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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001200-MR

GRETCHEN GREENFIELD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. McKAY CHAUVIN, JUDGE
ACTION NO. 09-CI-012124

JEFFREY W. McMILLEN and
REYNALDO DE LOS SANTOS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND MOORE, JUDGES.

MOORE, JUDGE: Gretchen Greenfield appeals from an order of summary judgment of the Jefferson Circuit Court dismissing her claim of wrongful use of civil proceedings against Appellees Jeffrey McMillen and Rey De Los Santos. Finding no error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

The relevant and undisputed facts surrounding this matter were summarized by the circuit court as follows:

> In October of 2005, Mr. McMillen, who lived in Texas, was in Louisville for training with United Parcel Service. Ms. Greenfield's mother approached Mr. McMillen after hearing him play piano during services at St. Thomas Episcopal Church and asked if he would be interested in the possibility of accompanying Ms. Greenfield, a vocal coach and singer, on a demo recording she was contemplating. Mr. McMillen was later contacted by Ms. Greenfield by telephone and they agreed to meet at her home on October [27], 2005.
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> During the course of that initial meeting Ms. Greenfield formed the belief that Mr. McMillen was interested in forming a romantic relationship with her. She was interested in forming a romantic relationship with him. Ms. Greenfield subsequently contacted Mr. McMillen through a series of telephone calls and e-mails centered around the anticipated recording. On October 30, 2005, Ms. Greenfield expressed her romantic desires to Mr. McMillen during a phone call in which she stated that she wanted "to make love" with him. Mr. McMillen responded via e-mail that he did not have reciprocal feelings for her and that he was already involved in a serious romantic relationship.
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> Ms. Greenfield nevertheless continued to send e-mails devoted in large part to her unrequited feelings for Mr. McMillen. His growing concern over the content and tone of these communications prompted him to send Ms. Greenfield an e-mail on November 16, 2005, in which he asked that she not contact him any further. November 17, 2005, Ms. McMillen went to the hotel where Mr. McMillen was staying. Mr. McMillen was sufficiently concerned by Ms. Greenfield's actions at this point that he felt it necessary to contact the police to report that he felt he was being "stalked" by her.

> Ms. Greenfield continued sending e-mails to Mr. McMillen on a regular basis. While generally similar in tone and content to those she had sent following her declaration of affection, a number of these e-mails [FN] were of a graphic sexual nature and many contained abusive language and express or implied threats to Mr. McMillen's well-being.
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> > [FN] Ms. Greenfield ultimately sent a total of approximately 170 e-mails to Mr. McMillen (attached as Exhibits 3, 4, and 5 to his motion and incorporated herein by reference) all but a very few of which were sent after he indicated that he did not share her feelings and asked that she have no further contact with him.
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> . . . .
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> While he ultimately opted not to pursue criminal charges, [McMillen] did retain Mr. De Los Santos to seek civil relief. Accordingly, on October 16, 2006, Mr. De Los Santos filed a Petition To Enjoin Harrassing Behavior and Application for Permanent Injunction with the District Court of the county where Mr. McMillen lives in Texas.[1] Ms. Greenfield offered to agree to the relief

[1] As *dicta*, we note that McMillen's Texas suit against Greenfield appears analogous to a cause of action Texas recognized in *Kramer v. Downer*, 680 S.W.2d 524 (Tex. App. 5 Dist. 1984), based upon circumstances similar to those in the case at bar. There, the Court held:

> [T]he rule in Texas is that damages are recoverable for mental suffering (even if unaccompanied by physical suffering) when the wrong complained of is a willful one intended by the wrongdoer to produce mental anguish or from which such result should be reasonably anticipated as a natural consequence. Invasion of one's right to privacy is such a wrong. Although it has not previously been so held in this State, we now hold that the right to privacy is broad enough to include the right to be free of those willful intrusions into one's personal life at home and at work which occurred in this case. Further, this right to be left alone from unwanted attention may be protected, in a proper case, by injunctive relief.

