In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-19-00150-CV
NO. 09-19-00151-CV

JAMES K. COLLINS AND TONI SHARRETTS COLLINS, Appellants

V.

ANGELICA GALCZYNSKI AND J.P. GONZALEZ, Appellees

and

JAMES K. COLLINS AND TONI SHARRETTS COLLINS, Appellants

V.

D.R. HORTON – TEXAS, LTD, D.R. HORTON, INC., DAVID RANDY SCHWEYHER, AND CHARLES MATTHEW CARR, Appellees

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On Appeal from the 284th District Court
Montgomery County, Texas
Trial Cause Nos. 17-03-03620-CV, 19-03-03325-CV

MEMORANDUM OPINION

This matter involves two appeals from summary judgment rulings in the same underlying suit concerning tort claims that were severed from a land title dispute between a developer and a contiguous landowner. In appeal number 09-19-00150-CV, James K. Collins, M.D. ("Dr. Collins") and Toni Sharretts Collins (hereafter collectively referred to as "the Collinses") challenge the trial court's order granting summary judgment in favor of appellees, Angelica Glaczynski and J.P. Gonzalez, on their malicious prosecution claim. In appeal number 09-19-00151-CV, the Collinses challenge the trial court's order granting summary judgment in favor of the appellees, D.R. Horton-Texas, LTD., D.R. Horton, Inc., David Randy Schweyher, and Charles Matthew Carr (collectively referred to as "the Horton defendants"), on their claims for trespass, conversion, and malicious prosecution. In appeal number 09-19-00150-CV, we affirm the trial court's summary judgment in favor of Glaczynski and Gonzalez (we will collectively refer to Glaczynski and Gonzalez as "the deputies"). In appeal number 09-19-00151-CV, we affirm the trial court's summary judgment in favor of the Horton defendants.

Background

In April 2015, D.R. Horton-Texas, Ltd. ("Horton") sued the Collinses for trespassing on land that Horton allegedly purchased and which is contiguous to the

Collinses' homestead. Horton pleaded that the Collinses had erected a fence within the last four to eight months on a portion of Horton's property and had filed an affidavit of adverse possession. On July 11, 2016, Dr. Collins was arrested on the disputed property by two off-duty deputies, who were working for Horton, and Dr. Collins was charged with criminal trespass with a deadly weapon.

In January 2017, the State of Texas dismissed the criminal trespass case against Dr. Collins. In February 2017, the Collinses filed their third amended original answer to the Horton's amended petition, along with affirmative defenses and counterclaims against the Horton defendants and the deputies; however, counsel for the Collinses only served the Horton defendants' counsel despite having added the deputies as parties. The Collinses filed counterclaims for, among other things, conversion, trespass, spoliation, and malicious prosecution against the Horton defendants and a malicious prosecution claim against the deputies, alleging that the Horton defendants and the deputies initiated and procured a wrongful criminal prosecution against Dr. Collins which terminated in Dr. Collins's favor. In March 2017, the Horton defendants filed an answer to the Collinses' counterclaims, and the

trial court granted the Horton defendants' motion to sever the Collinses' counterclaims from the Horton defendants' property case.[1]

In August 2017, the Horton defendants moved for summary judgment, arguing that they were not liable to the Collinses for spoliation, conversion, trespass, or malicious prosecution. According to the Horton defendants, all of the Collinses' claims rest on the incorrect assumption that they own the disputed property, but the final judgment in the property case determined that the Collinses do not own the property. *See Collins v. D.R. Horton-Tex. Ltd.*, 574 S.W.3d 39, 42-43 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). The Horton defendants argued that they were entitled to summary judgment as a matter of law because the Collinses do not own the disputed property.

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[1]In November 2016, the trial court granted Horton's motion for partial summary judgment in the property case, in which Horton requested a declaration that the Collinses could not claim property rights to the disputed property through the Sieberman survey. *See Collins v. D.R. Horton-Tex., Ltd.*, 574 S.W.3d 39, 42, 44 (Tex. App.—[14th Dist.] 2018, pet. denied). In March 2017, a jury found that no adverse possession had occurred and that the Collinses had trespassed on Horton's property. *See id.* at 43-44. The trial court's partial summary judgment and the jury's verdict in the property case were affirmed on appeal. *See id.* at 42-43, 50.

