IN THE SUPREME COURT OF IOWA

NO. 16-1136

LINDA LINN and MARK SHUCK,

Plaintiffs/Appellants

vs.

PAT MONTGOMERY, CHRISTY SCHRADER,
and BRAD ALLEN,

Defendants/Appellees

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY

THE HONORABLE J. HOBART DARBYSHIRE, THOMAS G. REIDEL,
and MARLITA A. GREVE PRESIDING

APPELLEE, PAT MONTGOMERY'S, FINAL BRIEF

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ROUTING STATEMENT

Appellee, Pat Montgomery (hereinafter "Montgomery"), respectfully requests that this case be transferred to the Iowa Court of Appeals, as it presents the application of existing legal principles. Contrary to the claim by the Appellants, Mark Shuck (hereinafter "Shuck") and Linda Linn (hereinafter "Linn"), the resolution of this case does not require the application of legal principles that are of first impression. Further, although the "discovery rule" and its application in defamation cases is largely unexplored in Iowa case law, this particular case can be decided without even addressing the discovery rule issue. This is because the jury, in finding in favor of the defendants, considered all evidence presented on defamation and found that no defamation had occurred, making the issue moot as to whether the District Court erred in strictly applying the discovery rule and granting Montgomery's Motion for Summary Judgment. Montgomery does not request oral argument in this matter but requests to be heard if the Court so orders.

STATEMENT OF THE CASE

This appeal arises from a Petition filed by Linn and Shuck alleging the following causes of action against Montgomery: defamation, malicious prosecution, and abuse of process. (App. Vol. I, 3–5). Generally, Linn and

Shuck sought damages, including punitive damages, resulting from Montgomery's statements to police and the county attorney regarding alleged criminal activity of Linn and Shuck, which ultimately resulted in criminal charges being filed against Shuck. (App. Vol. I, 2–3).

Montgomery filed a motion for summary judgment on or about February 18, 2016, asking the District Court to rule as a matter of law on all causes of action asserted by Linn and Shuck. (App. Vol. I, 26). The District Court partially granted summary judgment in favor of Montgomery. (App. Vol. II, 218). In its Ruling, the District Court dismissed Shuck's claims of defamation, abuse of process, and malicious prosecution. (Id.). The District Court denied Montgomery's motion for summary judgment as to Linn's claim for consortium damages. (Id.). The only viable claim remaining against Montgomery after the District Court's Ruling was Linn's claim for consortium damages resulting from the alleged defamation of Shuck.

A jury trial in the matter commenced on April 25, 2016. The jury returned a verdict finding that Montgomery did not defame Shuck. (App. Vol. II, 248). Therefore, no consortium damages were awarded to Linn. (Id.).

STATEMENT OF FACTS

Partridge Villa Townhomes Association, Inc. III, also known as "Building X" (hereinafter "Building X"), a sub-association of the Pheasant Hills Homeowners Association, is a homeowners' association that, at all relevant times, represented and managed six (6) units/homeowners in a condominium property. (App. Vol. III, 360, 369). Linn began living in Building X sometime in 1997. (App. Vol III, 357). Shuck then moved into Linn's Building X unit in 2001. (App. Vol. III, 364). Shuck became president of Building X sometime in 2004 and resigned from that position in 2008. (App. Vol. III, 365, 366). Montgomery moved into a unit adjacent to Linn and Shuck's Building X unit in July 2011 and served as treasurer of Building X during 2012. (App. Vol. III, 347). Defendant, Christy Schrader (hereinafter "Schrader"), purchased a unit in Building X in May 2008 and began serving as president of Building X in late 2009 or early 2010. (App. Vol. III, 358). Defendant, Brad Allen (hereinafter "Allen"), served as the accountant for Building X beginning in 1995. (App. Vol. III, 352).

After Shuck resigned as president of Building X in 2008, Cleyon Shafer became president, at which point it was discovered that Building X had very little money. (App. Vol. III, 360, 361). As a result, Cleyon Shafer initiated an investigation into the finances of Building X. (App. Vol. III, 361). From that investigation, it was discovered that Shuck had been writing

checks to himself and third parties on Building X's account for services and materials that had not been approved by the members of Building X. (Id.). Those included four unapproved payments, including checks to K&K Hardware, Egger Engineering, Brad Allen Accounting, and for gutter cleaning services. (App. Vol. III, 341). It was also discovered that Shuck and Linn had not been paying their association dues. (App. Vol. III, 361). In an attempt to recover those funds, in May 2009, Cleyon Shafer drafted and sent a letter requesting that the money be paid back to the association. (App. Vol. III, 311, 361). Linn and Shuck did not pay back the money. (App. Vol. III, 361). The association then filed a small claims action to recover the unpaid dues and some unapproved expenditures. (App. Vol. III, 363). The association was awarded damages for the unpaid dues and a portion of the unapproved expenditures, totaling around $5,000.00. (Id.).

