MIERA V. WALTEMEYER, 1982-NMCA-007, 97 N.M. 588, 642 P.2d 191 (Ct. App. 1982)

ROBERT MIERA, Plaintiff-Appellant
vs.
SERGEANT C. D. WALTEMEYER, Individually, and THE CITY OF ALBUQUERQUE, a Municipal Corporation,
Defendants-Appellees.

No. 5172

COURT OF APPEALS OF NEW MEXICO

1982-NMCA-007, 97 N.M. 588, 642 P.2d 191

January 07, 1982

Appeal from the District Court of Bernalillo County, Fowlie, Judge.

Petition for Writ of Certiorari Quashed March 12, 1982

COUNSEL

MICHAEL D. BUSTAMANTE, DONN F. BRISLEN, ORTEGA & SNEAD, P.A., Albuquerque, New Mexico, Attorneys for plaintiff-appellant.

JOE L. McCLAUGHERTY, RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A., Albuquerque, New Mexico, Attorneys for defendants-appellees.

JUDGES

Hendley, J., wrote the opinion. I CONCUR: Mary C. Walters, C.J. Lewis R. Sutin, J., (Dissenting).

AUTHOR: HENDLEY

OPINION

*{*589}* HENDLEY, Judge.

{1} Plaintiff was arrested by defendant, Waltemeyer, for simple battery. Plaintiff was found guilty in municipal court, but upon an appeal de novo to the district court, he was acquitted.

{2} Subsequently, plaintiff filed a complaint against Waltemeyer and the City of Albuquerque for damages, alleging malicious prosecution, false imprisonment, false arrest, battery, and violation of civil rights. The trial court granted defendants' motion for summary judgment on the allegations of malicious prosecution, false imprisonment, and false arrest. Plaintiff appeals. The parties agree that false imprisonment and false arrest are part of the greater offense of malicious prosecution. Since we hold that the trial court improperly granted defendants' motion, we need not discuss the false imprisonment or false arrest claims. We reverse.

{3} A reasonable doubt as to the existence of a genuine issue of material fact in dispute precludes the granting of a summary judgment. **Goodman v. Brock,** 83 N.M. 789, 498 P.2d 676 (1972). The party opposing the motion is to be given the benefit of all reasonable doubt in determining whether a genuine issue of material fact exists. **Pharmaseal Laboratories, Inc. v. Goffe,** 90 N.M. 753, 568 P.2d 589 (1977). We first set out the facts and then discuss law as relates to malicious prosecution.

Facts

{4} Plaintiff's version of the facts:

At approximately 4:00 A.M. on November 12, 1976, he heard what sounded like gunshots outside his house. He got dressed, grabbed a flashlight and went to investigate. He walked down his driveway and saw a police car in the street. Once the policeman shined the spotlight on him, he approached the police car. He had the flashlight in one hand and his other hand in his jacket pocket. Defendant told plaintiff to take his hand from his pocket and place both hands on the car, which plaintiff did. Defendant began frisking plaintiff and twice during the frisk he violently grabbed plaintiff's groin and crotch area. The first time plaintiff told defendant he was hurting him; the second time he struck defendant in the chest with his elbow. Defendant then punched plaintiff with his fist, handcuffed, and arrested him. Plaintiff was *{*590}* never asked his name, his address, or what he was doing.

{5} Plaintiff subsequently was examined by two doctors. The first doctor examined plaintiff shortly after the encounter and concluded plaintiff had suffered trauma to his groin area and recommended a scrotal support. The second doctor examined plaintiff almost a year after the incident and found plaintiff suffering from "post traumatic testalgia and epididymitis" and recommended continued use of the scrotal support.