The Collinses filed a response to the Horton defendants' motion for summary judgment. The Collinses argued that the Horton defendants' only defense, that they own the land, is inapplicable, because the trial court examines the circumstances at the time of the incident to determine whether the defendants had probable cause to act. According to the Collinses, a lawsuit regarding the property dispute was pending when the Horton defendants' bad faith trespass, conversion, spoliation, and malicious prosecution occurred, and the Collinses contend that the trial court recognized the Horton defendants' bad behavior when it granted a temporary injunction ordering the Horton defendants to cease and desist entry upon the disputed property. The Collinses maintained that genuine issues of material fact existed regarding the Horton defendants alleged trespass upon the Collinses' land; including claims that the Horton defendants destroyed, converted, and spoliated the Collinses' personal property and maliciously prosecuted Dr. Collins.

The Horton defendants replied to the Collinses' response to their motion for summary judgment, arguing that ownership of the property was no longer an issue because the trial court and a Montgomery County jury rejected the Collinses' claims that they owed the property or had a legal right to possess the property. The Horton defendants asserted that the Collinses' argument that ownership of the property is irrelevant is incorrect. The Horton defendants objected to the affidavits of Dr.

Collins, Toni Sharretts-Collins (“Toni”), and James Collins, arguing that the affidavits were not competent summary judgment evidence because they offered evidence pertaining to the issue of ownership, which had already been litigated, and contained statements of interested witnesses that are not free from contradiction. The Horton defendants argued that they were entitled to summary judgment because they had conclusively negated at least one essential element of each of the Collinses' claims.

In January 2019, the trial court granted the Horton defendants' motion for summary judgment, and the Horton defendants filed a motion to sever the Collinses' remaining claims against the deputies, arguing that the Collinses never served the deputies. The trial court granted the Horton defendants' motion to sever and ordered the Collinses to “show-cause” why the case against the deputies should not be dismissed for want of prosecution. In February 2019, the Collinses requested service on the deputies, and Gonzalez was served in February 2019, and Galczynski was served in March 2019. The deputies filed an answer, alleging, among other things, that the Collinses' malicious prosecution claim was barred by the statute of limitations.

The deputies moved for summary judgment on their affirmative defense of statute of limitations, arguing that the Collinses failed to serve them within one year

after the criminal case against Dr. Collins was dismissed and that the Collinses failed to prove that they had exercised due diligence in serving them. According to the deputies, although the Collinses had timely filed their malicious prosecution claim, the Collinses waited over a year to serve them. In their response to the deputies' motion, the Collinses argued that service on the deputies was completed through Horton, the deputies' employer, which the Collinses argued was acknowledged by the Montgomery County Commissioners Court resolution in April 2017 ordering the payment of the deputies' legal expenses. The Collinses argued that they exercised due diligence in serving the deputies in 2017 and again in 2019 after the trial court granted the Horton defendants' motion to sever the Collinses' claims against the deputies. The Collinses attached the Montgomery County Commissioners Court's docket from April 2017, which shows that the Montgomery County Attorney was approved to defend the deputies in the Collinses' suit.

In their reply, the Collinses argued that nothing in the Horton defendants' answer indicated that Horton did not accept service for the deputies as the deputies' agent. The Collinses further argued that the deputies' other employer, Montgomery County, had notice of the Collinses' claims since April 2017. According to the Collinses, they served the deputies again in 2019 under the new severed cause number so there would be no doubt that the deputies had been served. The Collinses

also argued that they properly proved service by their attorney's affidavit, which they assert is *prima facie* evidence of the fact of service. The trial court granted summary judgment in favor of the deputies. The Collinses appealed the trial court's orders granting summary judgment to the Horton defendants and the deputies.

Standard of Review

The party moving for traditional summary judgment must establish that (1) no genuine issue of material fact exists, and (2) it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). If the moving party produces evidence entitling it to summary judgment, the burden shifts to the nonmovant to present evidence that raises a fact issue. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). In determining whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). We review the summary judgment record "in the light most favorable to the non[-]movant, indulging every reasonable inference and resolving any doubts against the motion." *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). We must affirm the summary judgment if any of the grounds asserted in the motion are meritorious. *Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 648 (Tex. 2004).

The party asserting an affirmative defense has the burden of pleading and proving the defense as a matter of law such that there is no genuine issue of material fact. *Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984); *see also* Tex. R. Civ. P. 94. A defendant is entitled to summary judgment on the affirmative defense of limitations if he conclusively establishes all necessary elements of that affirmative defense. *Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex. 1997); *Thomas v. Omar Invs., Inc.*, 129 S.W.3d 290, 293 (Tex. App.—Dallas 2004, no pet.). Summary judgment will be affirmed only if the record shows that the defendant conclusively proved all elements of the affirmative defense as a matter of law. *Thomas*, 129 S.W.3d at 293.