After Cleyon Shafer resigned as president in late 2009 or early 2010 due to health reasons, Schrader became president of Building X. (App. Vol. III, 361). Montgomery could not locate any annual budgets entered during Shuck's presidency or approvals for the expenditures at issue in Building X's records. (App. Vol. III, 345–46). The bylaws of Building X required the majority of membership to approve all expenditures unless the expenditures fell within budgeted items approved by the association, in

which case the treasurer was authorized to disburse the funds. (App. Vol. III, 297, 345). Montgomery then communicated with an assistant county attorney at the Scott Count Attorney's Office twice during the month of January 2012. (App. Vol. III, 339). On the first occasion, Montgomery met in-person with the assistant county attorney and spoke with her about the four financial issues detailed in Cleyon Schafer's May 2009 letter. (App. Vol. III, 348). Montgomery was informed during this meeting that the four schemes occurred outside the statute of limitations and, therefore, could not form the basis of a criminal prosecution of Shuck. (Id.).

Montgomery, along with Schrader, then continued the investigation into the finances of Building X. (App. Vol. III, 361). Part of the investigation included reviewing numerous past water bills for Building X. (App. Vol. III, 349). Montgomery discovered that Building X, since March 1997, had been paying water bills for a spigot located behind Linn and Shuck's townhome. (App. Vol. III, 343, 362). The checks issued on Building X's account were signed by Shuck, and the address listed on the water bills was to Linn and Shuck's residence. (App. Vol. III, 344, 359). The investigation revealed that the expenditures at issue, including the water bills, were never approved by the association. (App. Vol. III, 345–46).

Montgomery then emailed the information he had compiled on the water bill scheme to the assistant county attorney. (App. Vol. III, 349). Montgomery was told by the assistant county attorney that there was probable cause for a criminal investigation and was instructed to produce any evidence for a criminal prosecution. (App. Vol. III, 339). After speaking to the assistant county attorney via telephone regarding the water bill issue, Montgomery continued his investigation and discovered an additional eight instances of unapproved spending of Building X funds by Shuck. (App. Vol. III, 349). It was discovered that Linn and Shuck had used Building X funds to cover additional expenses which were not approved. (App. Vol. III, 350). In total, including those schemes detailed in Cleyon Schafer's letter and the water bill issue, there were thirteen instances of unapproved payments using Building X funds while Shuck was President. (Id.).

On December 17, 2012, a binder of documents summarizing the thirteen schemes was compiled and submitted by Montgomery to Officer Dennis Tripp of the Bettendorf Police Department. (App. Vol. III, 350, 351). The investigation into the schemes was then assigned to Detective Brad Levetzow. (App. Vol. III, 323). After determining all but one of the alleged schemes was either outside the statute of limitations or lacking in

information, Detective Levetzow moved forward only with his investigation into the water bill scheme. (App. Vol. III, 324). Detective Levetzow reviewed the water bills, which had a billing address of Linn and Shuck's residence, and check registers, both of which showed the association had made payments on the water bills beginning in 1997, the year Linn moved into her residence. (App. Vol. III, 334, 357). Based on the water bills, Detective Levetzow concluded that the water line was installed by Linn or Shuck. (App. Vol. III, 335). Detective Levetzow's investigation ultimately resulted in the filing of a criminal complaint against Shuck for second degree theft. (App. Vol. III, 325, 337). Detective Levetzow confirmed that victims, such as Building X, have no right to instruct a detective to file criminal charges. (App. Vol. III, 335). And, in this case, Detective Levetzow testified that Montgomery did not have any say as to whether to proceed with the charge or submit it to the county attorney. (Id.). He relied on the hard evidence—the water bills—and came to his own conclusion to pursue charges. (Id.).

After Detective Levetzow signed the criminal complaint and affidavit, the prosecution of Shuck was taken over by the county attorney. (App. Vol. III, 326–27). The Scott County Attorney's Office filed a trial information formally charging Shuck with second degree theft. (App. Vol. III, 367–68).

