

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

NO. 2013-CA-000333-MR

ROBERT PETTIT

APPELLANT

v. APPEAL FROM ROCKCASTLE CIRCUIT COURT  
HONORABLE DAVID A. TAPP, JUDGE  
ACTION NO. 10-CI-00190

KATHY L. HENSLEY, NOW KATHY L. RILEY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: JONES, KRAMER AND MAZE, JUDGES.

JONES, JUDGE: This matter is before us on appeal from an order of the Rockcastle Circuit Court dismissing Robert Pettit's malicious prosecution claim against Kathy L. Hensley (now Kathy L. Riley). For the reasons more fully explained below, we REVERSE and REMAND.

## I. FACTUAL & PROCEDURAL BACKGROUND

On February 24, 2009, the Appellant, Robert Pettit, was arrested by the Mount Vernon Police Department and charged with stalking in the first degree after the Appellee, Kathy L. Hensley, filed a criminal complaint against him the prior day. At arraignment, Pettit's bond was set at \$5,000.00; he was placed on house arrest; and, he was equipped with a GPS monitoring device.

On July 13, 2009, the Rockcastle County Attorney voluntarily moved the Rockcastle District Court to dismiss the pending charges against Pettit. The district court sustained the motion. The district court's minute order states as follows: "Motion by Mr. Reynolds to dismiss with leave (at request of complaining witness). Sustained with condition no violations of law and ankle monitor removed. Bond exonerated."

On July 9, 2010, Pettit filed a civil action against Hensley in the Rockcastle Circuit Court. Pettit alleged in his complaint as follows:

### Malicious Prosecution

13. An original criminal judicial proceeding was instituted by the Rockcastle County Attorney against the Plaintiff in Rockcastle District Court.

14. The original criminal judicial proceeding was instituted against Plaintiff at the instance of Defendant and pursuant to Defendant's sworn statement.

15. The original judicial proceeding against Plaintiff was terminated in Plaintiff's favor.

16. The original criminal judicial proceeding against Plaintiff was instituted by Defendant intentionally and with malice against the Plaintiff.

17. No probable cause existed to support the charge filed against the Plaintiff by the Rockcastle County Attorney as the Defendant's affidavit supporting the charge contained false statements of material fact.

18. Plaintiff suffered severe emotion distress, loss of income, loss of reputation and the cost of defense because of the original criminal judicial proceeding instituted by Defendant.

With respect to the malicious prosecution count, Hensley filed an answer denying that the action was terminated in Pettit's favor. Her answer states: "Defendant denies the allegations contained in Paragraph 15 because the action was voluntarily dismissed with leave with no finding at the request of the Defendant, Kathy L. Hensley, now Riley."

Following a period of discovery, on February 28, 2011, Hensley filed a motion to dismiss Pettit's complaint against her. With respect to the malicious prosecution claim, Hensley sought dismissal based on her allegation that "the case was dismissed with leave upon the victim's request and with conditions that Mr. Pettit commit no further crimes."

On December 1, 2011, the circuit court entered an order granting Hensley's motion to dismiss with respect to Pettit's malicious prosecution claim. To this end, the circuit court found:

In this case, there is nothing in the record to suggest that the stalking charges were actually terminated in favor of Pettit. In fact, the record suggests the opposite; that the charges were dismissed at [Hensley's] requests, in exchange for Pettit's promise to leave her and her family and friends alone. Such a "bargain" or "compromise"

may indeed be a dismissal based on *Davidson* [*v. Caster-Knott Dry Goods Co., Inc.*, 202 S.W.3d 597 (Ky. App. 2006)]; however it precludes the defendant from arguing that the charges were terminated in his favor.

Pettit filed a motion seeking reconsideration of the circuit court's dismissal of his malicious prosecution claim, which the circuit court denied by order entered February 24, 2012. On January 16, 2013, the circuit court granted Hensley summary judgment on Pettit's remaining claims.

This appeal followed.

## II. STANDARD OF REVIEW

Kentucky Rules of Civil Procedure (CR) 12.02 governs motions to dismiss for failure to state a claim upon which relief may be granted. Such motions are to be granted when a trial court concludes that “the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” *Edmonson County v. French*, 394 S.W.3d 410, 413 (Ky. App. 2013).

In ruling on a motion to dismiss, the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true. *Mims v. Western–Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007). As such, “[t]he court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” *Pari–Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL–CIO v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky. 1977).

Therefore, “the question is purely a matter of law.” *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). Accordingly, the trial court's decision will be reviewed *de novo*. *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717, 719 (Ky. 2000).