Id. at 525 (internal citations omitted). Kentucky has also recognized this "right to be left alone" through enacting Kentucky Revised Statute(s) (KRS) 525.080, which prohibits individuals whose intention is to annoy, alarm, or harass from imposing their ideas on an unwilling listener not in a public forum. *Yates v. Com*., 753 S.W.2d 874, 875 (Ky. App. 1988). Moreover, KRS 446.070 allows for a private cause of action for damages to any person injured by the violation of

> requested. Ultimately, . . . the case was dismissed without prejudice for lack of prosecution.

Greenfield filed the instant matter on December 18, 2009, asserting claims of abuse of process, wrongful use of civil proceedings, and intentional infliction of emotional distress against both McMillen and De Los Santos based upon the Texas litigation. Upon McMillen and De Los Santos's joint motion for summary judgment, the circuit court dismissed the balance of Greenfield's claims. More particularly, with regard to Greenfield's claim for wrongful use of civil proceedings, the circuit court determined that Greenfield had failed to present any affirmative evidence demonstrating that the Texas litigation suit had been finally dismissed in her favor, or that McMillen and De Los Santos had lacked probable cause for filing it.

Greenfield now appeals.

STANDARD OF REVIEW

Summary judgment serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

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any statute, which would necessarily include a violation of KRS 525.080.

law." Kentucky Rule(s) of Civil Procedure (CR) 56.03. It is well established that a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Casualty Co. v. Belknap Hardware & Manufacturing Co*., 281 S.W.2d 914 (Ky. 1955). "[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to resort to surmise and speculation." *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citing *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)). "'Belief' is not evidence and does not create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky.1990); *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) ("A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment.") Furthermore, the party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 481 (Ky. 1991) (internal citations and quotations omitted).

On appeal, we must consider the evidence of record in the light most favorable to the non-movant, and must further consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916

S.W.2d 779 (Ky. App.1996). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

ANALYSIS

Greenfield has organized her several arguments on appeal under three general headings: 1) "Request for palpable error review"; 2) "Dismissal for failure to prosecute is both a 'final' and 'favorable' termination"; and 3) "Genuine issues of material fact requiring trial by jury." The sum of her arguments relates exclusively to the tort of wrongful use of civil proceedings and, in particular, its essential elements of "final and favorable termination" and "lack of probable cause," discussed more fully below. Greenfield makes no argument, and has thus waived review, regarding the circuit court's summary dismissal of her claims of abuse of process and intentional infliction of emotional distress. *See, e.g., Osborne v. Payne*, 31 S.W.3d 911, 916 (Ky. 2000) ("Any part of a judgment appealed from that is not briefed is affirmed as being confessed.").

1. Request for "palpable error review."

As noted, Greenfield styles her first set of arguments on appeal as a "request for palpable error review." As an aside, CR 61.02 provides that

> [a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and

> appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Greenfield believes that the circuit court's order of summary judgment reflects palpable error because it omits any mention of a reply memorandum that she filed after the appellees responded to her motion for summary judgment. As to why this omission constitutes palpable error, Greenfield presents two arguments. First, Greenfield points out that in her reply memorandum she raised an argument relating to the "lack of probable cause" element of wrongful use of civil proceedings contesting that "all or even most of [her] emails were graphic, threatening, or otherwise disagreeable to Mr. McMillen." Because the circuit court's order does not refer to her reply memorandum, Greenfield reasons that the circuit court must not have considered this particular argument, and she asserts that the outcome in this matter would have been different had the circuit court done so. Second, Greenfield points out that her reply memorandum also incorporated a motion to strike the appellees' response to her motion for summary judgment. Greenfield argues that when the circuit court omitted any reference to her reply memorandum in its order, it necessarily omitted any ruling upon her motion to strike. Essentially, Greenfield asserts that the circuit court's failure to rule upon her motion to strike also provides a basis for palpable error review.

