

RENDERED: APRIL 21, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001816-MR

WILLIAM SEREY

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE SAMUEL C. LONG, SPECIAL JUDGE
CIVIL ACTION NO. 99-CI-00583

GARIS PRUITT

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, DYCHE, AND MINTON, JUDGES.

MINTON, JUDGE: William Serey appeals from a summary judgment that dismissed his claims against Garis Pruitt. We conclude that summary judgment was proper because Serey has failed to show that there was any genuine issue of material fact supporting his claim for wrongful use of civil proceedings, and he has waived or abandoned any issues concerning his claim for abuse of process.

I. THE CIVIL ACTION AGAINST SEREY AND OMNI INSURANCE.

The Kentucky State Police responded to a one-car accident in rural Boyd County, finding a vehicle upside down and almost completely submerged in a creek with a very swift current. There were no apparent survivors. KSP requested the assistance of Serey in recovering the vehicle and any victims because of his underwater expertise. Serey was an Ashland city police officer who was also a certified SCUBA diver and instructor with experience in underwater rescue and recovery.

During recovery, the strong current swept the body of Stephanie Griffith out the open driver's door; and the body of Jason Qualls was recovered from the back seat on the passenger's side. At KSP's request, Serey gave them a written statement of his opinion that Stephanie was the driver at the time of the accident.

Qualls, who owned the vehicle involved in the accident, was uninsured. Stephanie's father, Glenn Griffith (Griffith), had uninsured motorist's (UM) coverage through Omni Insurance Co. UM coverage would be available under the policy only if Qualls, not Stephanie, was driving at the time of the accident. Omni refused to pay any UM benefits to Griffith on the grounds that Stephanie was the driver. Griffith disagreed with this conclusion. Griffith sought a lawyer's advice from attorney Garis Pruitt. Pruitt eventually filed a civil action

on Griffith's behalf in Boyd Circuit Court against Omni and Serey.

Griffith's complaint alleged that Omni had acted in bad faith by failing to pay UM insurance benefits and that Serey had breached the duty of a reasonable and prudent police officer by failing to exercise ordinary care in rendering his opinion to KSP that Stephanie was driving at the time of the accident. The complaint further alleged that Omni's wrongful refusal to pay benefits was based, in part, on its reliance on Serey's unqualified and erroneous opinion to KSP. The claims against Serey included gross negligence, negligence, and fraud.

The trial court granted summary judgment in favor of Serey. Pruitt appealed the decision on Griffith's behalf. In an unpublished opinion,¹ a panel of this Court affirmed the summary judgment, holding that Serey owed no duty to Griffith or to the public under the facts of the case. As a secondary reason for affirming, the Court held that any damages that Griffith suffered were not reasonably foreseeable when Serey complied with KSP's request to give his opinion of who was driving, meaning that Serey could not establish the element of causation.

¹ Griffith v. Serey, No. 1997-CA-002375-MR.

II. SEREY FOLLOWS WITH A SUIT OF HIS OWN.

Serey then filed this action against Griffith and Pruitt for wrongful use of civil proceedings and abuse of process. The trial court granted summary judgment in Griffith's favor in a very terse order that alluded to the defense of advice of counsel. Serey did not appeal that summary judgment order.

In a separate order, the trial court granted summary judgment in Pruitt's favor, stating simply that there was no material issue of fact and that Pruitt was entitled to judgment as a matter of law. This is Serey's appeal from the summary judgment on his claims against Pruitt.

III. ARGUMENTS ON APPEAL.

Pruitt defends the summary judgment by arguing that Serey could not prove that Pruitt acted without probable cause in bringing the civil action against Serey nor could he prove that Pruitt was primarily motivated by an improper purpose in doing so. Serey's brief disputes Pruitt's arguments regarding the propriety of summary judgment on the wrongful use of civil proceedings claim; Serey has not briefed any issue regarding the claim for abuse of process.

A. Pruitt's Argument to Dismiss this Appeal.

Before addressing the merits of Serey's appeal, we must address a procedural issue. Pruitt asserts in his brief that this appeal must be dismissed because of Serey's failure to comply with Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv), which requires references in the brief to points in the record that support an assertion, and CR 76.12(4)(c)(v), which requires references in the brief to points in the record where the claimed error was preserved.