### III. ANALYSIS

Six basic elements are necessary to maintain an action for malicious prosecution. *Raine v. Drasin*, 621 S.W.2d 895, 899 (Ky. 1981). 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." *Id.*

This appeal focuses our attention on the third element--termination in 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). The facts surrounding the termination, however, must indicate that the termination was also a "favorable" one. *Id.* A termination without prejudice can be considered favorable if the termination can be said to reflect on the accused's innocence of the alleged wrongful conduct. *Id.* On the other hand, "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.*

In order for a termination of proceedings to be favorable to the accused, the dismissal must be one-sided and not the result of any settlement or compromise. *See Feinberg v. Townsend*, 107 S.W.3d 910, 912 (Ky. App. 2003) (holding that a legal malpractice lawsuit did not terminate in plaintiff-lawyer's favor where the case was resolved by mutual agreement leading to a settlement and not by a one-sided dismissal). For example, in *Broaddus v. Campbell*, 911 S.W.2d 281 (Ky. App. 1995), we dismissed a plaintiff's malicious prosecution claim because the criminal case was dismissed after he admitted to probable cause for the indictment. *Id.* at 284. We concluded that the criminal case did not terminate in plaintiff's favor because “he gave up something to secure the dismissal of the charges” and the dismissal did not indicate that he was actually innocent. *Id.* The court held that “one may not elect to settle a criminal action, stipulate probable cause and maintain that the action was favorable to him on the merits.” *Id.* at 285.

In *Davidson*, we considered a case substantially similar to the present. Taja Davidson was charged with theft by deception after Timothy Bush—a loss prevention employee at Castner–Knott—appeared at the Warren County Attorney's office and signed a criminal complaint against Davidson. After certain factual developments, the Commonwealth moved to dismiss the indictment against Davidson without prejudice. Specifically, the Commonwealth indicated that it wished to dismiss the indictment because Davidson had previously filed a report indicating that her checks had been stolen, and, due to the fact that Castner–Knott no longer did business in Warren County. *Id.* As a result, the charges were

dismissed and Davidson pursued a malicious prosecution claim against Castner-Knott.

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 determined that whether the indictment dismissal was one on the merits was an issue of fact that required further evidence. 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, we reversed the trial court's summary judgment and remanded for further factual development. *Id.*

In this case, the circuit court appears to have based its dismissal on a portion of Hensley's answer wherein she stated: "Defendant admits the allegations contained in paragraph 11. Defendant agreed to dismiss the charges in exchange

for Mr. Pettit leaving her and her family and friends alone."<sup>1</sup> The circuit court opinion relies on the fact that Pettit did not deny this "bargain" in any subsequent pleadings.

As a primary matter, Pettit was not required to reply to this portion of Hensley's answer. Our Civil Rules are clear that a plaintiff shall not reply to an answer unless ordered to do so by the Court. *See* CR 7.01. There is no indication in the record that the circuit court ordered Pettit to reply to Hensley's answer. Therefore, it was error for the circuit court to deem an allegation contained in Hensley's answer to have been deemed admitted by Pettit.<sup>2</sup> Moreover, a review of the record indicates that Pettit vigorously denied ever negotiating with either Hensley or the Rockcastle County Attorney with respect to the criminal charges.

As in *Davidson*, additional discovery might support either Hensley's version of the events or Pettit's version. It is clear to us, however, that Pettit's allegations made out a *prima facie* malicious prosecution claim against Hensley sufficient to withstand a motion to dismiss. The record does not clearly indicate that the charges against Pettit were dismissed pursuant to his agreement. At best, the record is unclear in this regard. Accordingly, we conclude that that the circuit court erred when it dismissed Pettit's malicious prosecution claim.

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<sup>1</sup> Paragraph 11 of Pettit's complaint states as follows: "On or about July 13, 2009, the Rockcastle County Attorney moved the Rockcastle District Court for Voluntarily dismissal of all charges against Plaintiff at Defendant's request."

<sup>2</sup> While Hensley did file a counterclaim against Pettit, the language relied on by the circuit court was contained in the portion of Hensley's pleading labeled as her answer. While Pettit was required to respond to the allegations in Hensley's counterclaim, he was not required to address allegations made separately as part of Hensley's answer to Pettit's complaint. He was required only to address the separate allegations contained in the counterclaim portion of Hensley's pleading.



#### IV. CONCLUSION

For the reasons set forth above, we reverse and remand this action to the Rockcastle Circuit Court for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joshua D. Johnson  
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BRIEF FOR APPELLEE:

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