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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000285-MR

JAMES L. BATES, SR.

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 02-CI-00990

DANNY CURTIS AND
DONNETTA CURTIS

APPELLEES

OPINION
REVERSING AND REMANDING
WITH DIRECTIONS

** ** * * * * *

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

TAYLOR, JUDGE: James L. Bates, Sr., brings this appeal from a judgment entered upon a jury verdict on January 15, 2010, in the Franklin Circuit Court in favor of Danny Curtis and Donnetta Curtis (collectively referred to as the

Curtises), awarding damages to the Curtises in the amount of \$15,000. For the reasons stated, we reverse and remand with directions.

On November 15, 1997, Bates' fifteen year-old son, James Landon Bates, Jr., was found hanging in a small shed behind the residence rented by the Curtises. James was transported to Franklin County Regional Hospital where he was pronounced dead from asphyxiation resulting from the hanging. Following an investigation, law enforcement and medical personnel determined that James' death was a suicide. Bates, however, questioned law enforcement's conclusion. Bates conducted an independent investigation.

Because James' estate had no assets or liabilities, the Franklin District Court dispensed with administration of his estate by order entered December 1, 1997. However, as a result of his independent investigation, Bates came to believe that James' death was not a suicide in August, 1998. Consequently, Bates moved to re-open James' estate and appoint Bates administrator of the estate, which was granted.

Shortly thereafter, in his capacity as administrator of James' estate, Bates filed suit against the Curtises for the wrongful death of his son. Bates alleged that the Curtises failed to take reasonable and necessary measures to protect James from "dangerous and unsavory characters who posed threats to the safety and well being of their licensees" Plaintiff's Complaint in Case No. 98-CI-01392, Franklin Circuit Court.

After several years of discovery, the Franklin Circuit Court granted the Curtises' motion for summary judgment and dismissed the wrongful death claim on July 26, 2001. In July 2002, the Curtises filed a "malicious prosecution" suit against Bates, in his individual capacity, claiming he had no basis in law or fact to bring the initial wrongful death action against the Curtises.

During the course of the malicious prosecution litigation,¹ Bates filed several motions that the circuit court dismiss him as a party defendant and substitute in his place the Estate of James Landon Bates, Jr., by and through its administrator. Bates argued that, because he brought the initial wrongful death suit in his capacity as the administrator of his son's estate, the Curtises' subsequent malicious prosecution claim could only be filed against him in that same capacity, not against him individually. The circuit court denied Bates' motions.

Beginning January 11, 2010, a two-day jury trial was held on the Curtises' malicious prosecution claim. At the conclusion of the Curtises' proof, Bates moved for directed verdict, which was denied. The jury returned a verdict in favor of the Curtises, awarded \$0 in damages, but granted the Curtises' attorney fees in the amount of \$15,000; the circuit court entered a judgment consistent with that verdict. Bates filed a timely notice of appeal from this judgment.

Bates' primary arguments on appeal are that the trial court erroneously overruled his motion for directed verdict at trial and that Bates, individually, should have been dismissed before the case went to trial. Because we believe the

¹ The action on appeal was filed July 24, 2002, in the Franklin Circuit Court. A final judgment upon a jury trial was rendered January 15, 2010.

trial court should have granted a directed verdict to Bates due to the flawed nature of the “malicious prosecution” proceedings, we will thoroughly address the directed verdict issue only since it resolves the appeal without resort to any other appellate review.

LEGAL ANALYSIS

We note at the outset of our discussion that Bates’ prehearing statement identifies the sole issue on appeal as being “whether or not the court erred in allowing the case to go to verdict in Mr. Bates name individually, as opposed to in his capacity as administrator for his son.” The directed verdict issue was not raised in Bates’ prehearing statement but the Curtises acknowledged in their brief that a timely directed verdict motion was made at trial by Bates and denied by the trial court. And, both parties addressed the directed verdict issue in their briefs on appeal.

Kentucky Rules of Civil Procedure (CR) 76.03(8) limits a party on appeal to only argue issues set out in their prehearing statement, except that when good cause is shown upon timely motion, the court may permit additional issues to be submitted. This Court has applied CR 76.03(8) in the past to bar an appellant’s arguments for reversal that were not raised in a prehearing statement or timely motion. *Sallee v. Sallee*, 142 S.W.3d 697 (Ky. App. 2004). However, our Courts have a duty to address issues not properly raised, when the facts reveal a fundamental basis for a decision not presented by the parties, to avoid a misleading application of the law. *Mitchell v. Hadl*, 816 S.W.2d 183 (Ky. 1991). Also, we are

cognizant that the law protects any person who commences a civil action in good faith and upon reasonable grounds as public policy requires that all persons have free access to the courts to seek the redress of wrongs against them. *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981).