The charges were ultimately dismissed due to the trial information being filed more than three years after the last alleged criminal act. (App. Vol. III, 368).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED PARTIAL SUMMARY JUDGMENT IN FAVOR OF MONTGOMERY AS TO SHUCK'S DEFAMATION CLAIM

A. Preservation of Error

Montgomery agrees that this issue has been properly preserved.

B. Standard of Review

On appeal, a district court's granting of a motion for summary judgment is reviewed for correction of errors at law. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007) (citing *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 902 (Iowa 1996)). Therefore, the District Court's ruling in its order filed on April 11, 2016, in which it granted, in part, Mr. Montgomery's motion for summary judgment, should be reviewed by this Court for errors at law.

C. Introduction

Linn and Shuck first claim that the District Court erred in partially granting Montgomery's motion for summary judgment. In his motion, Montgomery sought summary judgment as to Shuck's defamation claim

based on the fact that Montgomery's alleged statements were made outside the two-year statute of limitations period. *See Clark v. Figge*, 181 N.W.2d 211, 215 (Iowa 1970) (holding the two-year statute of limitations under Iowa Code section 614.1(2) applies to defamation claims). The alleged defamatory statements by Montgomery were made between December 2012 and March 2013. (App. Vol. I, 2). Linn and Shuck did not file their Petition until March 10, 2015, more than two (2) years after the last alleged defamatory statement was published by Montgomery. Based on these facts, the District Court partially granted Montgomery's motion for summary judgment, dismissing Shuck's defamation claim on statute of limitations grounds. (App. Vol. II, 211–12).

Montgomery presents two arguments in response to Shuck's assertion that the District Court erred in granting partial summary judgment, each of which is addressed, in turn, below. First, Montgomery asserts that any error committed by the District Court in granting partial summary judgment was rendered harmless or moot by the verdict of the jury. Second, the District Court did not, in fact, err in granting partial summary judgment and refusing to apply the "discovery rule" to toll the statute of limitations on Shuck's defamation claim.

D. The Jury Found Mark Shuck was not Defamed, Rendering the Alleged Error by the District Court in Granting Partial Summary Judgment Harmless or Moot

Montgomery first asserts that any alleged error by the District Court in granting partial summary judgment was rendered moot by the jury's verdict. Therefore, this Court need not address whether the District Court correctly refused to apply the "discovery rule" to toll the statute of limitations on Shuck's defamation claim.

It is important to first clearly set forth the disposition of the various claims of Shuck and Linn following the District Court's ruling on summary judgment. As stated above, in its April 11, 2016 summary judgment ruling, the District Court dismissed Shuck's defamation claim on statute of limitations grounds, finding the statements of Montgomery were published outside the two-year limitation period. (App. Vol. II, 211–12). However, the District Court found that because a loss of consortium claim is an independent, non-derivative action—and therefore does not accrue at the same time as the underlying claim for statute of limitations purposes—Linn's consortium claim survived summary judgment. (App. Vol. II, 217–18). Therefore, the only theory of recovery against Montgomery that was submitted to the jury was Linn's consortium claim resulting from the alleged defamation of Shuck. (App. Vol. II, 248–50). In determining whether Linn

suffered a loss of consortium, all alleged defamatory statements made by Montgomery were presented and considered by the jury. These statements were contained in the binder of documents that Montgomery submitted to the Bettendorf Police Department. (App. Vol. III, 348). In fact, the jury was specifically instructed to consider all alleged defamatory statements made by Montgomery regarding Shuck. (App. Vol. II, 244, 245). The jury, in answering the verdict form, found that Montgomery did not defame Shuck and awarded no damages to Linn for her consortium claim. (App. Vol. II, 248).

Because the jury considered all alleged defamatory statements in considering Linn's consortium claim—and found Montgomery did not commit defamation—the alleged error by the District Court in granting partial summary judgment and dismissing Shuck's defamation claim was harmless or moot. *See Grefe & Sidney v. Watters*, 525 N.W.2d 821, 825–26 (Iowa 1994) (holding any error in granting summary judgment in favor of party was rendered harmless or moot where subsequent jury verdict found that party not to be liable). In other words, even if the District Court would have denied Montgomery's motion for summary judgment and allowed Shuck's underlying defamation claim to proceed to trial, the jury still would have found that Shuck was not defamed by the statements of Montgomery.

With the jury finding that Montgomery did not commit defamation against Shuck, the alleged error of the District Court in dismissing Shuck's defamation claim is harmless or moot.

