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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001827-MR
AND
NO. 2014-CA-001864-MR

J. FOX DEMOISEY, AND
DEMOISEY LAW OFFICE, PLLC APPELLANTS/CROSS-APPELLEES

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 12-CI-004075

PETER L. OSTERMILLER APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON, AND JONES, JUDGES.

JONES, JUDGE: This appeal and related cross-appeal arise out of a Jefferson Circuit Court civil action wherein the Appellants/Cross-Appellees, attorney J. Fox DeMoisey and the DeMoisey Law Office, PLLC (hereinafter collectively referred to as "DeMoisey"), asserted claims against the Appellee/Cross-Appellant, attorney

Peter L. Ostermiller, for tortious interference with contractual relations, tortious interference with prospective contractual relations/business advantage, and abuse of process. The claims arose out of Ostermiller's advice to and representation of Infocon Systems, Inc. ("Infocon"), a former client of DeMoisey.[1]

The Jefferson Circuit Court dismissed the abuse of process claim without prejudice on the ground that it was premature because Infocon's malpractice action against DeMoisey was still pending at the appellate level; it granted summary judgment to Ostermiller on the tortious interference with contractual relations and tortious interference with prospective business relations/business advantage claims on the basis that there was not a valid fee agreement in place between DeMoisey and Infocon and, therefore, no contract to support the tortious interference claims.

DeMoisey has appealed asserting that the circuit court erred in entering summary judgment on the tortious interference claims. Ostermiller filed a cross-appeal asserting that the circuit court should have dismissed the abuse of process claim with prejudice because it is time-barred. Upon careful review of the record and applicable legal authority, we AFFIRM in part as related to the tortious interference claims, REVERSE in part as related to the abuse of process claim, and

[1] We refer to Infocon as a "former" client because it eventually terminated DeMoisey. However, we are cognizant that Ostermiller's involvement in this matter overlapped DeMoisey's representation of Infocon from approximately March of 2007 to August of 2007.

REMAND to the circuit court with instructions to dismiss the abuse of process claim with prejudice.[2]

I. BACKGROUND

J. Fox DeMoisey is an attorney licensed to practice law in the Commonwealth of Kentucky. In the early 1990s, DeMoisey began representing Infocon Systems, Inc., a software solutions corporation focused on facilitating business transactions. Infocon is wholly controlled by Deepak Nijhawan, its President, and Robert Keith Hughes, its Vice President.[3]

In approximately 1998, Infocon began doing business with Exact Software North America, Inc. ("Exact").[4] Infocon was a reseller of Exact's software. Problems developed between Exact and Infocon around 2002. Ultimately, in the spring of 2003, Exact sued Infocon in the Marion County, Ohio, Court of Common Pleas. Asserting an action on account, Exact claimed that Infocon owed it $143,031.77 in unremitted payments from sales of Exact's software to Infocon's customers. Infocon removed Exact's suit to the United States District Court, Northern District of Ohio in Toledo, on the basis of diversity jurisdiction. Infocon also counterclaimed for breach of contract, fraud and

[2] As detailed below, we affirm as related to the tortious interference claims for slightly different reasons than the circuit court articulated in its opinion.

[3] Nijhawan owns 51% of Infocon's shares with Hughes owning the remaining 49% of the shares.

[4] Exact is a subsidiary of Exact Holding NV, a Dutch software company that offers accounting, enterprise resource planning, and other software for small and medium enterprises throughout the world.

intentional interference with the contract and asserted several affirmative defenses to the collection action.

