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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002166-MR

WANDA LINDLE — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, JUDGE
ACTION NO. 08-CI-00643

FIFTH THIRD BANK, JESSICA WICKER,
AND SHARON MOORE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MOORE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Wanda Lindle has appealed from the October 28, 2011, order of the Hopkins Circuit Court granting summary judgment in favor of Fifth Third Bank, Jessica Wicker and Sharon Moore on her claim of malicious prosecution. Following a careful review, we affirm.

On May 30, 2007, Lindle went to the Fifth Third Bank branch in Madisonville, Kentucky, to make a payment on her mortgage. After completing the payment, she asked Moore, a bank employee, to examine a $100.00 bill which Lindle believed to be "a fake." Moore conferred with Wicker, the branch manager, regarding the note, and the pair concluded it was, in fact, counterfeit. While there is some dispute over the exact nature of events which followed, it is undisputed that Lindle was informed the bill was bogus, following which she regained possession of it and left the bank premises.

After Lindle departed, Wicker became concerned about having allowed a known counterfeit $100.00 bill to leave the bank. As this sort of thing had never occurred at the branch previously, Wicker contacted Debbie Casselli, Fifth Third Bank's risk manager, to discuss the matter and obtain advice. Casselli informed Wicker that bank policy and Secret Service guidelines indicated she needed to contact law enforcement to inform them of the existence of the counterfeit bill. Consistent with this advice, Wicker contacted the Madisonville Police Department which dispatched Officer Scott Gipson to investigate. Wicker and Moore recounted their version of events to the officer.

As a result of the investigation, Officer Gipson issued a criminal complaint charging Lindle with criminal possession of a forged instrument[1] and subsequently obtained an arrest warrant for Lindle. She was arrested on July 7, 2007. Following a preliminary hearing in the Hopkins District Court at which only

[1] Kentucky Revised Statutes (KRS) 516.050(1), a Class C felony.

Officer Gipson testified, probable cause was found and the matter was bound over to the Hopkins County Grand Jury. Ultimately, the grand jury returned a "No True Bill" and charges against Lindle were dismissed.

In May 2008, Lindle instituted the instant action against Fifth Third, Wicker, Moore, Officer Gipson and the City of Madisonville, Kentucky, seeking damages for malicious prosecution, false arrest and violation of several of her Constitutional rights. Because federal questions were involved, the defendants below successfully petitioned to have the case removed to the United States District Court. Following a brief discovery period, Lindle voluntarily dismissed Officer Gipson and the City of Madisonville as defendants in the federal action. Shortly thereafter, Fifth Third, Wicker and Moore moved for summary judgment. In November 2009, the U.S. District Court determined it would no longer retain jurisdiction over the now non-diverse state law claims remaining in the action and remanded the case to the Hopkins Circuit Court.

Nearly two years later, in August 2011, Lindle moved the circuit court for an order redocketing the action. The parties agreed the circuit court should rule on the pending summary judgment motion before proceeding further. Following additional briefing on the matter, the trial court concluded Lindle could not, as a matter of law, establish the first of six required elements necessary to maintain an action for malicious prosecution. Thus, summary judgment was entered in favor of the Appellees. This appeal followed.

Lindle now contends the trial court utilized an incorrect legal standard in granting summary judgment. She further alleges genuine issues of material fact were present regarding at least three of the required elements of a malicious prosecution claim, thus precluding entry of summary judgment against her. We disagree with Lindle's assertions.

Summary judgment is a device utilized by courts to expedite litigation. *Ross v. Powell,* 206 S.W.3d 327, 330 (Ky. 2006). It is deemed a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 482 (Ky. 1991). In Kentucky, the movant must prove no genuine issue of material fact exists, and he "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id.* The trial court must view the evidence in favor of the non-moving party. *City of Florence v. Chipman,* 38 S.W.3d 387, 390 (Ky. 2001). *Steelvest* originally held the test would include the phrase "impossible" for the non-moving party to prevail at trial. The Supreme Court of Kentucky later clarified that the word "impossible" was "used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). The non-moving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact[.]" *Chipman*, 38 S.W.3d at 390.