Analysis

In appeal number 09-19-00150-CV, the Collinses argue that the trial court erred by granting summary judgment to the deputies because their summary judgment evidence showed that the deputies were served. According to the Collinses, their attorney served the deputies in March 2017, and that service was clearly evidenced in the record by the trial court and the Montgomery County Commissioners Court. The Collinses argue that the deputies provided no admissible evidence contradicting service. The deputies argue that the statute of limitations bars the Collinses' malicious prosecution claim, because service under Rule 21a on co-

defendants, who had already appeared in the case, does not constitute service on new parties to a suit. According to the deputies, the Horton defendants' attorney did not represent them or indicate that he accepted or waived service on their behalf. The deputies argue that some evidence that Montgomery County was aware that the Collinses had sued them is not sufficient to impute actual service. The deputies further argue that the Collinses did not put on any evidence of diligence during the two years it took them to effect service.

In reviewing whether the trial court erred in granting summary judgment in favor of the deputies on their affirmative defense of limitations, we first examine whether the deputies conclusively proved all elements of the affirmative defense as a matter of law, and then we examine whether the Collinses provided evidence of service necessary to present a genuine issue of material fact to preclude summary judgment. *See* Tex. R. Civ. P. 166a(c); *Johnson*, 891 S.W.2d at 644; *Thomas*, 129 S.W.3d at 293. To bring suit, a plaintiff must file suit within the applicable limitations period and also use diligence to have the defendant served with process. *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990). When a plaintiff files a suit within the statute of limitations period but does not serve the defendant until after limitations has expired, the date of the service relates back to the date of filing if the plaintiff exercised diligence in effecting service. *Id.* To obtain summary judgment

on the grounds that an action was not served within the limitations period, the movant must show that, as a matter of law, diligence was not used to effectuate service. *Id.* The movant may show lack of diligence as a matter of law based on unexplained lapses of time between the filing of the petition and service on the defendant. *See id.*[2]

When a defendant's summary judgment proof shows that the plaintiff failed to timely serve the defendant, the burden shifts to the plaintiff to explain the delay. *See Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 830 (Tex. 1990). It is the plaintiff's burden to present evidence regarding the efforts that were made to serve the defendant and to explain every lapse in effort or period of delay. *Proulx v. Wells*, 235 S.W.3d 213, 216 (Tex. 2007). Diligence is determined by asking "whether the plaintiff acted as an ordinarily prudent person would have acted under the same or similar circumstances and was diligent up until the time the defendant was served." *Id.* Whether a plaintiff was diligent in effecting service is generally a question of fact, but if the plaintiff offers no excuse for a delay or if the lapse of time and the plaintiff's acts conclusively negate diligence, lack of diligence will be found as

[2] In their motion for summary judgment the deputies cite the rule concerning a no-evidence motion for summary judgment, but their argument shows that they were apparently moving for traditional summary judgment. Tex. R. Civ. P. 166a(c), (i).

matter of law. *McCord v. Dodds*, 69 S.W.3d 230, 233 (Tex. App.—Corpus Christi 2001, pet. denied).

There is no dispute that the Collinses timely filed a malicious prosecution claim against the deputies during the one-year statute of limitations period. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.002(a); *see also Torres v. GSC Enterps., Inc.*, 242 S.W.3d 553, 561-62 (Tex. App.—El Paso 2007, no pet.) (providing that the statute of limitations begins to run when the criminal prosecution is terminated). The deputies complain that the Collinses did not use due diligence in serving them, and that the Collinses waited approximately one year after the statute of limitations expired to effectuate service. The record shows that on February 27, 2017, the Collinses filed a malicious prosecution claim against the deputies, and the Collinses served Gonzalez on February 21, 2019, and Galczynski on March 6, 2019. Because the deputies established that the statute of limitations bars the cause of action, the Collinses had the burden to present summary judgment proof raising a fact issue by providing an explanation for the delay. *See Murray*, 800 S.W.2d at 830.