Infocon engaged DeMoisey, along with local Ohio counsel, John Carey and Bob Bohmer, to represent it in connection with the Exact dispute. At this time, Infocon did not have the financial wherewithal to pay its counsel an hourly fee. Initially, it was agreed in return for his legal services, DeMoisey would receive a one-third interest in a company called Alocam.[5] As the Exact litigation proceeded, Alocam's net value diminished, causing doubt as to how DeMoisey would be compensated. It is unclear exactly how the relationship evolved from there, but, as stated by the federal district court, at some point it became "firmly set in the minds of Hughes and DeMoisey, at least, an understanding that DeMoisey would receive one-third of the results of the litigation." *Exact Software N.A., Inc. v. Infocon, Inc.*, No. 3:03CV7183, 2012 WL 1142476, at *8 (N.D. Ohio Apr. 4, 2012). Sometime around late 2004 or early 2005, approximately two years into the Exact litigation, DeMoisey drafted and delivered a fee agreement converting his one-third interest in Alocam to a contingency fee for one-third of any recovery from Exact. Hughes and Nijhawan deny ever signing any fee agreement with DeMoisey. A signed agreement has never been produced.[6]

[5] Hughes and Nijhawan would also each own a one-third interest in Alocam.

[6] Nijhawan denies ever agreeing to a contingency fee with DeMoisey. Hughes, however, acknowledged an agreement during a September 18, 2007, status conference before the Ohio federal district court. Testifying under oath, Hughes responded to the court's questions as follows:

> THE COURT: Now I gather what we're now talking about is the dispute regarding ultimately attorney's fees. And from your

The Exact litigation dragged on for several years.[7] On February 28, 2007, Infocon and Exact participated in a mediation of their lawsuit at the Seelbach Hotel in Louisville, Kentucky. As recounted by the federal district court presiding over the dispute, this mediation culminated in a tentative settlement being reached between the parties:

> On February 28, 2007, Infocon and Exact participated in a mediation of their lawsuit. Mr. Patel, head of Exact's Dutch operations, and Mr. Kent, head of Exact's North American operations, attended, along with their attorney, as did DeMoisey and Infocon's principals, Deepak Nijhawan and Robert Hughes. Patel and Kent had to leave fairly shortly after the mediation started. Just before they did so, Kent and Hughes went to the restroom together. When they came out, Hughes announced that the case had been settled for $4 million. Patel stated that Nijhawan and Kent would have to go to Dallas to finalize the settlement.

Exact Software N.A., Inc., supra, 2012 WL 1142476, at *3.

A few days later, on March 2, 2007, DeMoisey met with Nijhawan and Hughes to discuss the approach they should take while in Dallas. Hughes and Nijhawan told DeMoisey that they each wanted to net $1 million. Hughes confirmed that they wanted DeMoisey to get the same amount for his fee. This

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> standpoint, if I may ask, and what was-was your understanding a contingency understanding?
>
> MR. HUGHES: Was one-third. There were expenses that were to come off the top and one-third of the net.

Exact Software N.A., Inc. v. Infocon, Inc., No. 3:03CV7183, 2008 WL 2622943, at *2 (N.D. Ohio June 30, 2008).

[7]The Exact litigation would eventually result in two separate attorney malpractice actions with Exact suing its former counsel and Infocon suing DeMoisey. The DeMoisey malpractice action is directly related to the present dispute.

apparently led to a discussion among the three concerning how much each would need to gross before taxes to net a million dollars each. DeMoisey explained his fee would be taxed as ordinary income whereas theirs would be taxed at the capital gains rate. DeMoisey also recommended paying his associate, Jonathan Breitenstein, and local counsel, Carey, bonuses out of the settlement. To accomplish a net of $1 million to each of the three of them and give something to Breitenstein and Carey as bonuses, DeMoisey recommended settling for $5.3 or $5.4 million instead of the $4 million they had discussed at the mediation.

This conversation did not sit well with Nijhawan and Hughes. Apparently, they perceived DeMoisey's suggestion as an attempt to get more than a one-third contingency fee. While this may not have been DeMoisey's intent, Nijhawan and Hughes clearly thought DeMoisey was overreaching. What followed next was a breakdown in communication. This litigation is the result of that breakdown and its aftermath.