{6} Defendant Waltemeyer's version of the facts:

As defendant pulled up to plaintiff in his police car, plaintiff walked rapidly away from him. Plaintiff came back after defendant ordered him to. As plaintiff was approaching, he put his hand in his coat pocket. Defendant twice ordered plaintiff to remove his hand from his pocket and each time plaintiff loudly and belligerently said "no". Defendant grabbed plaintiff's hand from his pocket and plaintiff struck defendant in the chest. Defendant physically placed plaintiff against the car so he could be frisked. While

defendant was frisking the crotch area, plaintiff again struck defendant. Defendant struck plaintiff, continued the frisk, and arrested him for battery.

{7} A record was made of the municipal court hearing upon plaintiff's special request pursuant to N.M. Mun. Ct. R. 27(d), N.M.S.A. 1978 (Supp. 1981). That record indicates that the municipal court judge thought this to be a simple case of battery and that "we're spending entirely too much time on this one," that "[t]his isn't a case of police brutality," and that "[a]ll I want to hear is evidence which pertains to whether or not there was a battery [upon the police officer]. I told you that before and I'll tell it to you again. It's very simple issue in this case."

Malicious Prosecution

{8} The plaintiff, in a malicious prosecution case, must establish by a preponderance of the evidence: (1) that the criminal prosecution was commenced or induced or procured to be commenced by the defendants; (2) that it terminated in plaintiff's favor; (3) that no probable cause existed for the prosecution; and (4) that it was commenced maliciously. **Meraz v. Valencia,** 28 N.M. 174, 210 P. 225 (1922). This appeal involves the third element.

{9} Plaintiff relies on **Vincioni v. Phelps Dodge Corp.,** 35 N.M. 81, 290 P. 319 (1930), for the proposition (minority rule) that a prior conviction which is later reversed is only prima facie evidence of probable cause. Therefore, since plaintiff's municipal court conviction was overturned on a trial de novo in the district court, there is only prima facie evidence of probable cause, which may be rebutted. However, plaintiff contends there are facts in the record which, if taken as true as we must for the purposes of the summary judgment motion, rebut the presumption.

{10} Defendants rely on the majority rule as set forth in Restatement of Torts, Second, 667 (1976), to uphold the trial court's ruling. It states: "The conviction of the accused by a magistrate or trial court, although reversed by an appellate tribunal, conclusively establishes the existence of probable cause, unless the conviction was obtained by fraud, perjury or other corrupt means."

{11} Defendants contend that the majority rule should be adopted "because it is the majority rule" and "because it is the better reasoned view." Citing to the annotation in 86 A.L.R.2d 1099, defendants state that:

Courts adopting the majority rule have reasoned that although a finding of guilt by a properly empowered tribunal establishes a presumption of probable cause, subsequent indications of the Plaintiff's innocence do not destroy that presumption because innocence in fact does not establish any want of reasonable belief in the Plaintiff's guilt. * * * Thus, a favorable termination of the prosecution, though an essential element of the malicious prosecution action, does not constitute evidence of want of probable cause because a conviction requires a finding of *{*591}* guilt beyond a reasonable doubt

while an acquittal or other favorable termination may be based upon any one of many factors other than want of probability of guilt. * * *

{12} Defendants cite **Delgado v. Rivera,** 40 N.M. 217, 57 P.2d 1141 (1936), for the proposition that an acquittal in a criminal prosecution has little probative value because it may be for a variety of reasons, none of which is want of probable cause. However, plaintiff does not contend that the acquittal in district court establishes lack of probable cause, rather he argues that the facts and circumstances do so here.

{13} Defendants also contend that the majority rule would further policies already set out in New Mexico case law. They cite **Hughes v. Van Bruggen,** 44 N.M. 534, 105 P.2d 494 (1940), for the proposition that malicious prosecution actions are not favored because they deter prosecutions and endanger the order and peace of the community.

{14} In **Vincioni v. Phelps, supra,** our Supreme Court stated that a conviction that is later reversed is "at least prima facie evidence of probable cause" but unless there is some evidence to overcome the presumption, a directed verdict in favor of defendant must stand. We understand this language to mean that New Mexico adheres to the minority view.

{15} This view is sound for several reasons, one of which is expressed in **Lind v. Schmid,** 67 N.J. 255, 337 A.2d 365 (1975).

