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IN THE
COURT OF APPEALS OF INDIANA

State of Indiana, acting by and through its Department of Natural Resources,

Appellant-Defendant,

v.

Kailee M. Smith (now Leonard) and Jeffrey S. McQuary,

Appellee-Plaintiffs.

January 25, 2023

Court of Appeals Case No. 22A-MI-685

Appeal from the Marion Superior Court

The Honorable David J. Dreyer, Senior Judge

Trial Court Cause No. 49D01-1706-MI-23427

Weissmann, Judge.

[1] Kailee Leonard (formerly Smith) obtained a money judgment against Scott Johnson, an Indiana Department of Natural Resources (DNR) Conservation Officer, for his role in procuring Leonard's false arrest for leaving the scene of a car accident. Officer Johnson subsequently assigned to Leonard his right to indemnification by the State under Indiana's public employee indemnification statute, Indiana Code § 34-13-4-1 ("indemnification statute"). Leonard then sued the State for indemnification and obtained a judgment in her favor. The State appeals, arguing that the trial court erred in concluding Officer Johnson's actions were not "noncriminal," as required by the indemnification statute. We agree and reverse.[1]

Facts[2]

Accident & Criminal Charge

[2] While driving one night in December 2012, Leonard accidentally struck and killed Officer Johnson's pet dog with her vehicle. Leonard proceeded to the nearby home of her boyfriend, who accompanied Leonard back to the accident scene about 15 minutes later. There, Leonard encountered Officer Johnson and informed him about the accident. Officer Johnson, who was off duty at the

[1] We conducted oral argument in this case on November 2, 2022. We thank counsel for their participation and advocacy.

[2] Leonard's attorney, Jeffrey McQuary, was a co-assignee of Officer Johnson's indemnification rights and a co-plaintiff in Leonard's indemnification case against the State. Though McQuary is a named appellee in this appeal, we refer only to Leonard for simplicity.

time, instructed Leonard to report the accident to the Hancock County Sheriff's Department. Leonard did so from her home a few hours later.

[3] Three months after the accident, Officer Johnson was at the Hancock County Prosecutor's Office in the course of his duties as a DNR Conservation Officer. While there, he hypothetically questioned a deputy prosecutor about the legality of a motorist leaving, then returning to the scene of an accident that killed a dog. The prosecutor advised that the facts might constitute a criminal offense, after which Officer Johnson informed the prosecutor about Leonard's accident. The prosecutor instructed Officer Johnson to speak with Stephen Banks, an investigator with the Prosecutor's Office, for further action. Officer Johnson did just that.

[4] Months after discussing Leonard's accident with Officer Johnson, Investigator Banks executed a probable cause affidavit for Leonard's arrest. The State filed the affidavit in the Hancock Superior Court along with an information charging Leonard with Class B misdemeanor failure to stop after an accident. The Hancock Superior Court found probable cause to believe Leonard committed the charged offense, and Leonard was eventually arrested.[3] But a year into

[3] The Fourth Amendment to the United States Constitution protects citizens against "unreasonable searches and seizures." U.S. Const. amend. IV. The parties use the term "arrest," rather than "seizure," but the record does not show that Leonard was arrested as that term is commonly understood. According to Leonard, she simply received a "summons for a hit and run," "hired a lawyer," and "went in for the summons." Tr. p. 18. She did not "have to go to the jail to be booked in." *Id.* We note that "a summons alone does not equal a seizure for Fourth Amendment purposes." *Bielanski v. Cnty. of Kane*, 550 F.3d 632, 642 (7th Cir. 2008). However, there appears to have been no dispute that Leonard was seized in some manner contemplated by the Fourth Amendment.

Leonard's prosecution, the State voluntarily dismissed the case when the Prosecutor's Office learned that Leonard had informed Officer Johnson of the accident shortly after it occurred.

False Arrest Case

[5] After the criminal case was dismissed, Leonard filed a civil lawsuit against Officer Johnson under 42 U.S.C. § 1983 in the United States District Court for the Southern District of Indiana ("false arrest case"). In her complaint, Leonard claimed that "[Officer] Johnson's actions in procuring [her] prosecution constituted false arrest . . . in violation of the Fourth Amendment." Exhs. p. 14. To prevail on this claim, Leonard was required to prove that Officer Johnson's actions resulted in her seizure and that the seizure was unreasonable. *See* U.S. Const. amend. IV; *Bielanski v. Cnty. of Kane*, 550 F.3d 632, 637 (7th Cir. 2008); *Berg v. Cnty. of Allegheny*, 219 F.3d 261, 272 (3d Cir. 2000) ("[L]iability for an unlawful arrest can extend beyond the arresting officer to other officials whose intentional actions set the arresting officer in motion.").