The Collinses contend that the following summary judgment evidence created a fact issue as to whether they exercised due diligence: the Collinses' attorney's certification that he served Horton's counsel as required by Texas Rule of Civil Procedure 21a(e); the trial court's acknowledgement of service as evidenced by the

trial court sending the deputies notices of the trial court's orders; and the county commissioners' acknowledgement of service by passing a budget resolution to pay for the deputies' defense. The Collinses further argue that their summary judgment evidence shows that they diligently obtained supplemental service on the deputies in 2019 when the trial court asserted that additional service was required.

The record shows that proper service was not effectuated on the deputies until approximately two years after the Collinses filed suit against them. The record shows that prior to 2019, the Collinses never made any attempts to serve the deputies; thus, the Collinses have not shown that they acted diligently until the time the deputies were served. In their effort to provide a reason for their delay in serving the deputies, the Collinses merely point to evidence showing that they served Horton's attorney, Montgomery County had knowledge of their suit against the deputies, and that the trial court had addressed letters to the deputies. There is no evidence showing that the deputies actually received the trial court's notices. Mere knowledge of a suit, absent service, waiver, or citation does not place any duty on a defendant to act. *Wilson v. Dunn*, 800 S.W.2d 833, 837 (Tex. 1990).

We conclude that the Collinses' lack of effort to procure service on the deputies for almost two years conclusively negates diligence as a matter of law. *See Sharp v. Kroger Tex. L.P.*, 500 S.W.3d 117, 121 (Tex. App.—Houston [14th Dist.]

2016, no pet.); *McCord*, 69 S.W.3d at 233. Because the Collinses failed to produce summary judgment evidence showing that they exercised due diligence in serving the deputies, we conclude that the trial court did not err in granting the deputies' motion for summary judgment. *See* Tex. R. Civ. P. 166a(c); *Johnson*, 891 S.W.2d at 644; *Thomas*, 129 S.W.3d at 293. In appeal number 09-19-00150-CV, we overrule the Collinses' sole issue against the deputies.

In appeal number 09-19-00151-CV, the Collinses argue that the trial court erred as a matter of law by granting summary judgment in favor of the Horton defendants. The Collinses allege genuine issues of material fact exist regarding whether the Horton defendants trespassed while the litigation was pending, converted the Collinses' fence, and maliciously prosecuted a claim against Dr. Horton by failing to disclose that a title litigation was pending on the disputed property. The Collinses argue that they presented evidence of every element for their claims of conversion, trespass, and malicious prosecution. The Horton defendants maintain that the trial court correctly granted summary judgment on the Collinses' tort claims because no genuine issues of material fact existed.

We first examine whether the Horton defendants established that they were entitled to judgment as a matter of law on the Collinses' trespass claim. *See* Tex. R. Civ. P. 166a(c); *Johnson*, 891 S.W.2d at 644. The Collinses argue that when the

alleged bad faith trespass occurred, they had a possessory right to the disputed property because it was the subject of a pending title litigation. The Collinses contend that the trial court's order granting them a temporary injunction gave them the exclusive right to the disputed property, and that the Horton defendants trespassed in bad faith before title was adjudicated. The Horton defendants argue that considering the final judgment in the property case, which determined that the Collinses did not own or have any legal right to possess the disputed property, the Collinses cannot recover for trespass as a matter of law. The Horton defendants also contend that the trial court's temporary injunction, which was agreed to by the parties after attending mediation, is not evidence that the trial court determined that the Collinses rightly possessed the property when the alleged trespass occurred.

To establish a claim for trespass to real property, the Collinses must prove that (1) they owned or had a lawful right to possess the real property; (2) the Horton defendants entered their property and the entry was physical, intentional, and voluntary; and (3) the trespass caused injury. *See Wilen v. Falkenstein*, 191 S.W.3d 791, 798 (Tex. App.—Fort Worth 2006, pet. denied). In determining whether the Horton defendants were entitled to judgment as a matter of law on the Collinses' trespass claim, the trial court considered the final judgment in the property case, which determined that the Collinses did not own the disputed property. *See Collins,*

574 S.W.3d at 42-43. Because the Collinses failed to raise an issue of fact regarding their ownership or lawful right to possess the disputed property, we conclude the trial court did not err in granting summary judgment on their trespass claim. *See Walker*, 924 S.W.2d at 377; *Nixon*, 690 S.W.2d at 548-49; *Collins,* 574 S.W.3d at 42-43; *Wilen*, 191 S.W.3d at 798.

