IN THE SUPREME COURT OF IOWA

CASE NO. 16-1136

LINDA LINN and MARK SHUCK,
Plaintiffs-Appellants,

v.

PAT MONTGOMERY, CHRISTY SCHRADER, and
BRAD ALLEN,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT
FOR SCOTT COUNTY
HON. J. HOBART DERBYSHIRE (Motion for Summary Judgment)
HON. MARLITA A. GREVE (Motion for Summary Judgment)
HON. THOMAS G. REIDELL (Trial)

APPELLEE CHRISTY SCHRADER'S FINAL BRIEF

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ROUTING STATEMENT

This case involves application of existing principles of law and should be routed to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Mark Shuck (Shuck) and Linda Linn (Linn) brought suit against Pat Montgomery (Montgomery), Christy Schrader (Schrader), and Brad Allen (Allen) alleging defamation, malicious prosecution, and abuse of process. App. 3-4.

Shuck, Linn, Montgomery, and Schrader were all members of the Partridge Villa Townhome Association (Association). App. 1. Allen was the accountant for the Association. App. 2.

The Association began an investigation in 2008 concerning the lack of money in the Association's account. Schrader, Montgomery, and other members of the Association participated in the investigation. After reviewing the information collected by the investigation, the investigation determined Shuck and Linn had been using Association funds to pay a water bill for an outside water spigot. App. 221. In 2012, more unauthorized charges were discovered. App. 221.

This information was compiled and presented to the Bettendorf Police Department. Id. The Bettendorf Police Department referred the matter to the Scott County Attorney. App. 221-22. Shuck was charged with second degree theft. App. 222. The charges were later dismissed due to the expiration of the statute of limitations. App. 222-23.

Shuck and Linn filed their Petition at Law on March 10, 2015, claiming defamation, malicious prosecution, and abuse of process. App. 3-4. Linn filed a claim for loss of consortium. App. 3.

Schrader answered on May 5, 2015. App. 15. Schrader filed a motion to Amend Answer and an Amended Answer on February 12, 2016. App. 19-22.

On February 24, 2016, Schrader filed a Motion for Summary Judgment. App. 103. On March 14, 2016, Shuck and Linn resisted the Motion for Summary Judgment. App. 123. On April 18, 2016, the district court granted summary judgment on the malicious prosecution and abuse of process claims. App. 234-239. The district court allowed Shuck's defamation claim to proceed but only in regard to statements made by Schrader after March 10, 2013. App. 232. The court granted summary judgment on Linn's defamation claim. App. 233-234. A five day jury trial commenced on April 25, 2016. The jury returned a verdict in favor of all defendants. App. 246-252.

Shuck now appeals.

STATEMENT OF THE FACTS

Linda Linn began living in a townhome at the Partridge Villa in Davenport, Iowa in 1997. App. 357. Mark Shuck moved into Linn's townhome in 2001. App. 364. The Partridge Villa has a homeowners association, Partridge Villa Townhome Association, Inc. III. App. 220. The Association represents and manages six units in the condominium property.[1] App. 28. Shuck served as president of the Association from 2004 to 2008. App. 220. In 2008, Shuck resigned. Id. Cleyon Shafer began serving as president following Shuck's resignation, but stepped down due to health concerns. App. 316. Schrader served as president after Schafer. App. 318.

Following Shuck's term as president for the Association, the Association was concerned about its lack of money. An investigation was undertaken. App. 315. The investigation discovered charges paid by the Association that were not approved by the Association board including water bills for a spigot located on the back of Linn and Shuck's townhome. App. 221.

All of the checks used to pay the bills for the waterline were written from the Association's account. Id. The payments were not approved by the

[1] This Association is the Association for Building X of the Partridge Villa Townhomes only. App. 319.

Association's board. Id. Schrader, acting on behalf of the Association, had service to the spigot disconnected. Id. The account was closed on March 18, 2010, and the meter was removed on March 23, 2010. Id. These unapproved charges led to further investigation conducted by Schrader, Montgomery, and another Association member Ellen Frey. Id. The investigation lasted approximately twelve months. Id. Schrader, Montgomery, and Frey collected information from other members of the Association. Id. Montgomery prepared documents that compiled all materials and information obtained during the investigation. Id.