We agree that Serey's brief did not comply fully with either rule. But dismissal for failure to comply with the provisions of CR 76.12 is discretionary rather than mandatory.² And dismissal for failure to comply with CR 76.12 may be too drastic in a case like this one with a very sparse record "where the propriety of summary disposition was clearly joined at every stage of the proceeding."³ For this reason, we will consider the merits of the appeal despite the obvious shortcomings in Serey's brief.

² See Baker v. Campbell County Bd. of Education, 180 S.W.3d 479, 482 (Ky.App. 2005) (concerning CR 76.12(4)(c)(v)); Cornette v. Holiday Inn Express, 32 S.W.3d 106, 109 (Ky.App. 2000) (concerning what was then CR 76.12(4)(c)(iv) but which has been amended and is now CR 76.12(4)(c)(v)). See also CR 76.12(8).

³ Cornette, 32 S.W.3d at 109. See also, Baker, 180 S.W.3d at 482.

B. Summary Judgment Standard of Review.

Summary judgment is proper only if the movant demonstrates that there are no circumstances under which the adverse party could prevail.⁴ But "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial."⁵ "In the analysis, the focus should be on what is of record rather than what might be presented at trial."⁶ In ruling on a motion for summary judgment, the trial court must view the facts and all inferences reasonably drawn from them in the light most favorable to the party opposing the motion.⁷ On appeal, we must determine whether the trial court correctly found that there were no genuine issues of material fact and that the moving party was entitled to summary judgment as a matter of law.⁸ Because findings of fact are not at issue, we

⁴ Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

⁵ Hubble v. Johnson, 841 S.W.2d 169, 171 (Ky. 1992).

⁶ Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999).

⁷ Steelvest, 807 S.W.2d at 480; Smith v. O'Dea, 939 S.W.2d 353, 356 (Ky.App. 1997).

⁸ Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

need not defer to the trial court.⁹ And, as an appellate court, we may affirm the trial court for any reason sustainable by the record.¹⁰

C. Abuse of Process.

The complaint against Pruitt raised a claim of abuse of process, as well as wrongful use of civil proceedings. Although the summary judgment order does not mention the abuse of process claim, the summary judgment before us is not a partial summary judgment. The trial court granted summary judgment in Pruitt's favor on all claims asserted. In his prehearing statement, Serey said that he wished to address both claims on appeal. But his brief makes no mention of the abuse of process claim. "An appellant's failure to discuss particular errors in his brief is the same as if no brief at all had been filed on those issues."¹¹ Because Serey has failed to raise the abuse of process claim in his brief, we deem it to be waived or abandoned.¹² And we affirm the summary judgment as it relates to the claim of abuse of process.

⁹ *Id.*

¹⁰ Kentucky Farm Bureau Mut. Ins. Co. v. Gray, 814 S.W.2d 928, 930 (Ky.App. 1991). See, e.g., Stephens v. Denison, 150 S.W.3d 80, 82 (Ky.App. 2004) (affirming summary judgment order on different grounds than those of the trial court).

¹¹ Milby v. Mears, 580 S.W.2d 724, 727 (Ky.App. 1979).

¹² Cf. Grange Mutual Insurance Co. v. Trude, 151 S.W.3d 803, 815 (Ky. 2004).

D. Wrongful Use of Civil Proceedings.

Serey argues that the trial court erred in granting summary judgment in favor of Pruitt on the claim of wrongful use of civil proceedings. Serey and Pruitt both actually use the term "malicious prosecution" to describe this cause of action. Where, as here, the underlying action is civil, the tort properly is called "wrongful use of civil proceedings."¹³ So we will use the preferred terminology and reserve "malicious prosecution" for the wrongful prosecution of criminal cases.

The tort of wrongful use of civil proceedings protects individuals against the misuse of civil actions to cause harm.¹⁴ On the other hand, the law protects any person commencing a civil action in good faith and upon reasonable grounds because public policy requires that all persons have free access to the courts to seek redress of wrongs.¹⁵ Therefore, strict compliance with the prerequisites for maintaining an action for wrongful use of civil proceedings is required.¹⁶

¹³ Prewitt v. Sexton, 777 S.W.2d 891, 893-894 (Ky. 1989). See also, Mapother and Mapother, P.S.C. v. Douglas, 750 S.W.2d 430, 431 (Ky. 1988).