Additionally, CR 61.02 permits this Court to correct palpable errors which affect the substantial rights of a party, notwithstanding that the issue may have been insufficiently raised or preserved for review if the court determines that manifest injustice has resulted from the error. We believe there were numerous errors by the trial court during these proceedings and at trial, the cumulative effective of which has resulted in a manifest injustice to Bates. This warrants our review of the directed verdict issue and the remand of this action to the Franklin Circuit Court for dismissal of the complaint for the various reasons stated hereafter.

In this Court's review of the evidence supporting a jury verdict, our role as an appellate court is limited to determining whether the trial court erred in denying the motion for directed verdict. *Lewis v. Bledsoe Surface Mining, Co.*, 798 S.W.2d 459 (Ky. 1990). As noted, because we believe there were numerous trial errors made by the trial court during this proceeding, as well as at trial, under the facts and circumstances of this case, the trial court erred in denying Bates' motion for directed verdict.

Before analyzing the proceeding below, we are also mindful of a recent admonition from the Kentucky Supreme Court that trial courts have mandatory

duties in the conduct of evidentiary proceedings. In *Anderson v. Johnson*, 350 S.W.3d 453, 458 (Ky. 2011), the Court noted, “[o]ne should not have to ask a court to do its duty, particularly a mandatory one.”

With this admonition, we begin our review by an examination of the complaint filed in this action in 2002. The complaint is couched primarily in a malicious prosecution language, including allegations that Bates and other defendants named additionally in this action acted “with malice” in initiating the civil action in 1998 upon which summary judgment was granted in favor of the Curtises.

In *Mapother and Mapother, P.S.C. v. Douglas*, 750 S.W.2d 430 (Ky. 1988) and *Prewitt v. Sexton*, 777 S.W.2d 891 (Ky. 1989), the Kentucky Supreme Court adopted the *Restatement (Second) of Torts* §§ 674-681B (1977), which provides that a tort claim against one who uses civil court proceedings for a vexatious or improper purpose, is designated as a claim for “wrongful use of civil proceedings” and not malicious prosecution, which has now been reserved exclusively by our Supreme Court to describe or characterize cases involving wrongful prosecution in a criminal case. This distinction is important because malice is not an element in establishing a claim for wrongful use of civil proceedings where it is central to a claim for malicious prosecution. In wrongful use of civil proceeding actions, the prior action must have been initiated without probable cause and primarily for a purpose other than that of a proper adjudication of the prior claim. *Prewitt v. Sexton*, 777 S.W.2d 891 (Ky. 1989). Neither the complaint nor the trial court

addressed these mandatory requirements to maintain a wrongful use of civil proceeding claim.

The trial court made a substantial and continuing error by submitting this case to the jury as being one for malicious prosecution – not one for wrongful use of civil proceedings. In so doing, the trial court failed to follow the *Restatement (Second) of Torts* § 681B in conducting these proceedings, including in its jury instructions. This section of the *Restatement*, which again has been adopted as the law in Kentucky by the Kentucky Supreme Court in *Mapother* and *Prewitt*, sets forth the “Functions of Court and Jury” as follows:

(1) In an action for wrongful civil proceedings, the court determines whether

(a) a civil proceeding has been initiated;

(b) the proceeding was terminated in favor of the plaintiff;

(c) the defendant had probable cause for his action;

(d) the harm suffered by the plaintiff is a proper element for the jury to consider in assessing damages.

(2) In an action for wrongful civil proceedings, subject to the control of the court, the jury determines

(a) the circumstances under which the proceedings were initiated in so far as may be necessary to enable the court to determine whether the defendant had probable cause for initiating them;

(b) whether the defendant acted primarily for a purpose other than that of securing the proper adjudication of the claim on which the proceeding was based;

(c) the circumstances under which the proceedings were terminated;

(d) the amount that the plaintiff is entitled to recover as general and special damages;

(e) whether punitive damages are to be awarded, and if so, in what amount.

Prewitt, 777 S.W.2d at 895.

The jury's role is very limited in proceedings of this kind especially as concerns the issue of probable cause which must be determined by the trial court, not the jury. *Id.* These functions were explained by the Supreme Court in *Prewitt* as follows:

First, as to their meaning. "Probable cause" is a legal concept with origins in the judicial decision as to whether there was probable cause to issue a warrant, and as such its existence is a question for the *court* to decide. *Id.*, [§ 681B\(1\)](#). It covers both a mistake of law and a mistake of fact, and it exists where the person who initiates civil proceedings "reasonably believes in the existence of the facts upon which the claim is based, and . . . that under those facts the claim may be valid under the applicable law." *Id.*, § 675.

The second of these two essential prongs is an improper purpose, which is for the jury to decide *after* the court has determined that under the law and the facts the prior action was initiated or pursued without probable cause. *Id.*, [§ 681B\(2\)](#). . . .

Prewitt, 777 S.W.2d at 894.