With respect to her first argument, we disagree that the circuit court committed any error, palpable or otherwise, when it simply omitted mention of her

reply memorandum from its order of summary judgment. Greenfield cites no authority, and we have found none, that would have required the circuit court to mention it. Moreover, Greenfield's own motion for summary judgment (which was noted in the circuit court's order) also raised and preserved her argument regarding the approximately 170 e-mails she sent to McMillan, and the circuit court's order of summary judgment provides no indication that this argument was not considered. Regardless, addressing this argument is unnecessary with or without resorting to a standard of palpable review because it relates solely to the "lack of probable cause" element within the tort of wrongful use of civil proceedings; as discussed more fully below, Greenfield has failed to present any genuine issue relating to another element within that claim (*i.e.*, whether the Texas litigation terminated in her favor), and we have affirmed the circuit court on that ground.

With respect to her second argument, Greenfield correctly notes the circuit court made no ruling upon her motion to strike. However, when Greenfield failed to call her motion to the attention of the circuit court and to secure a ruling upon it before the circuit court's authority to do so expired, Greenfield effectively precluded this Court from either reviewing it as an issue on appeal or giving her any other kind of relief in that regard. *See, e.g., Morton v. Bank of the Bluegrass and Trust*, 18 S.W.3d 353, 361 (Ky. App. 1999) ("[T]here is no indication that the trial court ever ruled on Shirley's motion to amend her complaint to assert a cause of action based upon tortious interference with contractual relations. As such, this

court is without the authority to rule on this issue.") (Internal citation omitted); *see also Kirk v. Springton Coal Co*., 276 Ky. 501, 124 S.W.2d 760, 761 (1939); *Felts v. Edwards*, 181 Ky. 287, 204 S.W. 145, 149 (1918) (The appellants "did not choose to call the motions to the attention of the court or to cause any ruling to be had upon them, and hence must be considered to have waived any objections on that ground.").

2. Whether "Dismissal for failure to prosecute is both a 'final' and 'favorable' termination."

As adopted from the Restatement (Second) of Torts §§ 674–681B (1977), the elements of wrongful use of civil proceedings in Kentucky are: (1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding. *D'Angelo v. Mussler,* 290 S.W.3d 75, 79 (Ky. App. 2009). Under Kentucky jurisprudence, these are essentially the same elements for the tort of malicious prosecution. *See, e.g., Raine v. Drasin*, 621 S.W.2d 895, 899 (Ky.1981).

As mentioned previously, the circuit court dismissed Greenfield's wrongful use of civil proceedings claim on two alternative bases, the first being its conclusion that Greenfield had failed to provide affirmative evidence demonstrating that the Texas litigation McMillen filed against her had terminated

finally and in her favor, per the third element of this tort. As the heading of this section implies, Greenfield argues that when the Texas litigation was dismissed without prejudice for failure to prosecute, it was, to the contrary, a "final" termination "favorable" to her. For support, Greenfield relies upon the Restatement (Second) of Torts § 674, comment (j), which provides in relevant part:

> Civil proceedings *may* be terminated in favor of the person against whom they are brought . . . by (1) the favorable adjudication of the claim by a competent tribunal, or (2) the withdrawal of the proceedings by the person bringing them, or (3) *the dismissal of the proceedings because of his failure to prosecute them*.
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> . . . .
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> Whether a withdrawal or an abandonment constitutes a final termination of the case in favor of the person against whom the proceedings are brought and whether the withdrawal is evidence of a lack of probable cause for their initiation, *depends upon the circumstances under which the proceedings are withdrawn*. In determining the effect of withdrawal the same considerations are decisive as when criminal charges are withdrawn; and therefore §§ 660-661 and 665, and the Comments under those Sections are pertinent to this Section.

(Emphasis added.)

Greenfield also correctly cites to *Davidson v. Castner-Knott Dry Goods Co., Inc.*, 202 S.W.3d 597 (Ky. App. 2006), for the proposition that a dismissal "without prejudice" may be considered a "final" termination for the purpose of this tort. *Id*. at 604.