On December 17, 2012, Montgomery delivered the prepared documents to Officer Dennis Tripp of the Bettendorf Police Department. Id. Montgomery also communicated with an Assistant Scott County Attorney regarding the information. App. 221-22.

In March 2013, Detective Sergeant Bradley Levetzow with the Bettendorf Police Department contacted Schrader about the investigation and unauthorized charges. App. 222. On March 13, 2013, Detective Levetzow interviewed Schrader about Shuck's involvement in the unauthorized charges. Id. On March 14, 2013, Detective Levetzow filed a criminal complaint and affidavit alleging Shuck had committed theft through the unauthorized use of Association funds from 1997 through 2010. Id.

On May 1, 2013, the Scott County Attorney filed a trial information formally charging Shuck with second degree Theft. Id. No charges were filed against Linn. The charges were later dropped as the alleged activity occurred outside the statute of limitations. App. 222-223.

Shuck and Linn then initiated this action on March 10, 2015. App. 223.

ARGUMENT

Scope and Standard of Review

The Appellee agrees the Appellant preserved error on both issues on appeal.

A grant of summary judgment is appropriate when the moving party demonstrates there is no genuine issue of material fact and that she is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). Summary judgment rulings are reviewed for corrections of errors at law. *Des Moines Flying Serv., Inc. v. Aerial Servs. Inc.*, 880 N.W.2d 212, 217 (Iowa 2016). In reviewing the district court's ruling, the record is viewed in the light most favorable to the nonmoving party and the court may draw all legitimate inferences the evidence bears in order to establish the existence of fact questions. *Boelman v. Grinnell Mut. Reins. Co.*, 826 N.W.2d 494, 501 (Iowa 2013).

I. THE DISTRICT COURT WAS CORRECT IN GRANTING PARTIAL SUMMARY JUDGMENT ON SHUCK'S DEFAMATION CLAIM BECAUSE THE STATUTE OF LIMITATIONS HAD EXPIRED.

"The law of defamation includes the twin torts of libel and slander." *Yates v. Iowa W. Racing Ass'n*, 721 N.W.2d 762, 768 (Iowa 2006). The purpose of this tort is to protect "a person's common law 'interest in reputation and good name.'" *Bertrand v. Mullin*, 846 N.W.2d 884, 891

(Iowa 2014) (quoting *Johnson v. Nickerson*, 542 N.W.2d 506, 510 (Iowa 1996)). To prove defamation the plaintiff must prove "the following elements: (1) publication, (2) of a defamatory statement, (3) which was false and (4) malicious, (5) made of and concerning the plaintiff, (6) which caused injury." *Bierman v. Weier*, 826 N.W.2d 436, 444 (Iowa 2013).

Shuck argues the district court erred in granting summary judgment on any statement made by Schrader prior to March 10, 2013, because the two-year statute of limitations on those statements had expired. Shuck argues the ruling was incorrect for two reasons. First, Shuck argues the discovery rule should be applied to defamation actions regarding statements that "are secretive and not ascertainable." Second, he argues the criminal Complaint was a republication of the defamation. We will address each claim in turn.

A. The Statute Of Limitations Period Begins When The Alleged Defamatory Statements Are Made.

Iowa Code section 614.1(2) (2015) reads:

> Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:
> . . .
> 1. **Injuries to person or reputation--relative rights--statute penalty.** Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years.

The Iowa Supreme Court has ruled this code section applies to defamation actions. *Clark v. Figge*, 181 N.W.2d 211, 215 (Iowa 1970)("614.1(2) of the present Code, so far as we are concerned with it here, covers defamation, torts causing bodily injury or death, and harm related to those wrongs.").[2] The date of publication begins the statute of limitations. *Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 13 (Iowa 1990)("[T]he two-year limitation of Iowa Code section 614.1(2), which begins to run on the date of publication."). The date of publication for any allegedly defamatory statements was December 2012 when Montgomery turned in the information to the police, or on March 13, 2013 when Schrader was interviewed by Detective Levetzow. As the publication begins the period for the statute of limitations, the court was correct in only allowing Schrader's interview to be considered as Shuck's petition was not filed until March 10, 2015.