The Dallas trip was scheduled for March 12, 2007. On March 7, 2007, Hughes and Nijhawan opened a new checking account in the name of Infocon. At some point, they also contacted Peter L. Ostermiller about representing them for the purpose of disputing DeMoisey's fee.[8] On March 12, 2007, Hughes and Nijhawan flew to Dallas where they met with the executive officers of Exact's parent Dutch company, Exact Holding NV. At the Dallas conference, Hughes, Nijhawan and Exact agreed to a settlement of $4 million

[8] The date of Infocon's first interaction with Ostermiller has not been established for the purposes of this litigation.

dollars, the same sum they had discussed the prior month at the Seelbach Hotel. Before returning to Louisville, Hughes and Nijhawan called Ostermiller from the airport in Dallas to report that they had settled the Exact matter. On March 15, 2007, Ostermiller sent Infocon an engagement letter. In part, the letter set forth that Ostermiller had been engaged "regarding any potential attorney's fees and expense dispute between Infocon Systems, Inc., and its counsel, Fox DeMoisey, and issues related directly thereto."

Sometime thereafter, Ostermiller referred Hughes and Nijhawan to Scott P. Zoppoth, another Louisville attorney. On or about July 7, 2007, Hughes and Nijhawan retained Zoppoth relative to "the preparation, and/or review of the settlement documents regarding the resolution of [the] lawsuit involving Exact Software of North America." Neither Hughes nor Nijhawan told DeMoisey that they had retained Ostermiller or Zoppoth.

At the request of the parties, the federal district court had stayed the Exact litigation until August 2007, so that the parties could work on a possible settlement. In late July 2007, with a status report coming due in federal court, DeMoisey contacted Exact and requested a final written confirmation of the settlement agreement. On July 31, 2007, Exact's counsel advised DeMoisey that a settlement agreement was complete and would be forwarded immediately to him. DeMoisey and Exact's counsel then advised the federal district court that their settlement agreement was final. The federal district court entered an order the

same day acknowledging the settlement and ordering that any disputes regarding the terms of the settlement were to be submitted to the court for final adjudication.

After receiving and reviewing the written settlement agreement, DeMoisey forwarded Exact's counsel the specifics of his office's IOLTA,[9] attorney escrow account and wiring instructions for the settlement payment. However, shortly thereafter, Exact's counsel contacted DeMoisey and said that Exact would need to "push back" the payment until late August.[10] This aroused some concern and suspicion with DeMoisey. DeMoisey asked his associate to do some research into Exact. As a result of his research, DeMoisey's associate discovered Exact NV's T-1 Securities and Exchange Commission Report. The report, dated July 26, 2007, alarmed DeMoisey because it indicated that no settlement had been reached in the Exact litigation.[11]

On August 7, 2007, Hughes advised DeMoisey that he had edited and revised the settlement agreement. Despite DeMoisey's requests to see the revised settlement, it was not provided to him by either Hughes or Exact. DeMoisey believes that Infocon did not want him to see the settlement agreement because Hughes had revised it to provide that Exact was to deposit the settlement proceeds

[9] Interest on Lawyers Trust Account.

[10] Ostermiller alleges that the delay in funding the settlement was not due to any cash shortage, but was a subterfuge designed to defraud Exact's shareholders, which Hughes and Nijhawan were made aware of at the Dallas meeting.

[11] This prompted DeMoisey to send the T-1 Report to Exact's counsel asking for an explanation. When none was forthcoming, DeMoisey decided that he had a duty to advise the court and request its assistance in dealing with the matter. Exact's counsel responded with its own letter to the court stating that the court's assistance was not necessary. The court advised that it would await further developments.

in the "Infocon Escrow Account at First Capital Bank of Kentucky, 293 Hubbards Lane, Louisville, KY 40207."[12] This was the bank account that Hughes and Nijhawan had opened in March before they flew to Dallas.

On August 10, 2007, Ostermiller contacted DeMoisey and advised him that Infocon had retained him to address a fee dispute and further told him to anticipate correspondence from Infocon. Even though Infocon and its principals had engaged Ostermiller approximately five months earlier, in March of 2007, this was the first time DeMoisey was made aware of any potential dispute regarding his fee in the Exact matter or Ostermiller's involvement with Infocon.