¹⁴ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 119, at 870 (5th ed. 1984) (using the term "malicious prosecution" to describe actions based on the misuse of criminal or civil actions).

¹⁵ Raine v. Drasin, 621 S.W.2d 895, 899 (Ky. 1981).

¹⁶ Prewitt, 777 S.W.2d at 895 (describing this rule as "important baggage for this relatively new tort [wrongful use of civil

1. Lack of Probable Cause.

In a suit for wrongful use of civil proceedings, the standard for determining whether an attorney lacked probable cause for filing the underlying civil suit is set forth in the RESTATEMENT (SECOND) OF TORTS § 675,¹⁷ which states as follows:

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and . . .

(a) correctly and reasonably believes that under those facts the claim may be valid under the applicable law

Serey's allegations that Pruitt lacked probable cause are based on Pruitt's alleged mistake of law. Serey does not dispute that he gave KSP a written report that Stephanie was driving at the time of the accident; that Omni may have relied, in part, on this report in denying Pruitt UM benefits; or even that he (Serey) may have been mistaken in his opinion regarding who was driving. But he asserts that Pruitt lacked probable cause because Pruitt lacked a reasonable belief that under the facts of the case, the claims he filed against Serey on Griffith's behalf might be held to be valid.

proceedings] . . . brought along from its origins" in the tort of malicious prosecution).

¹⁷ See Mapother and Mapother, P.S.C., 750 S.W.2d at 431.

The fact that the issue of probable cause or the lack of it turns on a mistake of law makes this an issue of first impression in Kentucky. Earlier cases involving wrongful use of civil proceedings have all turned on alleged mistakes of fact or misrepresentations of fact by the attorneys who filed the underlying civil suits.¹⁸

One initiating civil proceedings is allowed more leeway with regard to mistakes of law than one filing criminal proceedings. An attorney initiating criminal proceedings "must correctly or reasonably believe that the facts constitute the crime charged"¹⁹ to act with probable cause. But, "[i]n determining probable cause for initiation of civil proceedings, all that is necessary is that the claimant reasonably believe that there is a sound chance that his claim may be held legally valid upon adjudication."²⁰ Moreover, where the legal validity of the claim is uncertain, the fact that the court ultimately does not sustain this claim is not dispositive of whether the plaintiff lacked probable cause in a case for wrongful use of civil proceedings.²¹

¹⁸ See, e.g., Raine, 621 S.W.2d 895; Prewitt, 777 S.W.2d 891; Mapother and Mapother, P.S.C., 750 S.W.2d 430.

¹⁹ RESTATEMENT (SECOND) OF TORTS § 675 cmt. e.

²⁰ *Id.*

²¹ *Id.* at § 675 cmt. f. See also, KEETON ET AL § 120 at 893 (noting that one bringing a civil suit "may, for example, reasonably submit

Proof that an attorney initiated civil proceedings out of ignorance of the law due to failure to research it would tend to support a finding of lack of probable cause.²² But the question of probable cause in a case for wrongful use of civil proceedings "does not turn on whether a court subsequently decides the attorney erred in his view of the law, any more than it turns on whether he was subsequently unable to prove his client's claims regarding the facts, so long as his views were tenable at the outset."²³ The attorney's views are tenable as long as they flow from the attorney's honest belief, even an unfounded belief, so long as it is not unreasonable.²⁴ Legal history is replete with instances in which an established line of authority has been modified or rejected in response to a challenge.²⁵ If such challengers were subject to the chilling effects of liability for wrongful use of civil proceedings, the law might stagnate rather than evolve.²⁶

a doubtful issue of law, where it is uncertain which view the court will take.").

²² Prewitt, 777 S.W.2d at 897.

²³ *Id.*

²⁴ *Id.* at 896.

²⁵ RESTATEMENT (SECOND) OF TORTS § 675 cmt. f.

²⁶ *Id.*

Pruitt testified in his deposition that in addition to researching the facts of Griffith's claims against Serey, he also conducted legal research and even thinks that he discussed the case with other attorneys in his office. Pruitt's legal research turned up no cases specifically on point, certainly none indicating that there was no cause of action against Serey. But he found cases that he believed at least supported his claim against Serey.