[6] Leonard made the following factual allegations in support of her Fourth Amendment false arrest claim:

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> 14. . . . Johnson approached Steve Banks, an investigator from the Hancock County Prosecutor's Officer, and asked him to press charges against [Leonard].
>
> 15. Banks did not conduct an investigation of his own, but rather relied on the information supplied by fellow law enforcement officer Johnson.

> 16. Johnson, however, falsely told Banks that [Leonard] left the scene of the accident and did not return until the following day.
>
> 17. Based on Johnson's information, Banks swore out a Probable Cause Affidavit . . . charging [Leonard] with Failure to Stop after Property Damage to Other than a Vehicle, a Class B misdemeanor.
>
> ***

Exhs. p. 14.

[7] The State declined to represent Officer Johnson in the false arrest case, concluding that he acted outside the scope of his DNR employment when he reported Leonard's accident to Investigator Banks. The false arrest case proceeded to trial, and a jury returned a verdict in Leonard's favor, awarding her $10,000 in damages. The District Court subsequently awarded Leonard an additional $52,462 in attorney's fees and costs, for a total judgment of $62,462 ("false arrest judgment").

[8] Officer Johnson and Leonard later entered into a contract by which Officer Johnson assigned Leonard his right to indemnification by the State for the false arrest judgment. In exchange, Leonard agreed that she would not collect the judgment from Officer Johnson directly.[4]

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[4] The assignment contract references a previously executed agreement between Officer Johnson and Leonard, "by which [Officer] Johnson satisfied the [false arrest] Judgment for valuable consideration," including a "Payment." Exhs. pp. 8-9. The assignment contract does not identify the payment amount, but during a summary judgment hearing in the indemnification case, Leonard's counsel explained that Officer Johnson paid Leonard $10,000, satisfying the damages portion of the false arrest judgment but not the $52,462 in attorney's fees and costs. *See Smith v. State*, Case No. 18A-MI-01593, Appellee's App. Vol. III, p. 8 (filed November 30, 2018).

Indemnification Case

[9] Pursuant to the assignment of Officer Johnson's indemnification rights, Leonard filed a complaint against the State in the Marion Superior Court, seeking indemnification for the false arrest judgment ("indemnification case"). Indiana's indemnification statute generally requires the State to indemnify a public employee for the employee's "personal civil liability for a loss occurring because of a noncriminal act or omission within the scope of the public employee's employment which violates the civil rights laws of the United States." Ind. Code § 34-13-4-1.

[10] After two rounds of cross-motions for summary judgment and one prior appeal,[5] the indemnification case proceeded to a bench trial. Leonard presented Officer Johnson's testimony that he told Investigator Banks that Leonard returned to the scene of the accident "later that evening" and "about an hour later." Tr. pp. 61, 62. Officer Johnson also testified that he was entirely truthful with Investigator Banks. *Id.* at 62, 72. Investigator Banks did not testify at trial, but the State presented Leonard's complaint in the false arrest case, in which she alleged that Office Johnson "falsely told [Investigator] Banks that [Leonard] left the scene of the accident and did not return until the following day." Exhs. p. 14. The State also presented the jury verdict form, which affirmatively

[5] *See Smith v. State*, 122 N.E.3d 991 (Ind. Ct. App. 2019) (reversing trial court's entry of summary judgment in favor of State and remanding for further proceedings).

indicated "[Leonard] proved that she was falsely arrested by [Officer] Johnson." *Id.* at 4.

[11] The Marion Superior Court (hereinafter "trial court") ruled in Leonard's favor. In its written judgment, the trial court found that "[Officer] Johnson falsely maintained [to Investigator Banks] that Leonard left the scene and returned the next day - not shortly after the accident, as had actually happened." App. Vol. II, p. 19. The court further concluded that Officer Johnson was acting within the scope of his DNR employment when he "cause[d] a false criminal charge to be brought against Leonard." *Id.* at 21-22. Although the court did not specifically conclude that Officer Johnson's actions were "noncriminal," the conclusion is inherent in the court's ultimate determination that Leonard—as assignee of Officer Johnson's indemnification rights—was entitled to indemnification by the State.