E. The District Court Correctly Refused to Apply the "Discovery Rule" to Toll the Statute of Limitations on Shuck's Defamation Claim

Linn and Shuck claim that the District Court, in ruling on summary judgment, erred in not applying the "discovery rule" to toll the statute of limitations on Shuck's defamation claim. For the following reasons, the District Court properly refused to apply the discovery rule and dismiss Shuck's defamation claim on statute of limitations grounds.

The two-year statute of limitations period under Iowa Code section 614.1(2) applies to defamation claims. *See Clark*, 181 N.W.2d at 215. In *Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 13 (Iowa 1990), the Iowa Supreme Court held that the two-year statute of limitations for slander claims begins to run "on the date of publication." "Publication is an essential element of defamation and simply means a communication of statements to one or more third persons." *Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 221 (Iowa 1996). A defamatory statement is published when it is heard and understood by a third person to be defamatory. *Id.*

The only relevant inquiry for statute of limitations purposes is when Montgomery made the allegedly slanderous statements. In their Petition, Linn and Shuck claimed that the alleged defamatory statements occurred between December 2012 and March 2013. (App. Vol. I, 2). In his sworn answers to interrogatories, Shuck stated that the last defamatory statement by Montgomery was made on March 4, 2013. (App. Vol. I, 102). Montgomery did not have any discussions with members of the Bettendorf Police Department or the Scott County Attorney's Office after March 4, 2013. (App. Vol. I, 94). Linn and Shuck did not file their Petition until March 10, 2015, more than two (2) years after the last alleged defamatory statement was published. As a result, the Shuck's defamation claim against Montgomery was barred by the statute of limitations, and the District Court correctly dismissed the claim on summary judgment.

Shuck, in order to avoid the statute of limitations, argues that the "discovery rule" should toll the statute on his defamation claim. "Under the 'discovery rule,' the statute of limitations does not begin to run until the injured person has actual or imputed knowledge of all the elements of the cause of action." *Hook v. Lippolt*, 755 N.W.2d 514, 521 (Iowa 2008) (internal quotations omitted). In an unpublished decision, the Iowa Court of Appeals addressed the question as to whether the discovery rule applies to

the statute of limitations on a claim of defamation. *Davenport v. City of Corning*, 742 N.W.2d 605 at *6 (Iowa Ct. App. 2007) (unpublished decision). In *Davenport*, the plaintiff, a former police officer in the defendant's department, brought a defamation claim against the defendant based on a conversation between two police officers regarding rumors that the plaintiff had abused his wife. *Id.* at *6. The statements were made outside the two-year statute of limitations period, but the plaintiff argued the discovery rule should toll the statute, given that he could not have known of the private comments at the time they were published. *Id.* The Iowa Court of Appeals found that the discovery rule did not apply to defamation claims. *Id.* "We accordingly conclude the district court was correct in finding the statute of limitations begins to run on the date of publication, not on the date the plaintiff discovers or reasonably should have discovered the slanderous statement." *Id.*

Thus, the "discovery rule"—the rule that a statute of limitations does not begin to run until the plaintiff knows of or reasonably should know of the actionable conduct—does not apply to defamation claims, *see id.*, and the District Court properly granted summary judgment on Shuck's defamation claim.

Shuck and Linn attempt to distinguish the *Davenport* case, claiming, unlike the present case, it involved statements made in a "public setting." 742 N.W.2d *6. This assertion is simply incorrect. The statements at issue in *Davenport* were made by the defendant to another person over the telephone, which a police officer overheard, and additional statements directly to the police officer regarding the plaintiff. *Id.* at *1. The plaintiff was not present and did not otherwise overhear these statements. *Id.* Despite the plaintiff's ignorance of the publication of these statements, the court held that the statute of limitations began to run when the statements were made, regardless of when the plaintiff discovered or reasonably should have discovered their publication. *Id.* at *6. Just like the statements in *Davenport*, Montgomery submitted his written statements to an authority in private and without the knowledge or in the presence of the Shuck. The court in *Davenport* refused to apply the discovery rule to toll the statute of limitations in a nearly identical situation, and the District Court also correctly did so in time-barring Shuck's defamation claim.