In this case, the issue of probable cause was submitted by the trial court directly to the jury as set forth in Jury Instruction No. 3. On its face, this would appear to be an impermissible delegation of a court's mandatory duty to determine

the existence of probable cause. Only after the trial court had determined the existence of probable cause in this action should the matter have then been submitted to the jury on whether the prior action was initiated for an improper purpose. *Id.* A trial judge could determine that there was no probable cause for filing a complaint but the jury could still exonerate the filer if they concluded it was not filed for an improper purpose. However, no jury instruction was submitted that addressed whether the action filed by Bates in 1998 was filed for an improper purpose, and presumably there was no evidence presented that established an improper purpose. In this case, the trial court failed to follow the mandate of both *Mapother* and *Prewitt* as well as the *Restatement (Second) of Torts* § 681B in conducting the trial.

The problems do not end here. An even greater trial error occurred that required a directed verdict in Bates' favor. This palpable error looks to the issue of Bates' assertion of advice of counsel as an affirmative defense in this action which was recognized by the trial court in Jury Instruction No. 4. The *Restatement (Second) of Torts* § 675(b), as adopted in *Mapother* and *Prewitt*, provides for the defense of advice of counsel as an absolute defense to any claim for wrongful use of civil proceedings. Advice of counsel is also an absolute defense to malicious prosecution claims. *Mayes v. Watt*, 387 S.W.2d 872 (Ky. 1964). Reliance on advice of counsel thus satisfies the existence of probable cause sufficient to defeat a wrongful use of civil proceeding claim if Bates acted in good faith and made full disclosure of all relevant facts within his knowledge to his

attorney, who would have of course, then advised him to proceed with the litigation. *Mapother*, 750 S.W.2d 430. During these proceedings, as reflected in Jury Instruction 4,² Bates has maintained that he relied on the advice of attorney Michael L. Judy in filing the civil action against the Curtises. Attorney Judy was a named defendant in this action. In January 2007, Judy was dismissed by the trial court as a result of a settlement being reached with the Curtises. Unfortunately, attorney Judy died prior to the trial of this action in January 2010 and the record reflects that his deposition was not taken prior to his death. Accordingly, Bates' position that he relied on his counsel's advice stands unrefuted in the record of this proceeding. Absent a conflict in the proof on this issue, advice of counsel as a defense should not have been submitted to the jury in the jury instructions as this looks to the probable cause element of the tort. As a legal issue, this can only be resolved as a matter of law in Bates' favor by the trial court given that there was no rebuttal statement or testimony from attorney Judy. Ironically, the answer to the complaint filed by attorney Judy in August 2002 raises the issues that the complaint incorrectly identified the tort of "malicious prosecution" regarding the claims asserted and that the complaint did not set forth the appropriate elements to assert valid claims against Bates or Judy in these proceedings.

As noted by the Kentucky Supreme Court in *Prewitt*, the burden of proof is always on the plaintiff in these proceedings to prove lack of probable cause rather than the converse. *Prewitt*, 777 S.W.2d 891; *Restatement (Second) of Torts* §

² We note that Danny Curtis and Donnetta Curtis did not file a cross-appeal in this case asserting any errors in the jury instructions below.

681A (1977). There being no testimony from attorney Judy to refute Bates' reliance on advice of counsel, a directed verdict should have been granted in Bates' favor at the close of the plaintiffs' case at trial because there existed no fact question for the jury to decide on this issue under applicable Kentucky law. The submission of Instruction No. 4 to the jury on the advice of counsel defense was both erroneous and an abuse of discretion and otherwise another failure of the trial court to comply with the court's mandatory duty to properly instruct the jury on the law of the case, even if Bates failed to timely object.

Finally, we would also point out that had the case been properly submitted to the jury, there was an additional flaw in the trial proceeding that would warrant reversal under CR 61.02. Regardless of how this case is characterized, it is clearly a tort or negligence action. In the complaint, there were two other alleged joint tortfeasors, Michael Judy and Robert Ackiss, for which joint and several relief was sought. As noted, the record reflects that some type of settlement was reached with Judy in 2007 and Ackiss was never served with the complaint or entered an appearance as a joint tortfeasor. Since *Hilen v. Hayes*, 673 S.W.2d 713 (Ky. 1984), Kentucky has been a comparative fault state, which requires an apportionment of fault against all tortfeasors, even those who may have settled prior to trial. Kentucky Revised Statutes (KRS) 411.182 codified the requirement of an apportionment of fault or comparative negligence in all tort cases in Kentucky and thus the jury should have been instructed accordingly in this case. There was no apportionment instruction given which was mandatory for the trial

court to give under KRS 411.182, regardless of whether Bates preserved the issue at trial.

For these reasons, the judgment of the Franklin Circuit Court is reversed and this cause is remanded with directions for dismissal of the complaint against Bates. It has been almost fifteen years since young James Landon Bates, Jr., tragically lost his life and the parties have been litigating his death now for fourteen years – it is time for finality in these proceedings.

ACREE, CHIEF JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

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