1. Iowa should not adopt the discovery rule in defamation actions.

To defeat the statute of limitations problem, Shuck argues the discovery rule, which tolls the statute of limitations until the plaintiff "has actual or imputed knowledge of the facts that would support a cause of action," should apply to defamation. *State v. Wilson*, 573 N.W.2d 248, 253

[2] Iowa Code section 614.1(2) reads the same as it did at the time of *Clark*. *See Clark*, 181 N.W.2d at 214 ("Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, * * * within two years.").

(Iowa 1998); *see Rieff v. Evans*, 630 N.W.2d 278, 291 (Iowa 2001) ("A claim does not accrue until the plaintiff knows or in the exercise of reasonable care should have known both the fact of the injury and its cause.").

The Iowa Court of Appeals has dealt with applying the discovery rule to defamation on two prior occasions. First, in *Stites v. Ogden Newspaper Inc.*, No. 00-1975, 2002 WL 663621, at *1-2 (Iowa Ct. App. Apr. 24, 2002) and then again in *Davenport v. City of Corning*, No. 06-1156, 2007 WL 3085797, at *6 (Iowa Ct. App. Oct. 24, 2007).

In *Stites*, Lisa Stites brought a defamation action for an article that appeared in the Urbandale Press Citizen on July 22, 1998. *Stites*, 2002 WL 663621, at *1. Stites filed suit on July 21, 2000, but named the wrong party. *Id.* The petition was amended to the proper party on July 28, 2000. *Id.* The district court found the statute of limitations on Stites' claim ran out on July 22, 2000, two years following the publication of the allegedly defamatory statement. *Id.* Stites appealed, arguing because she did not learn of the article until August 2, 1998, the discovery rule should apply and the statute of limitations not expire until August 2, 2000. *Id.* The Iowa Court Appeals found the statute of limitation ran at the time of publication and the

discovery rule did not apply. *Id.* at 2. ("[T]he statute of limitations on a libel claim begins to run on the date of publication.").

In *Davenport*, Mark Davenport sued the City of Corning, the Corning Police Chief, and Corning's former Mayor for defamation. *Davenport*, 2007 WL 3085797, at *1. The district court dismissed Davenport's defamation claim based on the statements Drew allegedly made to a former Corning police officer because the statements were outside the statute of limitations. *Id.* at *6. Davenport did not dispute that the statements were outside the statutory statute of limitation, but instead argued the discovery rule applied. *Id.* The Court of Appeals found "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.*

In his brief, Shuck correctly asserts that some states have recognized the discovery rule in defamation cases where the publication was "secretive or inherently undiscoverable." *Staheli v. Smith*, 548 So.2d 1299, 1303 (Miss. 1989); *see also Digital Design Group, Inc. v. Information Builders, Inc.*, 24 P.3d. 834, 839 n.7 (Okla. 2001) (collecting cases). However, other states have rejected the application of the discovery rule. *See* Francis M. Dougherty, *Limitation of Actions: Time of Discovery of Defamation as Determining Accrual of Action*, 35 A.L.R.4th 1002, § 2 (1985); *see also*

Nuwave Inv. Corp. v. Hyman Beck & Co. Inc., 114 A.3d 738, 741 (N.J. 2015) ("The statute's clear and unqualified language requires all libel claims to be made within one year of the date of the publication.").

Courts have noted an appropriate instance of adopting the discovery rule is when the defamation is in a credit report or confidential memo. *Staheli*, 548 So.2d at 1303; *see Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet Inc*., 334 N.E.2d 160, 164 (Ill. 1975). The facts of this case are inherently different. Unlike a situation involving a credit report or confidential memo where there is no other remedy, when defamatory statements lead to criminal charges being brought against a person a remedy is available – the tort of malicious prosecution.

The Iowa Supreme Court has previously discussed the balance between the chilling of reporting of criminal behavior and a person's right to be free from false charges. *See Lukecart v. Swift & Co.*, 130 N.W.2d 716, 723-24 (Iowa 1964) ("It is certainly not the province of the courts to create a legal climate where it is unhealthy or financially dangerous to call on peace officers for help or give information or testimony to officials and official agencies.").