[12] The trial court entered judgment for Leonard and against the State for the full $62,462 of the false arrest judgment. The State then timely filed a motion to correct error, arguing that Officer Johnson's actions were *not* "noncriminal," as required by the indemnification statute. The State's motion was deemed denied when the trial court failed to rule on it within 45 days. *See* Ind. Trial Rule 53.3(A) (2020). The State now appeals the trial court's judgment as clearly erroneous.

Standard of Review

[13] When a trial court issues a judgment with findings of fact and conclusions of law under to Indiana Trial Rule 52(A), we apply a two-tiered standard of review to determine whether the judgment is clearly erroneous. *Bowyer v. Ind. Dep't of Nat. Res.*, 944 N.E.2d 972, 983 (Ind. Ct. App. 2011). We first determine whether the evidence supports the findings, and second, whether the findings support the judgment. *Id.* We do not reweigh the evidence but consider the evidence favorable to the judgment. *Id.* Findings of fact are clearly erroneous when the record contains no facts to support them. *Id.* A judgment is clearly erroneous if no evidence supports the findings, the findings fail to support the judgment, or if the trial court applies an incorrect legal standard. *Id.* at 983-84.

Discussion and Decision

[14] To be entitled to indemnification by the State under the indemnification statute, Leonard was required to prove that the false arrest judgment arose from a "noncriminal act" committed by Officer Johnson "within the scope of [his public] employment." Ind. Code § 34-13-4-1. The State does not challenge the trial court's conclusion that Officer Johnson acted within the scope of his DNR employment in procuring Leonard's false arrest, and we are not asked to determine whether the State properly denied Officer Johnson a defense under the indemnification statute. The only issue before the Court is whether the trial court erred in concluding that Officer Johnson's actions were "noncriminal."

I. Waiver

[15] Leonard argues that the State waived its challenge to the noncriminality of Officer Johnson's actions by failing to raise it as an affirmative defense in the State's answer to Leonard's complaint. *See generally* Ind. Trial Rule 8(C); *Willis v. Westerfield*, 839 N.E.2d 1179, 1185 (Ind. 2006) ("[A] party seeking the benefit of an affirmative defense must raise and specifically plead that defense or it is waived."). But the State's challenge was not an affirmative defense.

[16] "An affirmative defense is a defense upon which the proponent bears the burden of proof and which, in effect, admits the essential allegations of the complaint but asserts additional matter barring relief." *Willis*, 839 N.E.2d at 1185 (internal quotation omitted). Under the indemnification statute, Leonard—not the State—had the affirmative burden of proving that Officer Johnson's actions were "noncriminal." *See* Ind. Code § 34-13-4-1. The State merely controverted this element of Leonard's claim by arguing that Officer Johnson's actions were *not* "noncriminal." It was not required to specifically plead the issue in its answer to Leonard's complaint.

[17] Moreover, Leonard impliedly consented to litigating the noncriminality of Officer Johnson's actions at trial. *See generally* Ind. Trial Rule 15(B) ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). An opposing party impliedly consents to a non-pleaded issue when the party "had notice of the issue" but "fail[s] to object [to the issue being

litigated] at trial." *Mercantile Nat'l Bank of Ind.* v. *First Builders of Ind., Inc.*, 774 N.E.2d 488, 492-93 (Ind. 2002).

[18] At trial in the indemnification case, Leonard's counsel recognized the following during opening argument: "[T]he State contends that . . . [Officer] Johnson committed the crime of false informing." Tr. p. 7. Leonard's counsel later questioned witnesses about that alleged crime. *Id.* at 70, 109. And in his closing argument, Leonard's counsel identified "whether [Officer Johnson's] actions were non-criminal" as one of "the two elements at issue . . . under the indemnification statute." *Id.* at 111-12. Leonard had notice that the State was challenging the noncriminality of Officer Johnson's actions and did not object.