On appeal, 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). Furthermore, because summary judgments do not involve fact-finding, our review is *de novo*. *Pinkston v. Audubon Area Community Services, Inc.,* 210 S.W.3d 188, 189 (Ky. App. 2006). With these standards in mind, we turn to the allegations of error presented.

First, we must address Lindle's contention that the trial court utilized an incorrect legal standard in its decision to grant summary judgment in favor of the Appellees. She alleges the trial court erroneously analyzed the matter under the more relaxed standard utilized in the federal courts rather than the well-settled —and more stringent—standard sanctioned by the Supreme Court of Kentucky. However, her argument is wholly contradicted by the record and is thus, without merit.

In its order, the trial court clearly indicated it was proceeding under the guidance and direction for summary judgment motions as laid down in *Steelvest*. It made absolutely no mention of any other standard, cited only state-court cases, and applied only the *Steelvest* standard. The trial court indicated it had reviewed the record in the light most favorable to Lindle as the non-moving party. It found no issue of material fact existed regarding one of the initial threshold requirements for sustaining an action for malicious prosecution, thus entitling the Appellees to summary judgment as a matter of law. These determinations are clearly in line with applicable Kentucky precedent regarding the appropriate summary judgment standard.

Furthermore, Lindle has failed to show how the trial court "basically adopted a standard that is utilized in the federal courts rather than the well established (sic) law in the Commonwealth of Kentucky in state courts relative to Summary Judgment proceedings." We will not search the record to construct Lindle's argument for her, nor will this Court undergo a fishing expedition to find support for underdeveloped arguments. "Even when briefs have been filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." *Milby v. Mears,* 580 S.W.2d 724, 727 (Ky. App. 1979). Lindle's allegation is unsupported on the face of the trial court's order and absent citation to the record showing otherwise, we can discern no error.

Lindle next argues genuine issues of material fact existed were present regarding at least three of the required elements of a malicious prosecution claim. Based on these alleged factual disputes, she believes the trial court's entry of summary judgment against her is infirm. We disagree.

In *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981), our Supreme Court thoroughly discussed malicious prosecution actions and the strict requirements for maintaining such an action.

> The doctrine of malicious prosecution is an old one in our Commonwealth. See, for example, *Holburn v. Neal*, 34 Ky. 120, 4 Dana 120 (1836). Historically, it has not been favored in the law. *Lexington Cab Co. v. Terrell*, 282 Ky. 70, 137 S.W.2d 721 (1940). 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. It is for this reason that one must strictly comply with the prerequisites of maintaining an action for malicious prosecution. *Davis v. Brady*, 218 Ky. 384, 291 S.W. 412 (1927).
>
> Generally speaking, there are six basic elements necessary to the maintenance of an action for malicious prosecution, in response to both criminal prosecutions and civil action. They 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. *Smith v. Smith*, 296 Ky. 785, 178 S.W.2d 613 (1944); *Cravens v. Long*, Ky., 257 S.W.2d 548 (1953); *Blankenship v. Staton*, Ky., 348 S.W.2d 925 (1961); *H. S. Leyman Co. v. Short*, 214 Ky. 272, 283 S.W. 96 (1926), Restatement of Torts, 2nd ed., Sec. 674, et seq.

Raine, 621 S.W.2d at 899. Because of the strict compliance requirement, it reasonably follows that if a plaintiff fails to prove each and every element, her malicious prosecution claim must fail as a matter of law.

Lindle's malicious prosecution claim is based on her arrest for possession of a forged instrument. It is undisputed judicial proceedings were instituted against her which were ultimately resolved in her favor. There is likewise no dispute that Lindle suffered damages. Thus, only malice, lack of probable cause, and the identity of the party instituting the judicial proceedings, are in issue.