In his response to the motion for summary judgment and again before this Court, Serey has not identified any evidence showing a genuine question of material fact on whether Pruitt lacked probable cause. Serey's whole argument that Pruitt lacked probable cause rests on the fact that a panel of this Court affirmed the summary judgment order granted in Serey's favor in the prior case because we could find no legal authority for holding Serey liable for negligently rendering an opinion under the circumstances of the case. But this alone is not enough to establish that Pruitt acted without probable cause in filing the civil suit against Serey. There was no precedent directly on point regarding whether a police officer could be held liable for negligently rendering an opinion in such circumstances. Thus, the state of the law was not perfectly clear. And even if there had been precedent directly on point, Pruitt would still have been permitted to challenge that

precedent if he believed there was chance that the court might rule in Griffith's favor. Serey offers no evidence to dispute Pruitt's testimony that he believed Griffith had a tenable cause of action. Nor does he even attempt to challenge the reasonableness of Pruitt's belief. Therefore, there are no material facts that precluded summary judgment on this point.

2. Improper Primary Purpose.

Lack of probable cause and having an improper primary purpose for the civil proceedings are two different elements.²⁷ Serey argues that there is a question of material fact regarding whether Pruitt brought the civil action against him primarily for a purpose other than that of securing the proper adjudication of Griffith's claim against Serey. Pruitt, of course, disputes that argument.

According to Section 676 of the RESTATEMENT (SECOND) OF TORTS, "[t]o subject a person to liability for wrongful civil proceedings, the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based." The Kentucky Supreme Court has clarified that this element, which "is often loosely labeled proof of 'malice[,]'" may not be inferred from proof of lack of probable cause in actions for

²⁷ Prewitt, 777 S.W.2d at 894.

wrongful use of civil proceedings as it may be in malicious prosecution cases:²⁸

Verbiage borrowed from criminal cases prosecuted where there was no probable cause, to the effect that malice may be inferred from lack of probable cause, is not appropriate to jury instructions in civil cases because probable cause to initiate a civil action does not require "the same degree of certainty as to the relevant facts that is required of a private prosecutor of criminal proceedings."²⁹

The plaintiff in the suit for wrongful use of civil proceedings bears the burden of proof on this matter.³⁰ And whether the defendant, meaning the person who prosecuted the underlying civil action, acted primarily for a purpose other than that of securing the proper adjudication of the claim on which the proceeding was based is a question to be decided by the jury.³¹ But, ultimately, whether there is a fact issue to be resolved by a jury as to whether Pruitt acted primarily for an improper purpose turns on whether Serey alleged the existence of any fact from which such knowledge could be inferred.³² Serey, as the non-moving party, "need not be required to try his case

²⁸ Prewitt, 777 S.W.2d at 894.

²⁹ *Id.* (quoting (citing RESTATEMENT (SECOND) OF TORTS § 675 cmt. d).

³⁰ RESTATEMENT (SECOND) OF TORTS § 681A(d).

³¹ RESTATEMENT (SECOND) OF TORTS § 681B(2)(b).

³² Parker v. Henry A. Petter Supply Co., 165 S.W.3d 474, 478 (Ky.App. 2005).

on a motion for summary judgment, but he has the burden of showing that a fact issue exists.”³³

Regarding whether there is a genuine issue of material fact about Pruitt’s acting primarily for a purpose other than securing the adjudication of Griffith’s claim against Serey, Serey asserts in his brief that “malice in the institution of the proceedings, is satisfied in that the . . . want or lack of probable cause for the proceeding[] acts as an inference of malice.” Because we have held that Serey could not establish a lack of probable cause, no inference that Pruitt acted primarily for an improper purpose can be inferred from a lack of probable cause. But even if Serey had established a lack of probable cause, he still would not have established this element. And Serey has not shown us any evidence in the record upon which a reasonable jury could find that Pruitt acted primarily for a purpose other than securing the adjudication of Griffith’s claims against him. Therefore, there is no material question of fact to submit to the jury regarding this issue. Since Serey cannot establish this element of his claim for wrongful use of civil proceedings, the trial court properly granted summary judgment in Pruitt’s favor on this claim.

³³ *Id.*

V. DISPOSITION.

Based on the foregoing discussion, we affirm because we hold that the trial court correctly determined that there were no genuine issues of material fact and that Pruitt was entitled to summary judgment as a matter of law.

ALL CONCUR.

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