[19] Leonard also argues that the State waived its challenge to the noncriminality of Officer Johnson's actions by failing to raise it in the State's first motion for summary judgment. *See generally Dunaway v. Allstate Ins. Co.*, 813 N.E.2d 376, 387 (Ind. Ct. App. 2004) ("Issues not raised before the trial court on summary judgment cannot be argued for the first time on appeal and are waived."). But the State is neither appealing from a summary judgment ruling nor challenging the noncriminality issue for the first time on appeal. *See infra* ¶ 18.

[20] For these reasons, the State did not waive its challenge to the noncriminality of Officer Johnson's actions in procuring Leonard's false arrest.

II. Error

[21] On the merits of the noncriminality issue, the State argues that Officer Johnson's actions amounted to false informing under Indiana Code § 35-44.1-2-

3. That statute makes it a Class B felony to give "(A) a false report of the commission of a crime; or (B) false information to a law enforcement officer that relates to the commission of a crime; knowing the report or information to be false." Ind. Code § 35-44.1-2-3(d)(1). Notably, the phrase "law enforcement officer" is defined to include "an investigator for a prosecuting attorney." Ind. Code § 35-31.5-2-185(a)(3).

[22] The State claims Officer Johnson effectively committed false informing when, as the trial court found, he "falsely maintained [to Investigator Banks] that Leonard left the scene and returned the next day - not shortly after the accident, as had actually happened" ("falsehood finding"). App. Vol. II, p. 19. Leonard does not contest that the falsehood finding reflects actions that are *not* "noncriminal" under the indemnification statute. Instead, she contends the falsehood finding is not supported by the record. We agree with the State and disagree with Leonard.

[23] In her complaint in the false arrest case, Leonard alleged that Officer Johnson "falsely told [Investigator] Banks that [Leonard] left the scene of the accident and did not return until the following day." Exhs. p. 14. Though evidence of this particular false statement was not presented at trial in the indemnification case, the trial court was not obligated to believe Officer Johnson's testimony that he told Investigator Banks that Leonard returned to the scene of the accident "later that evening" and "about an hour later." Tr. pp. 61, 62. *See Thompson v. State*, 804 N.E.2d 1146, 1149 (Ind. 2004) ("As a general rule,

factfinders are not required to believe a witness's testimony even when it is uncontradicted.").

[24] Moreover, during oral argument in this appeal, Leonard's counsel conceded that, in the false arrest case, "[Leonard] had to, and did, prove that [Officer] Johnson said something that is untrue." Oral Arguments Online, *State of Indiana v. Kailee M. Smith et al.*, at 22:15 (Nov. 2, 2022), http://mycourts.in.gov/arguments. And during summary judgment proceedings in the indemnification case, Leonard's counsel recited the facts underlying Leonard's false arrest as follows: "Instead of telling the prosecutor that Ms. Leonard had come to his door and – and said what happened, he told the prosecutor and the investigator that she had – she did not admit it until the following day." *See Smith v. State*, Case No. 18A-MI-01593, Appellee's App. Vol. III, p. 8 (filed November 30, 2018).

[25] On this record, we find no error in the trial court's falsehood finding. We therefore turn to the State's argument that the falsehood finding reflects actions that are *not* "noncriminal" under the indemnification statute. Because Leonard does not respond to this argument in her appellee's brief, we will reverse the trial court's judgment if the State establishes prima facie error. *Nance v. Miami Sand & Gravel, LLC*, 825 N.E.2d 826, 837 (Ind. Ct. App. 2005) ("An appellee's failure to respond to an issue raised in an appellant's brief is, as to that issue, akin to failing to file a brief."); *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006) ("When the appellee has failed to submit an answer brief . . . we will reverse the trial court's judgment if the appellant's brief presents a case

of prima facie error."). "Prima facie error in this context is defined as, at first sight, on first appearance, or on the face of it." *Morton v. Ivacic*, 898 N.E.2d 1196, 1199 (Ind. 2008) (internal quotation omitted).

[26] At first sight, the falsehood finding reflects that Officer Johnson effectively committed false informing by knowingly giving Investigator Banks false information relating to Leonard's alleged commission of a crime. *See* Ind. Code § 35-44.1-2-3(d)(1). Thus, on first appearance, the falsehood finding does not support the trial court's conclusion that Officer Johnson's actions were "noncriminal" under the indemnification statute. Finding prima facie error in the trial court's judgment, we reverse.

Bailey, J., and May, J., concur.