However, both the Restatement and *Davidson* also provide that proceedings are terminated in "favor" of the accused only when their final

disposition is such as to "indicate the innocence of the accused." *Id*. at 605 (citing *Alcorn v. Gordon*, 762 S.W.2d 809 (Ky. App. 1988), and Comment (a) to the Restatement (Second) of Torts § 660)). In this vein, *Davidson* further explains:

> It is apparent "favorable" termination does not occur merely because a party complained against has prevailed in an underlying action. While the fact he has prevailed is an ingredient of a favorable termination, such termination must further reflect on his innocence of the alleged wrongful conduct. *If the termination does not relate to the merits—reflecting on neither innocence of nor responsibility for the alleged misconduct—the termination is not favorable in the sense it would support a subsequent action for malicious prosecution*.

Id. (citing *Lackner v. LaCroix*, 25 Cal.3d 747, 159 Cal. Rptr. 693, 695, 602 P.2d 393, 395 (1979)).

Here, it was Greenfield's burden to present affirmative evidence demonstrating that the Texas litigation terminated in her favor, just as it was her burden to prove every other element of her claim for wrongful use of civil proceedings. *See* Restatement (Second) of Torts § 681A(a)-(f). To that effect, Greenfield argues only that McMillen and De Los Santos allowed the Texas litigation to be dismissed for want of prosecution because they feared that the trial court in that matter might have eventually determined that it had no personal jurisdiction over her. Greenfield argues that this circumstance reflects upon her innocence.

We are left to guess at much of what transpired during the Texas proceedings—including any jurisdictional matters associated therewith—because

apart from the summons, McMillen's complaint, Greenfield's answer, and the Texas trial court's final order dismissing that matter, Greenfield has produced no other part of that record for our review.[2] For his part, De Los Santos admitted in his deposition that the Texas court would have eventually held a hearing regarding whether Texas had personal jurisdiction over Greenfield, but for the dismissal for lack of prosecution. But, De Los Santos and McMillen both testified that they believed Greenfield's conduct subjected her to Texas jurisdiction and whether Texas would have asserted jurisdiction is simply a matter of speculation.

In any event, even if the Texas court would have ultimately determined that it had no personal jurisdiction over Greenfield, a dismissal based solely upon lack of personal jurisdiction is nothing more than a technical or procedural reason and would not have reflected upon the merits of the case. In the absence of circumstances surrounding that dismissal otherwise reflecting upon Greenfield's innocence or responsibility, it would not have been considered a "favorable termination of the action" within the meaning of this tort. *Davidson*, 202 S.W.3d at 605; *see also Lackner*, 602 P.2d at 751.

With that said, a closer review of the circumstances surrounding the dismissal of the Texas litigation becomes necessary. McMillen argues that he filed

[2] In an affidavit Greenfield filed before the circuit court in this matter and has relied upon in this appeal, Greenfield attempts to describe the substance of and motivations behind many of the pleadings and rulings of the Texas court during the Texas litigation, along with the substance and motivations behind several e-mails and text messages she claims to have in her possession, but did not enter into the record. Her affidavit cannot be considered evidence in this regard because, in violation of CR 56.05, "[s]worn or certified copies of all papers or parts thereof referred to" in her affidavit (*e.g.*, the pleadings before, and rulings of the Texas court, along with the various e-mails and text messages referenced in her affidavit) were not "attached thereto or served therewith."

the Texas litigation requesting an injunction against Greenfield because he regarded Greenfield's attempts to communicate with him as harassment and wanted her to stop. To this effect, it is undisputed that Greenfield began to leave McMillen voicemail messages, send him packages, and send him over 170 e-mails after the first and only time they had ever met. In a number of her e-mail messages, Greenfield threatened that if McMillen did not acknowledge her she would contact his employers, sue him for "mental anguish," and indicated that she might commit suicide. It is undisputed that Greenfield stopped attempting to contact McMillen in December of 2006, approximately two months after McMillan filed suit against her. In response to McMillen's suit in Texas, Greenfield filed an answer on or about October 30, 2006, stating (and underlining) in relevant part:

> Although this case should be dismissed by the Court, I submit for consideration: If this is what Mr. McMillen wants, if this court action is the thing which will bring him peace of mind, I ask the Court to grant his request, with the exception of any provision for monetary reimbursement or relief. Now that he has finally made himself clear after 12 months, I have no intention nor desire to contact him further whatsoever.

