RENDERED: APRIL 15, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001418-MR

RONNIE MOSBY APPELLANT

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE DAVID L. WILLIAMS, JUDGE
ACTION NO. 10-CI-00073

JAMES BARRY THOMPSON;
MARGARET PRESTON; JAMES
BARRY THOMPSON INSURANCE,
INC.; J. B. THOMPSON AGENCY,
LLC; FARMERS INSURANCE
EXCHANGE & FOREMOST
INSURANCE COMPANY; ROBIN
WYATT; DENELL BAKER,
CO-EXECUTRIX OF THE ESTATE OF
HAROLD HOUCHENS; AND ANNETTA
KAREN HOUCHENS APPELLEES

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** ** ** **

BEFORE: J. LAMBERT, KRAMER, AND NICKELL, JUDGES.

KRAMER, JUDGE: Ronnie Mosby appeals from the Monroe Circuit Court's order granting him summary judgment in part, denying summary judgment in part, and denying his motion to dismiss. After careful review, we affirm in part,[1] and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

In the trial court below, Appellees James Thompson and Margaret Preston alleged malicious prosecution against Mosby, a Special Investigator with the Kentucky Department of Insurance, for testimony related to them before the Monroe County Grand Jury, and Mosby's investigations and conduct that lead to his grand jury testimony. The Appellees were insurance agents authorized to write policies for Farmers Insurance Exchange (Farmers) and Foremost Insurance Company (Foremost). In November 2007, spouses Harold and Annetta Houchens decided to purchase insurance through the Appellees. The Appellees then collected initial premium payments from the Houchenses to secure coverage on both car and homeowner's insurance policies. In January 2008, the Houchenses requested that an additional vehicle be covered on a policy, but no premium for the additional vehicle was collected at that time.

On March 14, 2008, the Houchenses filed an accident claim on a vehicle they had intended to be insured. Farmers informed the Houchenses that the policy covering the vehicle had been cancelled for nonpayment of the premium.

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[1]We affirm the circuit court, albeit in part, upon different grounds. *See Vega v. Kosair Charities Committee, Inc*., 832 S.W.2d 895 (Ky. App. 1992).

The Houchenses filed a complaint with the Department of Insurance stating that they had paid the required premium for coverage to the Appellees. The case was assigned to Mosby in the course of his duties as a Special Investigator, Division of Fraud Investigation, with the Department of Insurance.

Upon the claim being filed, Mosby interviewed the Houchenses, obtained cash payment receipts given to them by the Appellees, and obtained the Houchenses' written statement that in spite of their payments made to the Appellees, Farmers had denied payment of their claim for their failure to pay premiums. Mosby also obtained written confirmation from Farmers and Foremost that they had not received the premium payments made by the Houchens to the Appellees.[2]

Mosby prepared a report that alleged that the Appellees had unlawfully accepted insurance premium payments and had failed to send them to the insurance companies. In consultation with the office of the Monroe County Commonwealth's Attorney, Mosby appeared before the Monroe County Grand Jury on September 17, 2008, to present the allegations. The Grand Jury returned felony indictments against the Appellees as individuals for fraudulent insurance acts. Subsequently, all of the charges for which they were indicted were dismissed.

The Appellees then filed the instant action in Monroe Circuit Court against Foremost, Farmers, the Houchenses, and Mosby. As stated above, the

[2] This later turned out to be a false statement, and the insurance companies determined that an error had been made.

complaint against Mosby was for malicious prosecution. After discovery, Mosby moved for summary judgment on the grounds that he was absolutely immune from malicious prosecution based on his testimonial privilege before the grand jury. In response to the motion, the Appellees raised facts they alleged demonstrate careless investigation by Mosby, if not ill will. They also filed a first amended complaint, alleging that Mosby not only initiated the false proceeding against them, but that he maintained the proceedings against them as well.

In its August 21, 2012 order, the trial court found that Mosby's testimony before the grand jury was absolutely privileged and therefore he was immune to liability for claims specific to his grand jury testimony. However, the trial court granted the Appellees additional time to show any evidence that might entitle them to relief under any other theory of liability. In response to the opportunity to develop more evidence, the Appellees filed a second amended complaint in which they alleged, for the first time, that Mosby's conduct amounted to outrageous conduct.

In its final order entered June 4, 2013, the trial court considered Mosby's argument that he was entitled to absolute immunity based on Kentucky Revised Statutes (KRS) 304.47-060(2). That statute states:

> The commissioner or any employee or agent of the Department of Insurance shall not be subject to civil liability for libel, slander, or any other relevant tort. No civil cause of action shall exist against these persons by virtue of the execution of official activities or duties of the commissioner or the division or by virtue of the

> publication of any report or bulletin related to the official activities or duties of the commissioner.