Two days later, on August 12, 2007, DeMoisey received a letter from Hughes advising him of his discharge "for many reasons which I will not outline in the letter, other than to say that we are very dissatisfied with the legal representation you have provided to Infocon." In response to this termination letter, DeMoisey and local counsel, Carey, moved to withdraw and filed respective Charging Liens (for earned yet unpaid attorneys' fees) with the federal district court. While Ostermiller had not been retained by Infocon to represent it in the underlying litigation with Exact, Ostermiller did enter an appearance on behalf of Infocon in the federal district court with respect to DeMoisey's charging lien. Given the charging liens, the federal district court required Exact to pay the entire $4 million settlement into the court's registry.

[12] DeMoisey maintains that this account was in no way, shape, or form a true "escrow account."

The federal district court held a hearing on September 18, 2007. During the hearing, Hughes testified that his understanding of the fee arrangement with DeMoisey for the Exact ligation was that DeMoisey's fee was contingent on the outcome of Infocon's counterclaims. Hughes explained that the fee was to be "one-third of the net" after expenses. Following the hearing, the federal district court made a partial distribution of the settlement funds. The court ordered that $2.5 million was to be transferred from the court's registry into Infocon's account. Of the remaining $1.5 million in the court registry, $38,406.86 was to be paid to local counsel Carey's office to satisfy its outstanding invoices to Infocon and another $200,000 was to be paid to DeMoisey, leaving the balance subject to the fates of further litigation. The federal district court retained jurisdiction over the charging lien and the remainder of the settlement monies.

On February 29, 2008, DeMoisey filed a motion for summary judgment with the federal district court relative to his charging lien. While the parties were awaiting the federal district's ruling on the summary judgment motion, on May 27, 2008, Hughes, Nijhawan, and Infocon, with Ross Turner, a Louisville attorney, as their counsel, filed a complaint in Jefferson Circuit Court against DeMoisey and his office alleging professional malpractice and actionable misconduct as related to DeMoisey's representation of Infocon in the Exact federal litigation.[13] DeMoisey believes that Ostermiller was the instrument behind the

[13] DeMoisey maintains that the malpractice action was devoid of any merit. As explained in further detail below, the action was eventually dismissed as time-barred. Accordingly, the substantive merit, if any, of the lawsuit was never resolved. However, the federal court reviewed the expert opinion filed as part of the action and found it lacking in many respects. Nevertheless,

malpractice action and intrinsically involved in Turner's decision to file it. In any event, Ostermiller later entered his appearance as co-counsel on behalf of Hughes, Nijhawan and Infocon.[14] DeMoisey counterclaimed seeking payment of his fee pursuant to his alleged contingency fee agreement with Infocon. The federal litigation with respect to DeMoisey's charging lien was stayed, pending resolution of the Kentucky action.

On October 22, 2009, the Jefferson Circuit Court found that the malpractice action was time-barred and granted summary judgment in favor of DeMoisey. On August 4, 2010, that court next held that no valid and enforceable fee agreement existed between DeMoisey and Infocon and, therefore, DeMoisey's breach of contract claim was not cognizable. Any fee DeMoisey was entitled to as related to his representation of Infocon in the Exact matter would have to be determined by the federal district overseeing that matter on the basis of *quantum meruit*. The Jefferson Circuit Court based its finding on the fact that DeMoisey had failed to present Infocon with a written agreement within a "reasonable time" as required by Kentucky Supreme Court Rules ("SCr") 3.130 (1.5).

The circuit court's order provides:

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the federal court did note that DeMoisey failed to keep the principals of Infocon fully informed as the Exact litigation progressed.

[14] Turner withdrew as counsel due to illness. He died a short time later. As a result, Ostermiller took over the malpractice action.