At approximately the same time, Greenfield sent a similarly worded letter to De Los Santos, who was then acting as McMillen's attorney.

Greenfield was also deposed after filing the instant matter against McMillan, where she testified:

> The last thing I sent [McMillen] was a pro se attempt to settle the lawsuit because Rey [De Los Santos] had ignored me. Rey had ignored my attempts to provide the requested injunctive relief. Sure did. He ignored my

> request. He—he ignored—Rey ignored my pro se attempts to provide the requested injunctive relief. I tried multiple times to reach Mr. De Los Santos after I was served with the petition. I was served October 21st[, 2006], I responded—when I responded to the court, I copied Rey on everything. Mr. De Los Santos, I'm sorry. And he wasn't answering me. As you know from my responses, I offered to provide the requested injunctive relief. You can read for yourself. Anybody read plain English? It says, you'd never get this through the court. I don't have any money to fight it from eleven hundred miles away. I want you to have your peace of mind, Jeff. I never meant you any harm. Take your injunction. Mister opposing counsel let's get it on, send me what you want me to sign. I'll sign it, I'll send it to you.

In her motion for summary judgment, which she filed with the Jefferson Circuit Court on January 14, 2011, Greenfield further represented:

> Although she could not offer a cash settlement to Mr. McMillan, Ms. Greenfield, and, later, her attorneys, consistently offered to cease all contact with Mr. McMillen in exchange for Mr. McMillen's withdrawal of the Petition [for an injunction against Greenfield].

When McMillen decided to forgo seeking an injunction against Greenfield and decided instead to allow his suit against her to be dismissed without prejudice for lack of prosecution on January 13, 2009, his suit had already caused Greenfield to cease communications with him. There is no indication from the record that Greenfield had done anything but refrain from attempting to personally communicate with him for a period of approximately two years. She had already promised, repeatedly, never to communicate with him again and to consent to an injunction so long as he dismissed his suit and paid his own court costs. When McMillen allowed his suit to be dismissed for lack of prosecution, McMillen paid

his own court costs, obtained no injunction against Greenfield, and effectively accepted less than what Greenfield had offered. Additionally, when McMillen was deposed in this matter, he testified he understood that a dismissal without prejudice would allow him to revisit the matter of seeking an injunction against Greenfield if necessary.

In the light most favorable to Greenfield, the evidence fails to demonstrate that when the Texas litigation terminated, the circumstances surrounding its termination reflected upon either her innocence of or responsibility for the conduct alleged in McMillen's petition. At best, it is indicative of an abandonment "out of mercy requested or accepted by the accused," which the Restatement (Second) of Torts § 660(c) describes as insufficient to meet the "favorable termination" element of a claim of wrongful use of civil proceedings. On this basis, we affirm the circuit court's summary dismissal of Greenfield's wrongful use of civil proceedings claims against McMillen and De Los Santos.

The remaining arguments asserted by Greenfield (which she describes under the heading, "Genuine issues of material fact requiring trial by jury") relate exclusively to the "lack of probable cause" element within the tort of wrongful use of civil proceedings. However, because Greenfield has failed to demonstrate a genuine issue of fact relating to the "favorable termination" element discussed above, we need not address them.

CONCLUSION

The judgment of the Jefferson Circuit Court is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gretchen Greenfield
Louisville, Kentucky

BRIEF FOR APPELLEES:

Joseph L. White
Louisville, Kentucky