The Restatement Rule is apparently bottomed on the assumption that the magistrate has upon a full and fair trial proceeded to conviction predicated upon evidence that would convince a prudent and reasonable man of the guilt of the accused. Therefore there must have been probable cause for the criminal proceeding. But the difficulty with the rationale is that the assumption may not be true. If the magistrate erred as a matter of law, should the plaintiff be deprived of his cause of action? If that trial court had acted correctly there would have been an acquittal. Then the plaintiff would have been able to maintain the malicious prosecution suit. The inequity of a rule which in that situation bars the cause of action is obvious. The better principle is that the magistrate's conviction raises a rebuttable presumption of probable cause. The most recent opinion which has considered the issue has reached this result. **MacRae v. Brant,** 108 N.H. 77, 230 A.2d 753 (1967). Other jurisdictions which are in accord are **Alabama, Johnston v. Byrd,** 279 Ala. 491, 187 So.2d 246 (1966); **Minnesota, Skeffington v. Eylward,** 97 Minn. 244, 105 N.W. 638 (1906); **Iowa, Miller v. Runkle,** 137 Iowa 155, 114 N.W. 611 (1908); **Nebraska, Bechel v. Pacific Exp. Co.,** 65 Neb. 826, 91 N.W. 853 (1902); and **New Mexico, Vincioni v. Phelps Dodge Corp.,** 35 N.M. 81, 290 P. 319 (1930).

See also, Chapman v. City of Reno, 85 Nev. 365, 455 P.2d 618 (1969).

{16} The court goes on to state that "where the municipal magistrate erred as a matter of law, including a factual determination unsupported by substantial evidence, so that the conviction could not stand, or his factual findings negated probable cause, or the

conviction was obtained by fraud, perjury or other corrupt means, the conviction should be disregarded."

{17} The wisdom of the minority rule is apparent from the transcript of the municipal court hearing, which shows that the municipal judge did not understand that self-defense is a defense to battery. **State v. Kraul,** 90 N.M. 314, 563 P.2d 108 (Ct. App. 1977). He would not consider any action of the police officer towards plaintiff, but only allowed evidence of whether or not there was a battery by plaintiff on the officer.

{18} Another reason we agree with the minority rule for the instant case is that there was a trial de novo. N.M. Const., Art. VI, § 27; § 35-15-10, N.M.S.A. 1978. **In Southern Union Gas Company v. Taylor,** 82 N.M. 670, 486 P.2d 606 (1971), our Supreme Court stated:

[O]ur statutes expressly provide appeals from a magistrate court to the district court shall be determined by trial de novo. *{*592}* We consider this to mean "anew," as did this court in **Pointer v. Lewis,** supra. [25 N.M. 260, 181 P. 428 (1919).] See also, **Lewis v. Baca,** 5 N.M. 289, 21 P. 343 (1889). This view is in accord with Black's Law Dictionary at 1677 (4th Ed. 1951), wherein "trial de novo" is defined as: "A new trial or retrial had in an appellate court in which the whole case is gone into as if no trial whatever had been had in the court below."

{19} Thus, a trial de novo resulting in an acquittal precludes consideration as to what has gone on before. Therefore, for the purposes of the summary judgment motion, we cannot say that there was still a finding of probable cause in the municipal court. **See, House v. Ane,** 56 Hawaii 383, 538 P.2d 320 (1975).

{20} In view of the foregoing discussion, we hold that in the factual posture of this case the municipal court conviction raises a rebuttable presumption of probable cause.

{21} Accordingly, we hold that the trial court erred in granting defendants' motion for summary judgment. The district court is reversed and is instructed to reinstate the matter on its civil docket. Defendants shall bear the costs of the appeal.

{22} IT IS ORDERED.

I CONCUR: Walters, C.J.

DISSENT

Sutin, J., dissents.

SUTIN, Judge (Dissenting).

{23} I dissent.