Shuck and Linn further attempt to distinguish the *Davenport* case by arguing the court's ruling on the discovery rule issue was not necessary to its decision, arguing that the court's actual ruling was that the plaintiff failed to establish the statements were defamatory. This is also simply untrue. In

Davenport, the plaintiff brought defamation claims based on separate statements by the defendant to two private investigators and to a former police officer. *Id.* at *1–2. The court affirmed summary judgment as to the statements made to the private investigators based on the fact the investigators did not understand the statements to be defamatory. *Id.* at *6. However, summary judgment was upheld regarding the statement to the former police officer based on its holding that the discovery rule did not apply and, therefore, the statute of limitations barred the claim. *Id.* Therefore, the court's refusal to apply the discovery rule was, in fact, necessary to its decision, and Shuck and Linn's assertion to the contrary is simply wrong.

Furthermore, in 2002, the Iowa Court of Appeals reaffirmed its holding in *Davenport* in *Stites v. Ogden Newspapers, Inc.*, No. 00-1975, 2002 WL 663621, at *2 (Iowa Ct. App. 2002) (unpublished decision), another unpublished decision. The court in *Stites*, just as it did in *Davenport*, found that the discovery rule does not apply in defamation cases. *Id.* Although *Stites* involved the publication of a newspaper article, not a private conversation or statement, there again is no mention of the exception the plaintiffs urge this court to adopt—that the discovery rule still applies when the statements are "secretive" or "inherently undiscoverable."

Therefore, the rule set forth in *Davenport* should be applied to the present case, and the District Court's ruling should be affirmed.

F. The "Republication" of Montgomery's Statements in the Criminal Complaint does not Bring Shuck's Defamation Claim within the Statute of Limitations

Shuck and Linn next argue that because Montgomery's statements were republished in the criminal complaint filed by the county attorney within the statutory period, his defamation claim against Montgomery was filed within the statute of limitations. For the following reasons, that filing of the criminal complaint is irrelevant for purposes of determining whether Shuck's defamation claim should be time-barred under Iowa Code section 614.1(2).

First, the criminal complaint and minutes of testimony do not even recite Montgomery's allegedly defamatory statements. The criminal complaint simply contains an affidavit, signed by Detective Brad Levetzow, summarizing the evidence against Shuck. (App. Vol. I, 97). Additionally, the minutes of testimony, filed by Assistant County Attorney Joseph Grubisich, lists Montgomery as a witness but does not quote him or otherwise indicate what Montgomery said regarding the criminal charges against Shuck. (App. Vol. I, 98). Instead, like the criminal complaint, the minutes of testimony simply summarize the evidence against Shuck. (Id.).

Therefore, the statements in these documents are not even repetitions or republications of Montgomery's statements and are completely irrelevant for statute of limitations purposes.

Shuck and Linn next argue that the filing of the criminal complaint and minutes of testimony constituted a repetition of Montgomery's defamatory statements and, therefore, was a "separate and independent claim" under *Kiner*, 463 N.W.2d at 14, from which the statute of limitations period should run. In doing so, Shuck and Linn have conflated two distinct issues regarding the republication of defamatory statements: the rule that a plaintiff is limited in recovery of damages that are the "natural and probable consequence of the original libel *or its repetition or republication*," *see Brown v. First Nat. Bank of Mason City*, 193 N.W.2d 547, 555 (Iowa 1972) (emphasis added), and the rule that every republication or repetition of defamatory content is an independent cause of action, *see Kiner*, 463 N.W.2d at 14.

While Shuck sought—and could have theoretically recovered, if he had established the requisite elements—damages related to the alleged republication/repetition of Montgomery's statements by the Scott County Attorney's Office and Bettendorf Police Department, this does not mean such alleged repetition/reputation tolls the statute of limitations related to the

original, allegedly defamatory remarks by Montgomery. Shuck does not have a separate cause of action under *Kiner* against Mr. Montgomery resulting from such repetition/republication. The rule under *Kiner* is that a plaintiff has a separate cause of action for the repetition/republication of defamatory material *against the repeater or re-publisher*, not against the original libeler. 463 N.W.2d 14. For instance, in *Kiner*, the court held the republished statement that was also made by the original libeler fell within the statute of limitations, despite the fact the original libel did not. *Id.* at 14. In other words, the plaintiff in *Kiner* had a separate cause of action based on each statement or republication thereof made by the defendant; unlike here, the original speaker and re-publisher in *Kiner* were the same party. Shuck has not cited to any authority that establishes the republication—by a party other than the original speaker—of a defamatory statement extends the beginning of the statute of limitations period to the date of the republication. For all these reasons, summary judgment was properly granted by the District Court on Shuck's defamation claim.