The court held that it was unconstitutional for the General Assembly to grant complete immunity, citing the Kentucky Supreme Court's decision in *Caneyville Volunteer Fire Department, et al. v. Green's Motorcycle Salvage, Inc., et al.*, 286 S.W.3d 790 (Ky. 2009). The trial court concluded that, although there is no doubt that the General Assembly has the authority to grant qualified immunity to state agencies, KRS 304.47-060 attempts to grant general immunity to Department of Insurance employees and therefore is unconstitutional.[3] The court then denied Mosby's motion for summary judgment insofar as it relied on the immunity accorded under KRS 304.47-060 and concluded that it had not been sufficiently alleged or shown whether Mosby's actions were in fact ministerial or if they were discretionary. The trial court concluded that more proof needed to be presented regarding the initial determination of whether Mosby's actions were ministerial or discretionary, and thus whether he was entitled to qualified official immunity.

With regard to immunity accorded to grand jury testimony, the trial court held that *Reed v. Isaacs*, 62 S.W.3d 398 (Ky. App. 2000), controlled. There, this Court held:

> Where a witness willfully and maliciously gives false testimony, he is liable to prosecution for perjury or false swearing. [However] [n]o civil action will lie against him, because it is a well-settled rule in practically all jurisdictions that the testimony of a witness given in the

[3] The question of whether or not the circuit court properly decided this issue of immunity and the constitutionality of KRS 304.74-060(2) is not before this Court because Mosby did not include those issues in this interlocutory appeal.

> course of a judicial proceeding is privileged and will not support a cause of action against him.

Id. at 399. The trial court concluded that Mosby's testimony was absolutely privileged and he was immune from any civil liability in this action insofar as such liability relies on his grand jury testimony. The trial court held that based on the allegation that Mosby's activities went well beyond his testimony before the grand jury, the Plaintiffs' (here, the Appellees') case could proceed against him concerning such activities. Accordingly, the trial court granted Mosby's motion for summary judgment as it related to claims made pursuant to his grand jury testimony, but otherwise denied his request for immunity from suit on the malicious prosecution claim. Finally, the trial court denied Mosby's motion to dismiss based on Kentucky Rules of Civil Procedure (CR) 12.02, holding that Mosby's claims under that motion relied solely on his memorandum submitted with his motion for summary judgment. This appeal now follows.

STANDARD OF REVIEW

This Court reviews a trial court's grant of summary judgment *de novo*. *Community Trust Bancorp, Inc. v. Mussetter*, 242 S.W.3d 690, 692 (Ky. App. 2007). The record must be viewed in the light most favorable to the party opposing the summary judgment motion. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). A trial court's denial of summary judgment is interlocutory and is not subject to appeal. *See Abbott v. Chesley*, 413 S.W.3d 589, 602 (Ky. 2013). However, interlocutory orders denying motions to dismiss

based on immunity are exempt from the general rule and are immediately appealable. *See South Woodford Water Dist. v. Byrd*, 352 S.W.3d 340, 342 (Ky. App. 2011).

ANALYSIS

On appeal, Mosby argues he is entitled to immunity from malicious prosecution because whatever actions he took leading up to his grand jury testimony were in support of that testimony. So, he argues that the absolute testimonial immunity blanket goes beyond his statements before the grand jury; according to him, it covers his prior conduct that formed the basis for his testimony. However, his argument is clearly in error because absolute immunity only applies to the testimony he provided before the grand jury, not to the actions leading up to it. *See Gregory v. City of Louisville*, 444 F.3d 725, 739 (6th Cir. 2006) ("[N]ontestimonial, pretrial acts do not benefit from absolute immunity, despite any connection these acts might have to later testimony.")