{24} Partial summary judgment was granted defendants on plaintiff's claims of malicious prosecution, false arrest and imprisonment. Plaintiff appeals. This case should be remanded.

A. **Plaintiff's complaint should be dismissed without prejudice.**

{25} Plaintiff sued defendants in four counts. Count I was based upon a violation of 42 U.S.C. 1983. It consisted of 13 paragraphs. Count II realleged Count I and also pled assault and battery. Count III realleged all of Counts I and II and also pled false arrest and imprisonment. Count IV realleged all of Counts I, II and III and also pled malicious prosecution.

{26} Rule 10(b) of the Rules of Civil Procedure provides that "a paragraph may be referred to by number in all succeeding pleadings," not an entire claim for relief. A complaint of this nature is not suitable as a pleading to be considered by the trial court in deciding a motion for summary judgment.

{27} Plaintiff's complaint is a violation of Rule 10(b) and should be dismissed without prejudice.

B. **Defendants' motion and order for summary judgment were erroneous.**

{28} Rule 56(c) of the Rules of Civil Procedure provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

{29} Defendants moved the court for partial summary judgment covering malicious prosecution, false arrest and imprisonment. The motion failed to allege "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The motion claimed that defendants were entitled to summary judgment "on the grounds that probable cause has been established as a matter of law for the arrest of the Plaintiff and on the grounds that the original conviction of the Plaintiff in the Municipal Court hearing is a bar to this claim." Perhaps, defendants seek summary judgment as a matter of law.

{30} In malicious prosecution, four issues of material fact are set forth in **Meraz v. Valencia, et al.,** 28 N.M. 174, 177-8, 210 P. 225 (1922). The court said:

The plaintiff was required to establish, by a preponderance of the evidence: (a) That the criminal prosecution was commenced or induced or procured to be commenced by the defendants; (b) **that it terminated in his favor;** (c) **that no probable cause existed for the prosecution;** and (d) **that it was commenced maliciously.** [Emphasis added.]

{31} The trial court did grant summary judgment but not upon either basis stated in defendants' motion. It found "that there are no genuine issues of material fact and that the Defendants are entitled to a judgment on the above listed claims as a matter of law." The judgment was not based upon the factors stated in Rule 56(c). It was granted after "having heard arguments of counsel and being fully aware of the facts involved as found in the Court record, and as presented to the Court in the Arguments."

{32} Proceedings of this nature should not be condoned in an appellate court. In passing, I note that plaintiff's answers to interrogatories were verified on information and belief and not under oath. The answers given cannot be used. **Lackey v. Mesa Petroleum Co.,** 90 N.M. 65, 559 P.2d 1192 (Ct. App. 1976). No record or proceedings of the municipal court conviction were presented in evidence. No affidavits were filed. No facts were presented in oral argument. What facts of record were considered by the court are unknown and not discussed in this appeal.

C. **The basis of plaintiff's appeal is groundless.**

{33} Before summary judgment can be granted, defendants must first show an absence of a genuine issue of material fact or that they were entitled to judgment as a matter of law. Once a prima facie showing is made, the burden shifts to plaintiff to show that a genuine issue of material fact exists and that defendants were not entitled to summary judgment as a matter of law. This issue was not presented in the court below nor in this appeal. Plaintiff does not contend that defendants failed to make a prima facie showing.

{34} Plaintiff's only claim is that a genuine issue of material fact exists as to the absence of probable cause. The basis of plaintiff's claim rests upon testimony elicited at plaintiff's criminal trial in the municipal court. The transcript of these proceedings were not before the trial court nor part of the record below. After partial summary judgment was granted and notice of appeal filed, the parties stipulated "that the Transcript of Proceedings of the Municipal Court in cause no. MC 76 19271, attached hereto as Exhibit 'A', shall be included in the record proper for the appeal of this matter."

{35} Parties in an appeal are without authority to add extraneous exhibits to the record. They are bound by Rule 7 of the Rules of Civil Appellate Procedure. The transcript of proceedings in the municipal court are not before us. It has no bearing upon the absence of probable cause.