In this appeal, we will focus on whether the criminal action against Lindle was instituted by or at the behest of the Appellants since the trial court granted summary judgment solely based on its review and determination of the absence of

that element. In *Cravens v. Long*, 257 S.W.2d 548, 549 (Ky. 1953), the former Court of Appeals held that a malicious prosecution claimant must show "the defendant was the proximate and efficient cause of putting the law in motion against the plaintiff." As the trial court noted, the Restatement (Second) of Torts § 653 (1977), explains the initiation requirement as follows:

> *d. Procuring the institution of criminal proceedings.* Under the rule stated in this Section one who procures a third person to institute criminal proceedings against another is liable under the same conditions as though he had himself initiated the proceedings. A person who does not himself initiate criminal proceedings may procure their institution in one of two ways: (1) by inducing a third person, either a private person or a public prosecutor, to initiate them, or (2) by prevailing upon a public official to institute them by filing an information. It is, however, not enough that some act of his should have caused the third person to initiate the proceedings. One who gives to a third person, whether public official or private person, information of another's supposed criminal conduct or even accuses the other person of the crime, causes the institution of such proceedings as are brought by the third person. The giving of the information or the making of the accusation, however, does not constitute a procurement of the proceedings that the third person initiates if it is left to the uncontrolled choice of the third person to bring the proceedings or not as he may see fit.
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> . . .
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> *g. Influencing a public prosecutor.* A private person who gives to a public official information of another's supposed criminal misconduct, of which the official is ignorant, obviously causes the institution of such subsequent proceedings as the official may begin on his own initiative, but giving the information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer

> if it is left entirely to his discretion to initiate the proceedings or not. When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this Section even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.
>
> If, however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving the false information. In order to charge a private person with responsibility for the initiation of proceedings by a public official, it must therefore appear that his desire to have the proceedings initiated, expressed by direction, request or pressure of any kind, was the determining factor in the official's decision to commence the prosecution, or that the information furnished by him upon which the official acted was known to be false.

We believe the Restatement correctly sets forth the law applicable in this Commonwealth. When viewing the record in the light most favorable to Lindle, as we must, we agree with the trial court that the Appellants did not, as a matter of law, initiate the criminal proceedings against Lindle.

Officer Gipson received information from Wicker and Moore that Lindle had in her possession what she believed to be a counterfeit $100.00 bill when she arrived at the bank. After being informed her suspicions were correct, Lindle regained possession of the fraudulent bill and left the bank premises. In support of

the motion for summary judgment, the Appellees attached affidavits indicating the sole goal of informing law enforcement that Lindle possessed a known counterfeit bill was to satisfy internal bank policies. In his deposition, Officer Gipson indicated no one at the bank made any demands or requests that criminal proceedings be initiated nor was any resolution suggested by Wicker or Moore. Officer Gipson testified he was contacted only because "the hundred dollar bill had been put back into circulation." Wicker and Moore had no further involvement after conversing with Officer Gipson. The officer then exercised his own, independent discretion to proceed with securing the arrest warrant and beginning the criminal prosecution process. No converse evidence appears in the record.

Contrary to Lindle's argument, a factual dispute regarding how she came to regain control of the note before leaving the bank does not taint the trial court's decision. It is undisputed she left the premises with the bogus $100.00 bill after being informed of its nefarious character and that it needed to be removed from circulation. Thus, regardless of whether she "snatched" the bill from the teller or that the teller handed it to her, Lindle knowingly possessed the bill when she departed. This information was the basis for Officer Gipson's pursuit of an arrest warrant.

We are unconvinced Wicker and Moore's comments to Officer Gipson surrounding the events constituted "false and misleading statements" that "initiated and encouraged the prosecution of the claim." Nor are we convinced that these statements somehow tainted the "intelligent exercise of the officer's discretion" in

choosing to pursue criminal charges. Therefore, as the trial court correctly concluded, the officer's independent actions shielded Wicker and Moore (and vicariously, Fifth Third Bank) from liability, and no genuine issue of material fact exists to countermand that decision. As such, Lindle could not, as a matter of law, succeed in proving Wicker, Moore or Fifth Third Bank initiated the criminal action against her and thereby was precluded from maintaining her action for malicious prosecution. The trial court's grant of summary judgment on these grounds was correct.

Wherefore, for the foregoing reasons, the judgment of the Hopkins Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark Wells
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BRIEF FOR APPELLEE:

John T. McGarvey
Eric M. Jensen
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