On a related topic, the Iowa Supreme Court has also discussed protecting complainants from defamation claims in the context of lawyer

discipline. *State v. Baker*, 293 N.W.2d 568, 576 (Iowa 1980). In discussing what is now Iowa Rule of Professional Conduct 35.24(1), the court said it was in the public interest in granting immunity to complaints filed with the grievance commission. *Id.* The court stated "persons should not be dissuaded from filing complaints by threats of defamation suits or other litigation." *Id.* Because a potentially wronged party has a remedy, the tort of malicious prosecution, it is unnecessary for the court to expand the discovery rule to defamation.

Because Iowa law has established the statute of limitations for defamation begins at the date of publication, the district court was correct in granting summary judgment in favor of Schrader on any statements made or written by Schrader prior to March 10, 2013, and should be affirmed. Iowa should not adopt the discovery rule as it relates to statements made to law enforcement.

B. Schrader Is Not Liable For The Republication Of The Allegations In The Criminal Complaint.

In Iowa, every publication or republication of a defamatory matter is a separate and independent claim from the original publication. *See Kiner*, 463 N.W.2d at 14 (citing *Bond v. Lotz*, 243 N.W.2d 586, 587 (Iowa 1932)). Shuck argues the criminal complaint was a republication of the defamation and the original makers of the statements are responsible. *See Huegerich v.*

IBP, Inc., 547 N.W.2d 216, 222 (Iowa 1996); *Brown v. First Nat'l Bank*, 193 N.W.2d 547, 555 (Iowa 1947) ("Certainly, one who communicates libelous material to a newspaper may not escape liability on the premise urged by the defendant. Repetition or republication by the newspaper would be expected."). The district court in its thorough and well-reasoned opinion found the republication did not affect the statute of limitations. A republication does not toll the statute of limitations, instead a republication entitles the plaintiff to a separate cause of action against the re-publisher, not the original publisher. *See Kiner*, 463 N.W.2d at 14 (finding only one publication fell within the two-year limitation). Schrader's allegedly defamatory statements were republished by a new publisher. Shuck's claims are against that new publisher not Schrader.

Iowa law is unambiguous on the statute of limitations for alleged defamatory statements. A plaintiff has two years from the date of publication to file a claim for each publication. The limitations does not toll for each republication, instead a republication is a new claim against the new publisher with a new statute of limitations. Because the district court's establishment of the statute of limitations was correct, the district court should be affirmed.

II. THE DISTRICT COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT ON SHUCK'S MALICIOUS PROSECUTION CLAIM BECAUSE SHUCK DID NOT SATISFY ALL THE ELEMENTS REQUIRED TO BE SUCCESSFUL IN A MALICIOUS PROSECUTION CLAIM.

Shuck argues the actions of the defendants' procured prosecution. Shuck's brief does not mention any actions specifically related to how Schrader procured prosecution and therefore the argument is waived. *See* Iowa R. App. P. 6.903(2)(g)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."); *see also Hyler v. Garner*, 548 N.W.2d 864, 876 (Iowa 1996) ("[W]e will not speculate on the arguments [appellant] might have made and then search for legal authority and comb the record for facts to support such arguments.").

To establish a claim of malicious prosecution, Shuck has the burden of proving the following elements:

> (1) a previous prosecution, (2) instigation or procurement thereof by defendant, (3) termination of the prosecution by an acquittal or discharge of plaintiff, (4) want of probable cause, (5) malice in bringing the prosecution on the part of the defendant and (6) damage to plaintiff.

Sarvold v. Dodson, 237 N.W.2d 447, 448 (Iowa 1976).

The district court focused on the second element, instigation or procurement of prosecution, in its granting of Schrader's Motion for Summary Judgment. The district court found providing information to police

did not constitute instigation or procurement of prosecution relying on *Lukecart*, 130 N.W.2d at 723-24. App. 236.

In *Lukecart*, the Iowa Supreme Court held "[t]he 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*. at 724 (internal quotations omitted).

