDANTS' MOTION FOR DIRECTED VERDICT

THIS CAUSE having come before the Court on Defendants' Motion for Directed Verdict, and the Court having heard the argument of counsel, reviewing the file and being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED:

1. Defendants' Motion for Directed Verdict is DENIED.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida on this _____day of _____, 2022.

11-CA-010379 2/22/2022 12:11:53 PM

11-CA-010379 2/22/2022 12:11:53 PM

The Honorable Lamar E. Battles

Conformed copies to:
Kerry C. McGuinn, Esq.
Gregory J. Prusak