G. Alternatively, the Republished Statements of Montgomery in the Criminal Complaint/Minutes of Testimony are Not Actionable, as they were made Preliminary to and/or as Part of a Judicial Proceeding

If the Court is unconvinced that the alleged republication of Montgomery's statement in the complaint and minutes of testimony is

irrelevant for statute of limitations purposes, as argued in Section E., the Court should find that the statements were absolutely privileged, as they were made preliminary to and/or as a part of a judicial proceeding. Therefore, the District Court's ruling on summary judgment should alternatively be upheld on this basis.

Iowa courts recognize an absolute privilege made in connection with a judicial proceeding. *See Kennedy v. Zimmermann*, 601 N.W.2d 61, 64 (Iowa 1999). "A statement is privileged if made by one who has an interest in the subject matter to one who also has an interest in it or stands in such a relation that it is proper or reasonable for the writer to give the information." *Spencer v. Spencer*, 479 N.W.2d 293, 295 (Iowa 1991). "[T]he communication must be examined in the context of the occasion to determine if it was made 'preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of a judicial proceeding.'" *Kennedy*, 601 N.W.2d at 64 (internal quotations omitted). "Second, the content of the communication must be evaluated to determine if it has some relation to the proceeding." *Id.*

The statements contained in the criminal complaint and minutes of testimony directly and solely related to the criminal prosecution of Shuck. (App. Vol. I, 97, 98). The statements were made and the documents were

filed as part of that criminal prosecution. Thus, even if the "repetition" of Montgomery's statements in the criminal filings against Shuck can serve as a basis for liability against Montgomery, those statements are subject to the absolute privilege, as they were made during the course of a judicial proceeding. On this basis, alternatively, the District Court's ruling dismissing Shuck's defamation claim should be affirmed.

II. THE DISTRICT COURT CORRECTLY GRANTED PARTIAL SUMMARY JUDGMENT IN FAVOR OF MONTGOMERY AS TO SHUCK'S MALICIOUS PROSECUTION CLAIM

A. Preservation of Error

Montgomery agrees that this issue has been properly preserved.

B. Standard of Review

On appeal, a district court's granting of a motion for summary judgment is reviewed for correction of errors at law. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007) (citing *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 902 (Iowa 1996)). Therefore, the District Court's ruling in its order filed on April 11, 2016, in which it granted, in part, Montgomery's motion for summary judgment, should be reviewed by this Court for errors at law.

C. Discussion

Shuck next argues that the District Court erred in granting partial summary judgment as to his malicious prosecution claim against Montgomery. For the reasons set forth below, the District Court correctly granted summary judgment in favor of Montgomery and dismissed Shuck's malicious prosecution claim.

"The basis of an action for malicious prosecution consists of the wrongful initiation of an unsuccessful civil or criminal proceeding with malice and without probable cause." *Sarvold v. Dodson*, 237 N.W.2d 447, 448 (Iowa 1976). Specifically, the elements of malicious prosecution are as follows:

> (1) a previous prosecution; (2) investigation of that prosecution by the defendant; (3) termination of that prosecution by acquittal or discharge of the plaintiff; (4) want of probable cause; (5) malice on the part of the defendant for bringing the prosecution; and (6) damage to the plaintiff.

Employers Mut. Cas. Co. v. Cedar Rapids Television Co., 552 N.W.2d 639, 643 (Iowa 1996) (citing *Wilson v. Hayes*, 464 N.W.2d 250, 259 (Iowa 1990)). "This damage to the plaintiff must be for an arrest of the person, seizure of property or special injury-injury that would not ordinarily result in all similar cases involving such a claim." *Employers Mut. Cas. Co.*, 552 N.W.2d at 643 (citing *Royce v. Hoening*, 423 N.W.2d 198, 200 (Iowa 1988); *Aalfs v. Aalfs*, 66 N.W.2d 121, 124 (1954)).

Iowa courts have made clear that an individual does not commit malicious prosecution when he or she merely provides information to an authority which then independently decides to file an action. *See Lukecart v. Swift & Co.*, 130 N.W.2d 716, 724 (1964). The Iowa Supreme Court has stated:

> "The giving of the information or the making of the accusation, however, does not constitute a procurement of the proceedings which the third person initiates thereon if it is left to the uncontrolled choice of the third person to bring the proceedings or not as he may see fit."

