

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

NO. 2011-CA-001485-MR

JERRY CHANEY

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT  
HONORABLE JEAN CHENAULT LOGUE, JUDGE  
ACTION NO. 08-CI-00752

ALISIA ROBINSON-HILL

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: CLAYTON, LAMBERT AND STUMBO, JUDGES.

CLAYTON, JUDGE: The Appellant, Jerry Chaney (“Chaney”), appeals a decision of the Madison Circuit Court granting summary judgment in favor of the Appellee, Alisia Robinson-Hill (“Alisia”) and dismissing Chaney’s malicious prosecution claim. The circuit court determined that there was no final and favorable termination of the proceedings which gave rise to his claim. As a result, the

essential elements of a cause of action for malicious prosecution could not be established. However, because material issues of fact exist, we reverse and remand for further proceedings consistent with this opinion.

In 2007, Chaney, Alisia, and her husband, Lonnie Hill (“Hill”), worked for the same employer. During that time Hill filed a claim for short-term disability alleging he suffered a serious back injury. Their employer doubted this claim and instructed Chaney to observe Hill and determine if he was performing manual labor outside of work.

Prior to observing Hill, Chaney spoke with the Richmond police to inform them that he would be parking on the street in front of Hill’s residence. Shortly after Chaney began to observe the residence, Alisia contacted the Richmond police. The police, having previously spoken with Chaney and visited him on the Hills’ street, declined to pursue charges. Alisia subsequently filed a private criminal complaint in the Madison District Court on February 7, 2008, alleging that Chaney: (1) was observing her home and her minor child, (2) was following her minor child, (3) had taken pictures of her and her family, and (4) had no reason for this behavior other than to harass, annoy, and alarm her.

After the criminal complaint was filed, Chaney was charged with harassment pursuant to Kentucky Revised Statutes (KRS) 525.070. Soon thereafter, Chaney filed a motion to suppress for lack of probable cause. At the

hearing, the court inquired as to whether the county attorney had verified matters set forth in the motion. The County Attorney, Mr. Robbins,<sup>1</sup> stated the following:

There is some truth to it your Honor.

I called the police officer and found the dispatcher that this gentleman spoke with, and although circumstances aren't the best, another gentleman witnessed [unintelligible] sitting across the street and he did what he reported to the police department he was going to do, . . . although he didn't do a very good job of it, across the street, and people got worried and called the police.

The officer went out there and talked with him, and, as I understand it, there wasn't a problem after that that she was aware of.

The court replied stating that:

Although there is probably probable cause and the motion is suppressed for lack of probable cause, I can tell you that either I believe there is probable cause if he tries this case before this Court, based on that fact pattern, I am going to find the Defendant not guilty, based upon that phase, unless you have some other evidence that you want to produce to this Court, that you might very well go ahead and make a motion to dismiss without prejudice and save yourself.

The County Attorney replied saying, "[b]ased on that evidence today, I'll make that motion."

The case was subsequently dismissed without prejudice and no additional charges were brought against Chaney. The one-year statute of

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<sup>1</sup> The County Attorney's full name is not stated in the record. We will refer to him as the "County Attorney."

limitations for such claims has since expired. *See* KRS 500.050(2) (setting a one-year statute of limitations for non-felony offenses).

On May 9, 2008, Chaney filed a civil action against Alisia for malicious prosecution. Subsequently, Alisia filed a motion for summary judgment or, in the alternative, to dismiss for violation of Rule 11. The Madison Circuit Court granted the motion for summary judgment finding that the harassment case was not decided on the merits and, therefore, could not support a claim of malicious prosecution.

A trial court's grant of summary judgment is reviewed to determine if the court correctly found that no genuine issue as to any material fact exists and that the moving party was entitled to judgment as a matter of law. *Scrifes v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

There are six basic elements necessary to maintain an action for malicious prosecution:

(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.

*Raine v. Drasin*, 621 S.W.2d 895, 899 (Ky. 1981). While Alisia argues that Chaney failed to establish several of the required elements necessary for a cause of action, the circuit court did not address her additional arguments. Instead, the

circuit court entered summary judgment for failure to establish the third element which requires termination in the defendant's favor.

A dismissal without prejudice is a “final termination” for purposes of malicious prosecution. *Davidson v. Castner-Knott Dry Goods, Co., Inc.*, 202 S.W.3d 597, 604 (Ky. App. 2006). However, the subject of controversy in this case is whether the decision was on the merits *and favorable* to Chaney. In *Davidson*, this Court noted:

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.* at 605 (citing *Alcorn v. Gordon*, 762 S.W.2d 809, 812 (Ky. App. 1988)) (emphasis added by the Court).

In *Davidson*, a woman was charged with theft by deception. The Commonwealth “filed a written motion to dismiss the indictment against Davidson without prejudice.” *Id.* at 600. At a previously scheduled pretrial conference held after the motion was filed, the Commonwealth explained “that he sought to dismiss the case due to (1) Davidson’s police report indicating that her checks had been stolen, and (2) the fact that Castner-Knott no longer did business in Warren County[.]” *Id.* When considering the claim for malicious prosecution, the trial

court concluded that the indictment was not dismissed because the Commonwealth thought Davidson was innocent, but instead “was dismissed because attainment of evidence necessary to fully prosecute her was not readily available.” *Id.* at 605. On appeal this Court noted, that while this was at least part of the rationale, it was important that the record also reflected that the dismissal “was motivated by the discovery that Davidson reported to the police that her checks had been stolen almost two months before[.]” *Id.* This Court was “hesitant to rule as a matter of law that the termination of Davidson’s indictment was on the merits . . . [however,] the record [did] clearly indicate[] that summary judgment as to [the] issue was inappropriate[.]” *Id.* at 606. We explained that “if further discovery—for example, a sworn deposition of the Commonwealth Attorney who originally handled Davidson’s indictment—support[ed] the current record’s strong suggestion that the Commonwealth’s prosecution was abandoned, even in part, because of Davidson’s report of stolen checks, the dismissal must be considered favorable to Davidson.” *Id.* As a result, the decision of the trial court was reversed and remanded for further factual development. *Id.*

In this case, the circuit court determined a ruling on the merits was not made as to the harassment charge. However, there is evidence in the record to support the assertion that the Commonwealth dismissed the charges because they believed Chaney was not guilty. Specifically, the prosecutor determined that Chaney had previously spoken with the police and the police had visited Chaney at his observation point. As in *Davidson*, additional discovery might support the record’s

suggestion that the case was dismissed because the prosecutor believed Chaney did not harass Alisia. If this is the case, then the decision must be considered favorable to him. Thus, material issues of fact exist as to whether the decision was in fact favorable and summary judgment was not appropriate.

Alisia's brief also asserts that Chaney did not meet other elements necessary to a claim of malicious prosecution. She further submits that, because she consulted with an attorney before seeking the harassment charge, she has a valid affirmative defense to the claim of malicious prosecution. However, these issues were not addressed by the circuit court. Therefore, we must decline to consider them here. *See Davidson*, 202 S.W.3d at 606 (declining to consider additional arguments not addressed in the trial court's summary judgment opinion).

For the reasons discussed above, the decision of the Madison Circuit Court is reversed and remanded for proceedings consistent with this opinion.

ALL CONCUR.

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