

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-001316-MR

CASEY JONES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JAMES M. SHAKE, JUDGE  
ACTION NO. 04-CI-010351

CHERI ERNSPIKER AND  
CHAD ERNSPIKER

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; NICKELL AND TAYLOR, JUDGES.

NICKELL, JUDGE: Casey Jones appeals from a directed verdict entered in favor of Cheri Ernspiker and Chad Ernspiker on a claim of malicious prosecution. Jones argues: (1) the issue of lack of probable cause was an issue of fact for the jury; (2) the trial court admitted improper hearsay testimony; and (3) the trial court erred by

permitting evidence demonstrating the existence of probable cause which was acquired after the commencement of the criminal proceeding. We affirm.

Chad Ernspiker was attacked at a Catholic school party. He was approached from behind and struck in the head with brass knuckles. While Chad was on the ground, two other individuals punched and kicked him. When Chad returned to school, another student approached Chad and told him the names of his attackers. The student wrote three names on a piece of paper: Casey Jones, Spindle Johnson, and Keith Gutterman. This information was corroborated by Ms. Ernspiker's nephew, who told her the same three names after speaking to a coworker while working at a pizza parlor.

Ms. Ernspiker filed a complaint against Jones in the juvenile court. Complaints were also filed against Johnson and Gutterman. The charges against Jones were dismissed without prejudice. Gutterman admitted he had attacked Chad and stated that Jones was not involved. Subsequently, Jones filed an action for malicious prosecution against Ms. Ernspiker and Chad. At the close of the evidence, the trial court granted a directed verdict in favor of Ms. Ernspiker and Chad finding that Jones had failed to establish a lack of probable cause and malice. Jones filed a motion for a new trial, which the trial court denied. This appeal followed.

Jones first argues that the issue of probable cause should have been determined by the jury. In analyzing the probable cause element of a malicious prosecution claim, it has long been the rule in Kentucky that whether certain facts

constitute probable cause is a question of law for the court to decide. *Hendrie v. Perkins*, 240 Ky. 366, 42 S.W.2d 502 (1931). Where the trial court concludes the facts do not establish probable cause and the underlying facts are in dispute, there is a question of fact for the jury to decide. *Prewitt v. Sexton*, 777 S.W.2d 891, 894 (Ky. 1989).

In the case at bar, Jones does not allege a factual dispute concerning the existence of probable cause. Rather, he questions the credibility and weight of the evidence. Jones points out that the jury could have disbelieved the evidence and the existence of the sources that provided the information to Ms. Ernspiker and Chad. However, this is not a factual dispute as Jones has presented no affirmative evidence contradicting the evidence establishing probable cause. Again, this is a question of credibility and weight. As the facts were not in dispute, the trial court properly analyzed the probable cause issue as a matter of law. We next turn to whether the trial court correctly determined that probable cause existed.

In *Goode v. Commonwealth*, 199 Ky. 755, 252 S.W. 105, 106 (1923), the former Court of Appeals stated:

Probable cause, in cases of malicious prosecution, has been frequently defined by the courts as that which affords a reasonable ground of suspicion supported by circumstances sufficiently strong within themselves to warrant a cautious person in the belief that the person accused is guilty of the offense of which he is charged. And it has been held that while mere conjectures and suspicions will not warrant a prosecution, credible information received from others might well be enough to induce such action, although proof that the information came from an unreliable source would be important in

showing that the information was such that a reasonable man would not act on it.

The evidence demonstrated that Chad was told that Jones, Johnson, and Gutterman attacked him. Ms. Ernspiker was informed from a second source that Jones, Johnson, and Gutterman attacked Chad. Jones was at the party when the attack occurred. Jones was friends with Johnson and Gutterman and attended the party with them. Jones admitted discussing the attack with Gutterman later that same night where Gutterman admitted attacking Chad with brass knuckles. The facts are undisputed. We conclude this evidence was sufficient to establish probable cause.

Moreover, even assuming *arguendo* that there was no probable cause, the trial court also found that there was no evidence of malice. “[L]ack of probable cause and improper purpose are separate and distinct elements, separate both as to their meaning and as to their function; *i.e.*, the role they play in the decision-making process.” *Prewitt*, 777 S.W.2d at 894. While Jones notes that the jury may infer malice from a lack of probable cause, he points to no affirmative evidence whatsoever on the element of malice. Rather, the evidence demonstrated that Ms. Ernspiker and Chad did not know Jones or his family. Ms. Ernspiker testified that she filed a complaint simply to initiate a police investigation after she learned from two sources that Jones was involved in the attack on Chad. The lack of any malicious intent is an independent basis for affirming the directed verdict.

Next, Jones argues that the trial court improperly admitted hearsay testimony by allowing testimony regarding anonymous communications. KRE<sup>1</sup> 801(c) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” The substance of the anonymous communications received by Ms. Ernspiker and Chad was not introduced to prove that Jones was actually involved in the attack on Chad. Rather, they were offered to demonstrate the basis upon which Ms. Ernspiker filed her complaint and the circumstances surrounding her motive for doing so. The statements were not offered to prove the truth of the matter asserted and were, therefore, not impermissible hearsay.

Next, Jones argues that the prejudicial effect of the anonymous statements outweighs its probative value under KRE 403. Jones has not demonstrated where this alleged error was preserved in the record. The KRE 403 issue was not raised in his motions *in limine* to restrict hearsay testimony nor did the trial court address this issue in its order denying Jones’ motion *in limine*. Issues may not be raised for the first time on appeal. *Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky. App. 1980). Therefore, we decline to address this argument.

Finally, Jones argues that the trial court erred by admitting evidence of probable cause which was acquired after Ms. Ernspiker filed her complaint. Jones cites both the general rule of relevancy and foreign authority in support of his argument. We disagree.

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<sup>1</sup> Kentucky Rules of Evidence.

In *Mosier v. McFarland*, 269 Ky. 214, 106 S.W.2d 641, 643 (1937), the former Court of Appeals stated that the issue in malicious prosecution cases is whether probable cause **actually** existed. (emphasis added). The Court stated that “it would not make any difference” if evidence regarding probable cause was obtained after the issuance of the warrant. *Id.* Thus, the evidence acquired after the complaint was issued was properly admitted. There was no error.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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