Shuck argues Schrader procured prosecution citing to *Winckel v. Von Maur, Inc.*, 652 N.W.2d 453, 460 (Iowa 2002) *abrogated on other grounds by Barreca v. Nickolas*, 683 N.W.2d 111, 121 (Iowa 2004) where the Iowa Supreme Court stated:

> As revealed by the quotation from *Lukecart* . . . we have recognized that merely furnishing information to the police is not the instigation of a criminal prosecution. Our cases also recognize, however, that ordinarily the filing of a criminal complaint is the instigation of criminal charges, and indeed, a private person may be an instigator even though that person has not filed a formal complaint.

Winckel, 652 N.W.2d at 460.

In *Winckel*, the plaintiff was arrested based on a formal complaint by a store security officer. *Id.* While the complaint was not filed until after the arrest, the arresting officers required the complaint be filed. *Id.* The Iowa Supreme Court found this was "the genesis" of the prosecution. *Id.*

The district court correctly found those facts to be distinguishable from the facts in this case. It is undisputed that Schrader met with the Bettendorf Police Department and reported Shuck's potential illegal activity. Yet, Schrader did not file a formal criminal complaint nor did she do anything else to bring about the instigation of the prosecution. Detective Levetzow called her to set up an interview. Detective Levetzow, by affidavit, said the final decision to issue a complaint was made by the Bettendorf Police Department. App. 236. In *Lukecart*, the court was aware about the important balance between protecting "individuals from the harassment of improper charges . . . but . . . cannot go so far as to say that whenever a prosecution fails those who called for an investigation or gave testimony are liable for malicious prosecution." *Lukecart*, 130 N.W.2d at 723. That is what happened here, information was brought to law enforcement, law enforcement did an investigation and then decided to prosecute.

The Iowa Court of Appeals dealt with a similar situation in *McLaughlin v. Ranschau*, No. 10-0102, 2010 WL 3503543, at *1 (Iowa Ct. App. Sept. 9, 2010). Ronald McLaughlin and his sister, Ruthanne Ranschau, became involved in a "tense situation" which resulted in Ruthanne reporting the incident to the police and Ronald being charged with two misdemeanors.

Id. Ronald was prosecuted and acquitted. *Id.* He then brought a malicious prosecution charge against his sister. The court noted the following language from the Restatement (Second) of Torts § 653 cmt. g at 409 (1977):

> When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this Section even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.
>
> 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.

Id. at *3. The court found Ruthanne did not procure or instigate the investigation and McLaughlin failed to prove this required element. *Id.* ("Ruthanne's call to the police and her disclosure of what happened at Vaughn's house—which was corroborated by other witnesses including Ronald himself—does not support a finding of procurement of a malicious prosecution.").

In this case, the district court found Schrader did not coerce or pressure the Bettendorf Police Department to file a complaint. Shuck makes no allegations on appeal that Schrader provided any false information and thus he has waived any claim to that argument. *State v. Adney*, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001) ("When a party, in an appellate brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived.").

Because Shuck is unable to prove Schrader instigated or procured his prosecution, Shuck failed to prove all the required elements necessary for malicious prosecution and the district court's granting of Schrader's Motion for Summary Judgment on this claim should be affirmed.

CONCLUSION

The district court was correct in granting partial summary judgment on Shuck's defamation claim as Iowa law is unambiguous that the statute of limitations for defamation actions is two years and the statute begins to run at the date of publication. Iowa has previously rejected the application of the discovery rule to defamation cases and the court should not adopted the discovery rule. Finally, the filing of a formal complaint is not a republication by the original publisher for the purposes of defamation.

The district court was correct in granting summary judgment on Shuck's malicious prosecution claim as Schrader's report of potentially illegal activity does not constitute instigation or procurement of prosecution.

Therefore, Defendant Schrader request the district court be affirmed.

REQUEST FOR NON-ORAL SUBMISSION

Defendant-Appellee Schrader believes this case can be decided on the briefs without the assistance of oral argument. However, if oral argument is granted, the Appellee requests the opportunity to be heard.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 23, 2017, I electronically filed the foregoing Appellee's Final Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System (EDMS), which will send notice of electronic filing to the following:

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Per Rules 6.106(1) and 6.701, this constitutes service for purposes of the Iowa Court Rules.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 3,854 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word 2013 in Times New Roman 14 pt.

Dated: January 23, 2017

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