Id. In *Lukecart*, the plaintiff brought a malicious prosecution claim against his former employer, who reported to the police and the county attorney that plaintiff had stolen fertilizer. *Id.* at 719. Finding the defendant had not "procured" or initiated the prosecution for purposes of the claim, the court noted that the county attorney—not the defendants—filed the trial information, the criminal charges were filed after months of investigation by the sheriff's office and county attorney, and there was no evidence that defendants applied coercion or pressure on the county attorney to file the charges. *Id.* at 724.

Similarly, in *Reed v. Linn Cty.*, 425 N.W.2d 684, 686 (Iowa Ct. App. 1988), the plaintiff brought a malicious prosecution claim against the sheriff's department based on the filing of a child in need of assistance

("CHINA") action which alleged the plaintiff had sexually abused his daughter. The plaintiff claimed the sheriff's department initiated the CHINA action by forwarding the results of its investigation of the plaintiff to the county attorney's office. *Id.* The court held that, in doing so, the sheriff's department had not "initiated" the CHINA action, as it was the county attorney who ultimately decided to file the action. Upholding the district court's grant of summary judgment, the court stated, "The ultimate decision regarding whether to proceed with a criminal or CHINA action, or do neither, rested with the county attorney's office." *Id.*

Shuck cites to the Iowa Supreme Court case, *Winckel v. Von Maur, Inc.*, 652 N.W.2d 453, 460 (Iowa 2002) *abrogated by Barreca v. Nickolas*, 683 N.W.2d 111 (Iowa 2004). The defendant in *Winckel* was a department store whose security guard filed a criminal complaint against the plaintiff, whom the guard alleged had been shoplifting. *Id.* at 456. The court upheld the jury's award of actual and punitive damages for malicious prosecution. *Id.* at 460. In its opinion, however, the court specifically distinguished the case before it from those where a defendant merely provides information to a third party who then decides to initiate an action against the plaintiff. *Id.* ("[W]e have recognized that merely furnishing information to the police is not the instigation of a criminal prosecution."). The court found the security

guard had done more than simply furnish information—he filed the criminal complaint with the magistrate judge in order to hold the plaintiff in custody and such a complaint was required from a store official before the police could make an arrest. *Id.* In other words, the security guard actually filed a criminal complaint with the court, thereby committing an act that exceeded merely providing information.

Montgomery merely provided information to the Bettendorf Police Department and the Scott County Attorney's office on the potentially illegal activity of Linn and Shuck. Following the investigation, Montgomery assisted in preparing the documents that summarized the suspected unapproved expenditures. (App. Vol. I, 84). Montgomery then compiled the materials and delivered them in a binder to the Bettendorf Police Department on December 17, 2012. (App. Vol. I, 84, 85). Montgomery also had two conversations with an Assistant County Attorney with the Scott County Attorney's Office regarding the alleged financial schemes. (App. Vol. I, 86).

Montgomery did not file a criminal complaint with the court, as the security guard did in *Winckel*, or otherwise play a more active role than merely furnishing information to the police and prosecuting authority. Here, the criminal complaint was filed by a member of the Bettendorf Police

Department, and the trial information was filed by the Scott County Attorney's Office. (App. Vol. I, 97, 98). By way of affidavit, Detective Brad Levetzow testified at the summary judgment stage that he drafted, signed, and submitted to the county attorney the criminal complaint and affidavit in Shuck's case. (App. Vol. II, 188). Detective Levetzow confirmed that the decision to file a criminal complaint against Shuck was left to the sole discretion of the Bettendorf Police Department. (Id.). He further testified that the deciding factor in submitting the complaint and affidavit was his belief that probable cause existed to arrest Shuck for the criminal charges alleged therein. (Id.).

The Iowa Supreme Court and Iowa Court of Appeals have already made it clear that the mere provision of information to either the police or prosecuting attorney does not amount to instigating or procuring a prosecution. *See Lukecart*, 130 N.W.2d at 724. Just as with the declarant in *Lukecart*, the decision to file criminal charges against Mark Shuck was "left to the uncontrolled choice" of a third person—the police department and county attorney. As such, Shuck's claim for malicious prosecution failed as a matter of law, and the District Court properly granted summary judgment.