{36} Plaintiff also claims that his conviction in the municipal court was subsequently overturned in a trial de novo by the district court. The record of appeal as provided by Rule 39 of the municipal court rules and the record and proceedings of trial de novo in the district court were not presented in the court below nor made part of the record in this appeal. Where a judicial determination has been made of criminal proceedings, the district court must analyze what occurred and the effect thereof. The criminal record and transcript of proceedings must be presented to this Court for an appropriate determination of favorable termination and probable cause.

{37} As Judge Hendley points out, a "trial de novo" is defined as:

"A new trial or retrial had in an appellate court in which the whole case is gone into **as if no trial whatever had been held in the court below."** [Emphasis added.]

{38} In other words, the case is tried "as if the suit had been filed originally in that court." **Lone Star Gas Co. v. State,** 153 S.W.2d 681, 692 (Tex. 1941).

{39} Absent proceedings in the municipal court and the district court, plaintiff cannot rely upon them.

{40} In **Vincioni v. Phelps Dodge Corp.,** 35 N.M. 81, 290 P. 319 (1930), the only issue on appeal was whether plaintiff had failed in proof of probable cause. The opinion opened with the statement that:

This action for malicious prosecution is the aftermath of **State v. Vincioni,** 30 N.M. 472, 239 P. 281, [conviction reversed] where most of the essential facts will be found stated.

{41} The instant case is also the aftermath of the district court trial de novo. The judgment of acquittal does not assist plaintiff in proving lack of probable cause. It is not sufficient proof. In fact, if defendants can satisfy the jury that plaintiff, notwithstanding his acquittal, was in fact guilty of the crime charged, no recovery can be had. **Delgado v. Rivera,** 40 N.M. 217, 57 P.2d 1141 (1936). But the facts and circumstances resulting in acquittal might be essential but are not before us.

{42} "Probable cause does not depend upon the guilt or innocence of [plaintiff] the person accused. Probable cause is an honest belief on the part of [defendant] the prosecutor in the guilt of [plaintiff] the accused, based on reasonable grounds." **Nelson v. National Casualty Co.,** 179 Minn. 53, 228 N.W. 437, 438-9, 67 A.L.R. 509 (1929), quoted in part in **Marchbanks v. Young,** 47 N.M. 213, 216, 139 P.2d 594 (1943). An "honest belief" is a "belief having a reasonable basis." **Redhing v. Central R. Co.,** 68 N.J.L. 641, 54 A. 431, 432 (1903). "But belief in this connection must mean something short of certainty. Absolute certainty is not required even for a conviction on the criminal charge." **Keefe v. Johnson,** 403 Mass. 572, 24 N.E.2d 520, 524 (1939).

{43} In other words:

Probable cause is in effect the concurrence of the **belief** of guilt with the existence of facts and circumstances reasonably warranting the **belief....**

If it should be developed... **however, that the prosecution was not based upon the belief of the defendant**... **but upon his own knowledge of the facts, then it would seem that the reason for the rule just stated ceases, and consequently, the rule disappears....** [Emphasis added.]

Delgado [40 N.M. 230].

{44} State v. Ledbetter, 88 N.M. 344, 347, 540 P.2d 824 (Ct. App. 1975) quoted a simile of the **Delgado** rule from an opinion of the Supreme Court of the United States:

"... Probable cause **exists** where 'the facts and circumstances **within their** [the **Officers'**] **knowledge**... [**are**] **sufficient themselves** to warrant a man of reasonable caution in the belief that' an offense has been or is being committed...." [Emphasis added.]

{45} Rodriguez v. State, 91 N.M. 700, 703, 580 P.2d 126 (1978) put the rule in this fashion:

The probable cause essential to support an arrest without a warrant is a belief based upon facts within the knowledge of the arresting officer, persuasive enough to convince a judge that a cautious but disinterested man would also believe the arrested person guilty.