To the extent that Mosby's argument or the circuit court's order means that an evaluation needs to be undertaken to determine if Mosby is entitled to qualified immunity (*i.e.,* a determination of whether or not his actions were discretionary or ministerial), that would be error. Qualified immunity does not apply to a state law claim of malicious prosecution.[4] Although unpublished, we quote *Palmer v. Carter*, 2014 WL 4377874, at *3 (Ky. App. 2014), because it explains this area of

[4] Federal case law regarding malicious prosecution is distinguishable from state law claims for malicious prosecution. A cause of action under § 1983 for "malicious prosecution" is susceptible to a claim of qualified immunity because it does not require proof of malice to succeed. *See Sykes v. Anderson*, 625 F.3d 294, 308–309 (6th Cir. 2010).

the law; we believe it is good persuasive authority; and we believe it fulfills the requirement of CR 76.28(4)(c):

> [T]here are at least two reasons why qualified immunity cannot apply to a claim of malicious prosecution under Kentucky law. First, as the Kentucky Supreme Court explained in *Yanero [*v. *Davis*, 65 S.W.3d 510, 522 (Ky. 2001)] qualified immunity applies only to claims sounding in negligence. *Id*.; see *also id*. at 524 (providing that a public official is not entitled to qualified immunity if "the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive"). Malicious prosecution does not sound in negligence because "malice" is one of its essential elements, and "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) (emphasis added); *see also Martin v. O'Daniel*, Nos.2009–CA–001738–MR, 2009–CA–001795–MR, 2009–CA–001739–MR, 2011 WL 1900165 at *6 (Ky. App. May 20, 2011), review denied (March 14, 2012) (holding qualified immunity unavailable in the context of malicious prosecution claim because it "is an intentional tort, requiring proof of malice; and the trial court believed there were genuine issues of material fact regarding malice on the part of appellants").
>
> Second, qualified immunity is a confession and avoidance; that is, it requires the defendant to admit every element of the cause of action while claiming that his conduct giving rise to the cause of action was nevertheless justified. *See Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 608 (Ky. 2014) ("qualified immunity ... [is] a type of pleading dealing in confession and avoidance, *i.e*., pleading "more or less to admit the general complaint and yet to suggest some other reason why there was no right ..." (citation omitted)); *Rich v. Commonwealth,* 305 S.W.2d 771, 772 (Ky. 1957) (in a "civil plea of confession and avoidance ... the accused admits doing the act and seeks to be excused for some legal or affirmative reason"); *see also* 61A Am.Jur.2d Pleading § 279.7 Thus, applying qualified immunity in the context of a claim for malicious prosecution would be illogical because it would effectively be a plea of denial. That is, the defendant asserting

> immunity would confess to intentionally and maliciously acting without probable cause in order to assert that he mistakenly but in good faith acted without probable cause. *See Chaney v. Slone*, 345 S.W.2d 484, 485 (Ky. 1961) ("A defense proceeding by way of confession and avoidance—namely, an 'affirmative' defense—is in its very nature inconsistent with a denial of any material allegations of the complaint." (Internal quotations and citation omitted)).

(Notes omitted.)

Consequently, the malicious prosecution claim in this case cannot be thwarted by qualified immunity. Accordingly, the circuit court properly denied Mosby's motion for summary judgment on the issue of absolute immunity, but was in error when it concluded that additional evidence needed to be taken regarding whether Mosby's pre-testimony conduct was discretionary or ministerial, *i.e.,* a qualified immunity defense.

Finally, Mosby claims that he is entitled to judgment as a matter of law regarding the Appellees' alternative pleading of outrageous conduct. Mosby does not inform this Court where he preserved this issue. His motion for summary judgment before the circuit court was based solely on the malicious prosecution claim, and Appellees thereafter amended the complaint to include the tort of outrage. Although we are not required to peruse the record to find where Mosby preserved this claim, a review of the record after the Appellees filed their amended complaint only shows a Motion to Dismiss pursuant to CR 12.02. Therein, he states that "in support of this motion, Mosby relies on the memorandum of

authorities submitted with his pending Motion for Summary Judgment." That motion is based singularly on malicious prosecution.

A statement of preservation directing us to the portion of record where an appellant preserved his claims of error is required by CR 76.12(4)(c)(v). Here, Mosby has failed to direct us to the portion of the record where his claims of error are preserved. Failure to include a statement of preservation permits us to strike the brief entirely, refuse to consider those claims that do not comply with the rule, or review the arguments under the standard of manifest injustice. *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990). Our review of the record indicates that this issue was not argued by Mosby below, and if it was, it was his obligation to inform this Court of where this issue is preserved; he has wholly failed to do so. Accordingly, we conclude this issue is not properly before this Court.

In closing, we note that our interlocutory review of this matter is limited to claims of immunity defenses. Whether Appellees' allegations amount to a legally cognizable claim against Mosby for malicious prosecution, or whether the record could even sustain such a claim, is beyond the scope of our jurisdiction in this matter.

For the reasons as stated, we hereby AFFIRM IN PART AND REVERSE IN PART.

NICKELL, JUDGE, CONCURS.

J. LAMBERT, JUDGE, DISSENTS.

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