

RENDERED: JANUARY 25, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001599-MR

MICHAEL OAKLEY

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 10-CI-00165

BALLARD COUNTY, KENTUCKY;
BALLARD COUNTY SHERIFF'S
DEPARTMENT; BALLARD COUNTY
SHERIFF, TODD COOPER, AND BALLARD
COUNTY DEPUTY SHERIFF TRENT GRIEF

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: In this action for malicious prosecution, Michael Oakley appeals from a summary judgment of the Ballard Circuit Court granted in favor of Ballard County, Kentucky, Ballard County Sheriff's Department, Ballard County

Sheriff Todd Cooper and Ballard County Deputy Sheriff Trent Grief. The circuit court ruled that the undisputed facts demonstrated that there was probable cause for Oakley's arrest, there was no evidence of malice and that it would be impossible for Oakley to prove damages.

The facts leading to the filing of this action are undisputed. On December 12, 2009, Deputy Sheriff Grief responded to a domestic disturbance at Oakley's residence. Prior to Grief's arrival, Oakley left the scene. Grief arrived at the residence and, following his investigation, caused an arrest warrant to be issued by the Ballard District Court Judge against Oakley for assault, fourth degree, a misdemeanor, and fleeing and evading police, first degree, a felony. Grief also filed an abuse report containing a narrative of his investigation and a notation that the victim, Oakley's wife Amie, had visible injuries.

On the same date, Amie filed a domestic violence petition and an emergency protection order was issued. Subsequently, Oakley filed a domestic violence petition against Amie. Both actions were later dismissed at Oakley's and Amie's request.

Oakley was arrested and released on bond on December 14, 2009. At his arraignment, the charges were dismissed upon the prosecutor's motion. According to the Ballard County Attorney's affidavit filed in this action, the charges were dismissed at Amie's request.

After the criminal charges were dismissed, Oakley filed the present action alleging malicious prosecution. Before discussing the substantive issues, we recite our standard of review.

The appellees filed a CR 12.02 motion to dismiss. However, because the appellees attached various exhibits to their motion, it was converted into a motion for summary judgment. *Waddle v. Galen of Kentucky, Inc.*, 131 S.W.3d 361, 364 (Ky.App. 2004). Our standard of review is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996).

The elements to sustain a malicious prosecution action are recited in *Raine v. Drasin*, 621 S.W.2d 895, 899 (Ky. 1981), as follows:

(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.

Although the action remains viable, it is one not favored in the law. “Public policy requires that all persons be able to freely resort to the courts for redress of a wrong, and the law should and does protect them when they commence a civil or criminal action in good faith and upon reasonable grounds.” *Id.* If a malicious prosecution case followed every case resulting in an acquittal or dismissal of criminal charges,

“the prosecutor would hesitate to set the criminal law in motion if he was rendered liable for damages, unless the prosecution should be successful[.]” *Davis v. Brady*, 218 Ky. 384, 291 S.W. 412, 413 (1927). “It is for this reason that one must strictly comply with the prerequisites of maintaining an action for malicious prosecution.” *Raine*, 621 S.W.2d at 899.

Oakley’s malicious prosecution claim is based on his arrest for fleeing and evading. Because those charges were dismissed at his arraignment, the judicial proceedings were resolved in his favor. *Davidson v. Castner-Knott Dry Goods Co. Inc.*, 202 S.W.3d 597 (Ky.App. 2006). Our focus at this point in the litigation is on the elements of probable cause, malice, and damages.

“Generally, the element of lack of probable cause in a malicious prosecution action presents a mixed issue of law and fact.” *Craycroft v. Pippin*, 245 S.W.3d 804, 806 (Ky.App. 2008). However, the facts upon which the circuit court based its probable cause determination were undisputed. “When the underlying facts are undisputed, the issue of the existence of probable cause becomes a question of law for the court.” *Id.*

Pursuant to KRS 520.095, a person is guilty of fleeing and evading in the first degree when he or she “knowingly or wantonly disobeys a direction to stop his or her motor vehicle, given by a person recognized to be a police officer[.]” Because Oakley was not present when the police arrived and no police officer commanded him to stop, it was not reasonable for any person to believe that he committed the felony offense. Consequently, we are compelled to agree with

Oakley that there was no probable cause for his arrest on the fleeing and evading charge. We now turn to the issue of malice.

“Malice is an essential element of a cause of action for malicious prosecution.” *Bowles v. Katzman*, 308 Ky. 490, 494, 214 S.W.2d 1021, 1023 (1948). As its name implies “malice is the root of the action of malicious prosecution[.]” *Puckett v. Clark*, 410 S.W.2d 154, 158 (Ky. 1966). Malice is defined as “the intentional doing of a wrongful act to the injury of another, with an evil or unlawful motive or purpose.” *Stearns Coal Co. v. Johnson*, 238 Ky. 247, 37 S.W.2d 38, 40 (1931). It is a distinct element that must be alleged and proven and cannot be presumed. *Miller v. Jefferson County Police Department*, 569 S.W.2d 189, 191 (Ky.App. 1978). malice may be inferred from a lack of probable cause. Cite case 1986 case

Although the law permits an inference of malice from a lack of probable cause, that fact alone does not conclusively establish the intent of the alleged wrongdoer. The explanation given in *Mosier v. McFarland*, 269 Ky. 214, 106 S.W.2d 641, 642-643 (1937), is instructive:

In an action for malicious prosecution, both malice on the part of the defendant and want of probable cause for his prosecution of the plaintiff must be alleged and proved, although malice may be inferred from proof of the absence of probable cause. The jury, however, may not invariably imply malice from the mere want of probable cause if all the facts disclosed lead to a different conclusion. If malice was to be inferred from want of probable cause alone, then there would be no necessity for having a distinct requirement that malice be proven, for want of probable cause would then be the only

element necessary to be established (internal citations omitted).

When served with interrogatories that specifically asked the facts relied upon to claim that the appellees acted with malice, Oakley responded: “They arrested me without probable cause that a felony had been committed.” As a matter of law, Oakley cannot merely rely on the absence of probable cause for his arrest on the fleeing and evading charge to sustain his malicious prosecution action. “[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.” *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992).

Oakley maintains that summary judgment was granted prematurely without an adequate opportunity to conduct discovery to present evidence of malice. It is the rule that a party responding to a motion for summary judgment cannot complain of the lack of a complete factual record when it can be shown that the respondent has had an adequate opportunity to undertake discovery. *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628, 630 (Ky.App. 1979). Although this case remained pending for over seven months prior to the appellees’ motion, Oakley did not take Deputy Grief’s deposition or otherwise

develop affirmative facts to establish malice.¹ The lack of probable cause alone was insufficient to defeat the summary judgment motion.

Based on the foregoing, the summary judgment of the Ballard Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Delbert K. Pruitt
Paducah, Kentucky

BRIEF FOR APPELLEE:

Lisa D. Carter
Benton, Kentucky

¹ Amie's deposition was taken after the summary judgment was entered and filed on the same date as the court issued its order denying Oakley's motion to vacate the summary judgment. Because it was not considered by the circuit court when it issued summary judgment, it may not be considered by this Court. Apparently the only relevant information gained was that Annie and Grief were high school classmates.