State v. James, 91 N.M. 690, 579 P.2d 1257 (Ct. App. 1978); **Ulibarri v. Maestas,** 74 N.W. 516, 395 P.2d 238 (1964); **Cave v. Cooley,** 48 N.M. 478, 152 P.2d 886 (1944) strongly support defendants' position.

{46} In the instant case, during an investigation by defendants, an array of fisticuffs occurred between plaintiff and defendant. Each had knowledge of the facts. If plaintiff and defendant each honestly believed the other to be guilty of a simple battery and each filed a criminal complaint against the other, regardless of the result, neither had a claim against the other for malicious prosecution. Under the **Delgado** rule, the rule of probable cause disappears. Under the **Ledbetter** rule, probable cause exists. On the issue of probable cause, knowledge of facts which a prosecutor honestly believes to be a criminal offense is equivalent to the conviction of the person accused. Under either event, the person accused has no claim against the prosecutor for malicious prosecution. The basis reason is that one who honestly believes he has been battered by another has an independent absolute right to file a criminal complaint against the person who battered him.

{47} The same rule would apply if plaintiff had a first fight with a third person in the presence of defendant. **Cave** quoted the following:

"An officer may arrest a person when circumstances exist that would cause a reasonable person to believe that a crime has been committed in his presence. [Citations omitted.] And this is true even though no offense has actually been committed. Consequently no civil liability attaches to him on account thereof in either circumstance." [48 N.M. 481.]

{48} We must keep in mind that probable cause is not related to the innocence or guilt of plaintiff, nor conviction or acquittal of plaintiff. It is not related to plaintiff's belief nor upon plaintiff's view of the facts. It is based solely upon whether defendant had an

honest belief in the guilt of plaintiff based upon defendant's "own knowledge of the facts."

{49} In the instant case, defendant was asked if plaintiff offered resistance when defendant took his hand out of plaintiff's pocket. Defendant said, "that's when he hit me, knocked me backwards.... he might have hit me with an open hand and pushed me backwards.... when I started to check his crotch for a weapon, he turned and hit me again and knocked me backward.... The two times is all. Once on the driveway, once at the car. That was it." These are the crucial facts from which the trial court should determine whether defendant had "an honest belief in the guilt of the accused based upon reasonable grounds." If established in the evidence that plaintiff was found guilty of simple battery and later found not guilty, such evidence is extraneous to the issue of probable cause.

{50} Vincioni said:

It seems to be invariably held that a conviction, though reversed, is **at least** prima facie evidence of probable cause. 38 C.J. pp. 415, 416. **Unless there is some evidence to overcome the presumption, the judgment must stand.** [Emphasis added.] [35 N.M. 83.]

{51} The referenced authority points to a majority and minority view. To me, it does not mean that **Vincioni** adopted the minority view. "The words 'at least' are emphatic, and expressive of a minimum, to be equated as **no less than."** [Emphasis by Court.] **Lasro Corp. v. Kree Institute of Electrolysis, Inc.,** 215 N.Y.S.2d 125, 128 (1961); **Santow v. Ullman,** 36 Del.Ch. 427, 166 A.2d 135 (1960). The "minimum" equates with the minority rule. The reference to "at least" simply means that under the majority rule "unless the judgment of conviction has been obtained by fraud, corruption, false testimony, or other undue or unlawful means, the conviction is conclusive evidence of probable cause, although reversed on appeal to a superior tribunal." [38 C.J. 415.]

{52} On the other hand, the minority rule is "In some jurisdictions a conviction followed by acquittal on appeal is not conclusive but prima facie evidence of probable cause for instituting the prosecution; and this evidence may be rebutted by any competent evidence which clearly overcomes the presumption arising from the fact of the conviction in the first instance." [38 C.J. 416.]

