

January 18.

The summary judgment hearing was held as scheduled on January 22. The court announced its decision in favor of the defendant at the conclusion of the hearing, and entered a written opinion and judgment to that effect on January 26.

Along with the present motion, the plaintiff has filed an affidavit of George Cridlin, the plaintiff's former attorney in the criminal proceeding. The plaintiff contends that I was mistaken in my ruling that the arrangement by which the criminal proceeding was dismissed precludes the present malicious prosecution action. He also asserts that the affidavit by Cridlin shows that at the least there is a genuine issue of material fact as to circumstances by which the criminal charge was dismissed. The plaintiff desires that I vacate the judgment and either enter judgment for the plaintiff as to liability or allow a jury to determine such liability.

Federal Rule of Civil Procedure 59(e) permits the court to alter or amend a judgment, provided a motion requesting such relief is filed within ten days after entry of judgment.¹ Fed. R. Civ. P. 59(e). The rule itself contains no standards for judging such a motion, but it is established that there are three grounds: "(1) to accommodate

¹ The plaintiff also relies on Federal Rule of Civil Procedure 52, but that rule applies only to trials without a jury where findings of fact or law are required. No such findings are required in a summary judgment. *See* Fed. R. Civ. P. 52(a); *A R Inc. v. Electro-Voice, Inc.*, 311 F.2d 508, 513 (7th Cir. 1962).

an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” *Pac. Ins. Co. v. Am. Nat’l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998).

In his present motion, the plaintiff relies on the case of *Hilferty v. Shipman*, 91 F.3d 573 (3d Cir. 1996), in order to show that a clear error of law has occurred. In that case, however, the court (applying Pennsylvania law) simply found that a wife was not barred from a malicious prosecution claim where charges against her were dropped pursuant to the prosecutor’s agreement with her husband, who also was charged, by which the husband agreed to a dismissal of the charges in return for his participation in a rehabilitation program. *See id.* at 576. The court determined that the wife had not entered into the agreement, although she was a beneficiary of it, and thus her legal ability to pursue her civil remedies was unimpaired. *See id.* at 581. The *Hilferty* decision does not require a change in result here.

The new affidavit of the plaintiff’s former attorney likewise does not justify reconsideration of the summary judgment. In his affidavit, the attorney does not dispute the essential facts of the manner in which the criminal charge against the plaintiff was dismissed, but rather offers his opinion that the events should not be characterized as a compromise settlement. It is still clear, however, that the then-defendant, through his counsel, agreed to a procedure by which the charge would be

dismissed without a judicial determination, conditioned upon the accused's future behavior. That is sufficient to bar the present civil action. *See Tucker v. Duncan*, 499 F.2d 963, 964 (4th Cir. 1974) (holding malicious prosecution claim barred simply because prosecutor agreed to nolle prosequi of accused's charges "after his attorney spoke with the prosecutor in a back room").

Moreover, even if the additional affidavit did create a genuine issue of material fact, it is within my discretion to refuse to consider it at this stage, where there is no showing of any justifiable reason why the material could not have been presented before summary judgment was granted. *See RGI, Inc. v. Unified Indus., Inc.*, 963 F.2d 658, 662 (4th Cir. 1992). This is an alternative reason for denying the motion.

For these reasons, I find that no proper ground exists to vacate the judgment. Accordingly, it is **ORDERED** that the Motion to Amend Judgment Pursuant to FRCP 52 and 59 (Doc. No. 20) is denied.

ENTER: February 12, 2001

United States District Judge