We next examine whether the Horton defendants established that they were entitled to judgment as a matter of law on the Collinses' conversion claim. *See* Tex. R. Civ. P. 166a(c); *Johnson*, 891 S.W.2d at 644. The Collinses argue that the trial court granted them an injunction, enjoining the Horton defendants from entering the disputed property until title could be adjudicated and ordering the Horton Defendants to return the Collinses' personal property, which the Horton defendants failed to do. The Collinses argue that the elements of conversion do not provide that if a party is later determined to own title to the property that the party's prior acts are exonerated. The Horton defendants argue that they are not liable for conversion because they had the right to remove the Collinses' fence because the fence was located on property that a jury found was owned by Horton. The Horton defendants contend that Horton had repeatedly offered to return the fence by sending four notices to the Collinses, but the Collinses refused to accept the offer and demanded that the fence be reinstalled on Horton's property. According to the Horton

defendants, because the Collinses were not legally entitled to place a fence on Horton's property, the Horton defendants did not unlawfully assume control of the fence or wrongfully deprive the Collinses from the use of the fence.

To establish a claim for conversion, the Collinses must prove that (1) they owned or had possession of the property or entitlement to possession, (2) the Horton defendants unlawfully and without authorization assumed and exercised control over the property to the exclusion of, or inconsistent with, the Collinses' rights as owners; (3) the Collinses demanded return of the property, and (4) the Horton defendants refused to return the property. *See Lawyers Title Co. v. J.G. Cooper Dev., Inc.*, 424 S.W.3d 713, 718 (Tex. App.—Dallas 2014, pet. denied). The Collinses must also establish that they were injured by the conversion. *See id.*

The records show that the Horton defendants presented the affidavit of their counsel, who averred that he had personally sent four letters to the Collinses and their counsel, notifying them that Horton offered to return the Collinses' property, but the Collinses never responded to arrange a time for the delivery. The Horton defendants attached the letters that their counsel sent to the Collinses, in which they offered to return the Collinses' property and requested that the Collinses contact them to make arrangements. Based on our review of the record, we conclude that the Collinses did not provide any controverting evidence showing that the Horton

defendants refused to return the property. The Collinses merely argued that they objected to the Horton defendants delivering the property at their front gate because it was prohibited by their homeowners' association and because the return did not include costs for replacing or reinstalling the fence. Viewing this evidence in the light most favorable to the Collinses, and making every reasonable inference in their favor, we cannot conclude that there is any genuine issue of material fact as to their refusal to accept the Horton defendants' offer to return the property. *See Whitaker v. Bank of El Paso*, 850 S.W.2d 757, 761-62 (Tex. App.—El Paso 1993, no pet.). We conclude that the Horton defendants have proven, as a matter of law, that the Collinses cannot prevail on one of the essential elements of their claim for conversion, and that the trial court did not err in granting summary judgment on the Collinses' conversion claim. *See Walker*, 924 S.W.2d at 377; *Nixon*, 690 S.W.2d at 548-49; *Whitaker*, 850 S.W.2d at 761-62.

Lastly, we examine whether the Horton defendants established that they were entitled to judgment as a matter of law on the Collinses' malicious prosecution claim. *See* Tex. R. Civ. P. 166a(c); *Johnson*, 891 S.W.2d at 644. The Collinses argue that they created a fact issue regarding probable cause, because Dr. Collins could not have trespassed on his own property. According to the Collinses, even if Horton had owned the property, Horton never gave the Collinses notice that entry was forbidden

or notice to depart as required for the offense of criminal trespass with a deadly weapon. The Collinses contend that Dr. Collins acted under a *bona fide* claim of right to the disputed property, and the Horton defendants acted with malice by intentionally lying to the prosecutors about the ownership of the disputed property and failing to disclose the pending litigation.

The Horton defendants argue that no genuine issue of material fact exists as to the malicious prosecution claim. According to the Horton defendants, the deputies were present when Dr. Collins fired his shotgun in the direction of Horton's employees, who were on Horton's property, and the deputies' statements prove that the deputies made the decision to arrest Dr. Collins. The Horton defendants argue that the Collinses produced no evidence showing that the prosecutor's decision to charge Dr. Collins was based on material information that the Horton defendants provided and knew to be false. The Horton defendants contend that Horton's lawsuit against the Collinses served as notice that the Collinses were illegally encroaching on Horton's land, and one of the deputies had informed the Collinses that they were not to trespass on Horton's land while workers were clearing the land. The Horton defendants further argue that the Collinses failed to present any evidence of malice or show that they were damaged when the land being cleared belonged to Horton.