Shuck cites to the deposition testimony of Montgomery, arguing that he did "procure" the prosecution of Shuck due to the fact that he knew the

information he gave the police was false. Presumably, Shuck and Linn are attempting to invoke the rule described in *Rasmussen Buick-GMC, Inc. v. Roach*, which states that a person who merely provides information to a prosecuting authority may still be liable for malicious prosecution if the information given was knowingly false. 314 N.W.2d 374, 376 (Iowa 1982). The court in *Rasmussen Buick-GMC, Inc.*, quoting the Restatement (Second) Torts s 653, comment g, stated that rule as follows:

> If, however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving the false information. In order to charge a private person with responsibility for the initiation of proceedings by a public official, it must therefore appear that his desire to have the proceedings initiated, expressed by direction, request or pressure of any kind, was the determining factor in the official's decision to commence the prosecution, or that the information furnished by him *upon which the official acted* was known to be false.

314 N.W.2d at 376–77 (emphasis added).

Shuck cites to several lines of testimony that he claims demonstrate Montgomery knew some of the information he gave the police was false, including that Montgomery knew the water bills dated back to May 1997, prior to Linn contracting for the purchase of the residence, and that Montgomery knew some of the water bills were sent by the water company to the office of Brad Allen, rather than all of them being sent to Linn and

Shuck's residence. However, Shuck ignores an important element of the exception created by the Restatement (Second) Torts s 653, comment g—the public official must have *acted upon* the false information. This important qualification to the exception to the rule was discussed in the Texas Supreme Court case, *King v. Graham*, 126 S.W.3d 75, 78 (Tex. 2003) (citing comment g, and stating, "If the decision to prosecute would have been made with or without the false information, the complainant did not cause the prosecution by supplying false information.").

Shuck was criminally charged with theft for the unauthorized use of Building X's funds in paying the quarterly water bills from 1997 to 2010. (App. Vol. I, 97). There was no dispute that the payment of the water bills was not approved by the membership of Building X and that Mark Shuck signed the checks to pay the bills as President of Building X. (App. Vol. I, 45, 87, 96). Put simply, Shuck presented no evidence that the police department or the county attorney's office relied upon Montgomery's allegedly false information in bringing a criminal prosecution against Shuck.

In fact, at trial, Detective Levetzow testified that the information Shuck claims Montgomery knew to be false was immaterial to his decision to file a criminal complaint. He testified that he concluded that the criminal charge had merit based on the hard evidence—the water bills. (App. Vol.

III, 335). Further testifying on the procedure for investigating Shuck's activities, Detective Levetzow stated:

> Q: And did you make your own determination as to whether that charge had merit?
>
> A: Yes. The nice part about the water bill portion of this is you have the water bills. It's not anybody else's opinion or what they think happened. It's a document from an unbiased, non-thinking business that says somebody used the water. Here's what it costs and here's who paid for it.

(App. Vol. III, 333). According to Detective Levetzow, Montgomery had no say as to whether to proceed with criminal charges or submit the case to the county attorney's office. (App. Vol. III, 335).

Further, at the time of filing the criminal complaint, Detective Levetzow already knew that the bills were sent to the office of Brad Allen, rather than to Shuck and Linn's residence. (App. Vol. III, 332). He testified that this fact did not matter for purposes of deciding to file the criminal complaint. (App. Vol. III, 336). In addition, Detective Levetzow testified that whether or not the water spigot had been installed by Shuck and Linn was irrelevant to whether Shuck committed any wrongdoing. (App. Vol. III, 328). Ultimately, Detective Levetzow said that the deciding factor in filing the complaint was that the water bills were being paid "for no apparent reason" using association funds. (App. Vol. III, 336). Shuck failed to set

forth facts to show that the Bettendorf Police Department or Scott County's Attorney Office "acted upon" any alleged false information provided by Montgomery. Therefore, the District Court properly granted summary judgment in favor of Montgomery.

CONCLUSION

For the reasons stated above, Appellee, Pat Montgomery, respectfully requests that the judgment of the District Court be affirmed, with costs of this action and appeal assessed against Appellants, Linda Linn and Mark Shuck.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENT

1. This brief complies the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because:

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/s/ Ryan F. Gerdes January 23, 2017
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CERTIFICATE OF SERVICE AND FILING

I certify that on the 23rd day of January, 2017, I, the undersigned, did file electronically this Appellee, Pat Montgomery's, Final Brief with the Clerk of the Iowa Supreme Court using the Electronic Document Management System.

I certify that on the 23rd day of January, 2017, I, the undersigned, did serve this Appellee, Pat Montgomery's, Final Brief on the attorney for the Appellants listed below via electronic service of the Electronic Document Management System. Upon information and belief, the attorney for the Appellants is a registered filer pursuant to Iowa R. Civ. P. 16.201.

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