{53} Neither the majority nor minority view was applied in **Vincioni.** It is illogical and unreasonable to believe that the Supreme Court would adopt a minority view absent a discussion of the majority rule, the citation of cases, analyzation and a statement of reasons. The syllabi is erroneous. **Vincioni** was followed in **Lind v. Schmid,** 67 N.J. 255, 337 A.2d 365 (1975) relief on by Judge Hendley. It was also discussed in **Mendoza v. K-Mart, Inc.,** 587 F.2d 1052 (10th Cir. 1978) in which the court said:

[I]t has been recognized that such prima facie evidence of probable cause by a conviction may be overcome **by showing that the conviction was obtained through corruption, perjury, or other unfair means.** [Emphasis added.] [Id. 1060.]

{54} This rule, if adopted in New Mexico, would place a heavy burden on plaintiffs in malicious prosecution suits. In my opinion, **Vincioni** led the above cases astray. Neither the majority nor minority view has been adopted in New Mexico.

{55} We should adopt the majority view. Restatement (Second) Torts, Section 667 (1977) states the rule as follows:

The conviction of the accused by a magistrate or trial court, although reversed by an appellate tribunal, conclusively establishes the existence of probable cause, unless the conviction was obtained by fraud, perjury or other corrupt means.

{56} The citation of cases is unnecessary. See, Annot. **Conclusiveness, as evidence of probable cause in malicious prosecution action, of conviction as affected by the fact that it was reversed or set aside,** 86 A.L.R.2d 1090, 1094 (1962), Later Case Service, p. 412 (1979). We have followed portions of Restatement on malicious prosecution. **See Hughes v. Van Bruggen,** 44 N.M. 534, 105 P.2d 494 (1940). **Hughes** points to the policy of the law and quotes it: "The law does not look with favor upon suits for damages for malicious prosecution." [Id. 541.] We should be solicitous of the honest efforts of police officers and private citizens to assist in enforcing the law. The requirements safeguard a citizen who prosecutes on reasonable grounds, while preserving a claim for the innocent victim who has been hauled into court on baseless charges.

{57} Whether probable cause is a question of law for the court to determine or a question of fact for the jury, remains, in my opinion, in a state of uncertainty. See, **Yucca Ford, Inc. v. Scarsella,** 85 N.M. 89, 509 P.2d 564 (Ct. App. 1973), Sutin, J., specially concurring; Somerstein v. Gutierrez, 85 N.M. 130, 509 P.2d 897 (Ct. App. 1973), Sutin, J., specially concurring. **Yucca Ford** has been accepted for the proposition "that where the facts are in dispute, probable cause is a question of fact for the trier of the facts." **Mendoza,** [587 F.2d 1060]. Nevertheless, the issue of "law or fact" has not yet been decided by the Supreme Court. A review of all New Mexico cases are found in **Yucca Ford.** See, Annot. **Comment Note.-- Probable cause or want thereof, in malicious prosecution action, as question of law for court or of fact for jury,** 87 A.L.R.2d 183 (1963), Later Case Service, p. 458 (1979).

{58} Due to the disorder in which this case began and ended, it should be remanded to the district court with the following instructions:

(1) Plaintiff shall file an amended complaint in accordance with the Rules of Civil Procedure, and defendants shall file an answer.

(2) Plaintiff's answers to interrogatories shall be verified under oath.

(3) Defendants shall be ordered to present as an exhibit, the complete authenticated record, proceedings and trial of plaintiff for simple battery in the municipal court.

(4) Plaintiff shall be ordered to present as an exhibit, a complete authenticated record, proceedings and trial de novo in the district court.

(5) Defendants shall file a proper motion for summary judgment.

(6) The parties shall stipulate as to each fact upon which there is and is not a genuine issue of material fact.

(7) The court may hold a hearing.

(8) The court shall enter an order granting or denying defendants' motion for summary judgment in accordance with Rule 56(c) of the Rules of Civil Procedure. The court may, in its discretion, set forth in the order any findings or state any reasons to support the basis upon which the order was entered. See, Wilson v. Albuquerque Board of Realtors, 81 N.M. 657, 472 P.2d 371 (1970).