To prove a civil claim of malicious prosecution, a plaintiff must establish: (1) the commencement of a criminal prosecution against him; (2) initiation or procurement of the action by the defendant; (3) termination of the prosecution in his favor; (4) the plaintiff's innocence; (5) the absence of probable cause from the proceedings; (6) malice in filing the charge; and (7) damages. *Kroger Tex Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 792 n.3 (Tex. 2006). The elements concerning probable cause and malice guard against the inclination to punish those who, through error but not malevolence, initiate criminal proceedings against a person who is exonerated. *Id.* at 792. The probable cause element asks whether a reasonable person would believe that a crime had been committed given the facts as the complainant honestly and reasonably believed them to be before the criminal proceeding was initiated. *Richey v. Brookshire Grocery Co.,* 952 S.W.2d 515, 517 (Tex. 1997). In a malicious prosecution action, there is an initial presumption that the defendant acted reasonably and in good faith and had probable cause to initiate the proceedings. *Id.* If the plaintiff produces evidence that the motives, grounds, beliefs, and other evidence upon which the defendant acted did not constitute probable cause, the presumption disappears, and the burden shifts to the defendant to offer proof of probable cause. *Akin v. Dahl*, 661 S.W.2d 917, 920 (Tex. 1983).

Probable cause is measured at the time when the defendant reports the case to the authorities and not later when the case is investigated, tried, or dismissed. *Id.*; *Pettit v. Maxwell*, 509 S.W.3d 542, 547 (Tex. App.—El Paso 2016, no pet.). Because we evaluate probable cause from the perspective of the person who made the report to law enforcement and at the time the report was made, events subsequent to the report that may tend to show whether the act of reporting turned out to be correct or incorrect are not material to the probable cause evaluation. *See Pettit*, 509 S.W.3d at 548. The State's dismissal of the charge against Dr. Collins is not evidence of a lack of probable cause; it only shows that the State did not believe it could prove Dr. Collins's guilt beyond a reasonable doubt. *See Suberu*, 216 S.W.3d at 794-95.

In determining that the Horton defendants were entitled to summary judgment on the Collinses' claim for malicious prosecution, the trial court relied on the affidavit of Charles Matthew Carr, who stated that on July 11, 2016, he was present when Dr. Collins discharged a firearm on Horton's property and ordered Horton's employees to stop working. According to Carr, the deputies witnessed the incident and placed Dr. Collins under arrest, and neither Carr nor any other Horton employee was involved in determining whether charges would be filed against Dr. Collins. In his statement to the police, Carr stated that on June 14, 2016, Horton gave written notice to the Collinses that Horton would begin clearing land and that any items on

Horton's property would be bulldozed. Carr averred that based on Dr. Collins's actions, he honestly and reasonably believed that there were sufficient grounds for the officers to arrest Dr. Collins and charge him with a crime.

The summary judgment evidence includes the offense report of the arresting officer, Deputy J. Herman, who reported that he was working security on Horton's property when he heard a gunshot, and Herman observed Dr. Collins carrying a shotgun and yelling at the workers. Herman indicated that Carr reported that Dr. Collins was given written notice not to trespass on Horton's property. According to Herman, the assistant district attorney agreed to accept charges for criminal trespass with a deadly weapon. The record also contains an incident report from Galczynksi, in which she reported that she was also working security for Horton when Dr. Collins fired a shot and approached them with a shotgun while yelling at workers.

Based on our review of the Collinses' summary judgment evidence, including the affidavits of Dr. Collins and Toni, we conclude that the Collinses have failed to produce evidence overcoming the presumption that the Horton defendants acted reasonably and in good faith and had probable cause to initiate the charge against Dr. Collins. *See Suberu*, 216 S.W.3d at 794-95; *Richey,* 952 S.W.2d at 517; *Akin*, 661 S.W.2d at 920. Accordingly, we conclude that the trial court did not err by granting summary judgment on the Collinses' malicious prosecution claim. Having

concluded that the trial court did not err by granting the Horton defendants' motion for summary judgment on the Collinses' claims for trespass, conversion, and malicious prosecution, in appeal number 09-19-00151-CV, we overrule the Collinses' sole issue against the Horton defendants. In appeal numbers 09-19-00150-CV and 09-19-00151-CV, we affirm the trial court's judgments.

AFFIRMED; AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on January 2, 2020
Opinion Delivered May 14, 2020

Before McKeithen, C.J., Horton and Johnson, JJ.