

IN THE SUPREME COURT OF TEXAS

No. 03-0913

KROGER TEXAS LIMITED PARTNERSHIP
AND ROBERT MOODY, PETITIONERS,

v.

THERESA SUBERU, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued November 9, 2004

JUSTICE JOHNSON, joined by JUSTICE MEDINA and by JUSTICE WAINWRIGHT as to Part III, concurring in part and dissenting in part.

In connection with the first jury question, which submitted Theresa Suberu's malicious prosecution claim, the jury was instructed, without objection, that:

"Malice" means ill will, bad or evil motive, or such gross indifference to the rights of others as to amount to a willful or wanton act.

"Probable cause" means the existence of such facts and circumstances as would excite belief in a person of reasonable mind, acting on the facts or circumstances within his knowledge at the time the prosecution was commenced, that the other person was guilty of a criminal offense. The probable cause determination 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 proceedings were instituted.

See Richey v. Brookshire Grocery Co., 952 S.W.2d 515, 517 (Tex. 1997); COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—GENERAL NEGLIGENCE & INTENTIONAL PERSONAL TORTS PJC 6.4 (2000). We must evaluate the evidence according to the charge given and the contentions of the parties. *Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 618-19 (Tex. 2004) (“In assessing the evidence, we assume that the portions of the charge just quoted, because they were given without objection, correctly state the law.”).

I

The instruction as to probable cause tasked the jury, in part, to resolve conflicting testimony as to whether Suberu was exiting the Kroger store with a basket of groceries when she was stopped and detained by Kroger employees. As the court of appeals’ opinion and the Court’s opinion set out in detail, she testified, unequivocally, “No”; Kroger’s employees testified, unequivocally, “Yes.” Under the first sentence of the probable cause instruction (that part of the instruction defining probable cause), the jury had to resolve the clearly conflicting testimony to find what facts and circumstances existed, and then to find if those facts and circumstances were such that they would excite belief in a person of “reasonable mind” that Suberu was guilty of a criminal offense. The second sentence of the instruction authorized the jury to find that probable cause existed if a reasonable person would believe Suberu committed a crime given the facts as Kroger *both* honestly *and* reasonably believed them to be.

The Court focuses on Suberu’s failure to prove that Kroger did not honestly believe that Suberu was leaving the store with a cart full of groceries for which she had not paid. Even assuming a lack of evidence that Kroger did not subjectively honestly believe that Suberu was leaving with

a basket of groceries and that Kroger's witnesses did not subjectively honestly believe Suberu was leaving with a basket of groceries, an honest belief was not enough. Under the charge, the jury's finding that Kroger did not have probable cause could have been, and we must presume that it was, based on a finding that an honest belief was not reasonable because the credibility conflict was resolved in favor of Suberu: she was not leaving with a basket regardless of Kroger's witnesses' honest belief that she was.

Suberu's testimony contained inconsistencies. Nevertheless, her testimony that she did not have a cart and that there was no cart next to her at the time Kellie Wier stopped her was some evidence supporting the jury's finding that Kroger's belief in a contrary set of facts was not reasonable regardless of Kroger's subjective sincerity in holding that belief. I would hold that the evidence was legally sufficient to support the jury's finding that Kroger lacked probable cause. I dissent from the Court's holding that it was not.

II

As to petitioner Robert Moody, individually, however, I agree that the evidence was legally insufficient to support the jury's finding that he lacked probable cause; that is, that facts and circumstances within his knowledge were not such as would have excited belief in a person of reasonable mind that Suberu was guilty of a criminal offense. The jury charge required separate findings as to whether Kroger maliciously prosecuted Suberu and as to whether Moody maliciously prosecuted her. Suberu alleged that Kroger was liable by and through its employees, but she did not allege that Moody was liable based on the actions or knowledge of anyone other than himself.

Moody was not present when Suberu was exiting the store and thus had to make a decision based on conflicting factual reports from Suberu and Kroger employee witnesses. There is no evidence that Moody, as assistant manager, did not have an honest, reasonable belief that Suberu was exiting the store with a basket of unpaid groceries and was probably committing a crime. I concur in the Court's opinion and judgment as to Moody.

III

Finally, I note that Kroger does not challenge the evidentiary sufficiency of the jury findings as to malice, except in relation to exemplary damages. Kroger's failure to challenge the evidentiary support as to malice is understandable in light of our decisions holding that malice may be inferred merely from a lack of probable cause. *See, e.g., Shannon v. Jones*, 13 S.W. 477, 479 (Tex. 1890); *Gulf, Colo. & Santa Fe Ry. Co. v. James*, 10 S.W. 744, 747 (Tex. 1889); *Biering v. First Nat'l Bank of Galveston*, 7 S.W. 90, 92 (Tex. 1888). Evidence of a defendant's subjective motives, state of mind, and good faith and honesty of belief in initiating or commencing a prosecution is relevant to the malice element of the cause of action. A re-examination of our holdings that lack of probable cause will support an inference of malice without further examination of the evidence may well be in order.

Phil Johnson
Justice

OPINION DELIVERED: May 5, 2006