Mr. DeMoisey argues that SCr 3.130 (RPR 1.5) does not prohibit the enforcement of a tendered, but unsigned, contingency fee agreement and the Counterclaim Defendants [Infocon, Hughes and Nijhawan] are therefore estopped from challenging its enforcement. While it may be accurate to state that a contingency fee agreement need not be signed by clients, Mr. DeMoisey's submission of the agreement to the Counterclaim Defendants clearly failed to meet the rather minimal requirements of SCr 3.130(1.5)(b) and (c). At the time in question, the rules in relevant part read as follows:

> (b) When the lawyer has not regularly represented the client, the basis or rate of the fee should be communicated to the client, preferably in writing before or within a reasonable time after commencing the representation.
>
> (c) A fee may be contingent on the outcome of the matter for which a service is rendered . . . A contingent fee agreement shall be in writing and should state the method by which the fee is to be determined. . . .

When read together, these subsections require a lawyer who desires to represent a client under a contingency fee arrangement to submit it in writing either "before or within a reasonable time" after representation starts. (That is, unless the attorney and client have sufficient previous experience with one another to allow the client to know what the fee arrangement will be.) There is no quantification of what constitutes reasonableness with respect [to] the time within which to submit the agreement to the client. No Kentucky case law is on point, but DeMoisey's position is contrary to the holding of *Stakey, Kelly, Blaney & White v. Estate of Nicolaysen*, a New Jersey case that concluded a contingency fee agreement submitted over two years after representation started was unenforceable. 796 A.2d 238, 242 (N.J. 2002). This rule helps to prevent the mischief and animosity that could arise if lawyers were allowed to set the percentage of the recovery they receive after

> substantial amounts [of] both time and effort have passed. By that point, the client's freedom to negotiate may be severely constrained. Although this necessarily did not fall within the gamut of Mr. DeMoisey's previous representation. Therefore, for the reasons above, Mr. DeMoisey's contingent fee agreement is not enforceable against the Counterclaim Defendants [Infocon, Hughes and Nijhawan].
>
> The record does not indicate any other enforceable fee arrangement. . . . With no fee agreement in place, Mr. DeMoisey's fee must be determined on a *quantum meruit* basis.

Infocon, Hughes and Nijhawan then appealed the dismissal of their malpractice claim against DeMoisey to our Court.[15] DeMoisey also appealed on his breach of contract claim.[16] While the appeal was still pending, the federal district court lifted its stay and proceedings resumed in that court concerning

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[15] Ultimately, we affirmed the circuit court. In so doing, we held as follows:

> [T]he legal malpractice action accrued on March 12, 2007, when Exact and Infocon entered into an oral settlement of the Exact litigation. At that time, a readily ascertainable event occurred for purposes of any alleged malpractice committed by DeMoisey in the Exact litigation, and any injury became fixed and non-speculative regardless of the delay in executing a formal written settlement agreement or dismissing the Exact litigation. Having concluded the action accrued on March 12, 2007, the malpractice action was not timely filed unless the discovery provision of KRS [Kentucky Revised Statutes] 413.245 applies.

Hughes v. DeMoisey, No. 2010-CA-002093-MR, 2014 WL 2632504, at *7 (Ky. App. June 13, 2014), reh'g denied (Aug. 18, 2014), review denied (May 6, 2015), opinion not to be published.

[16] This Court determined DeMoisey's cross-appeal on the breach of contract issue was moot because DeMoisey had elected to pursue a fee in *quantum meruit* by filing his charging lien in federal court, thereby rendering the breach of contract claim of no consequence. *See id.* ("By electing to remove the case to federal court and recover on the basis of *quantum meruit,* DeMoisey elected that remedy and waived claims related to the existence of a contingency fee contract. *See Fruit Growers Exp. Co. v. Citizens Ice & Fuel Co.*, 271 Ky. 330, 112 S.W.2d 54 (1937) (holding there can be no recovery based on an express contract and *quantum meruit*.")).

DeMoisey's charging lien. The federal district court conducted a bench trial on the charging lien issue on December 13, 14, and 15, 2011.

On April 4, 2012, the federal district court entered its order. Therein, it awarded DeMoisey $1.4 million in attorney's fees for services performed.[17] However, in recognition that the Jefferson Circuit Court had already determined that the contingency fee agreement was not valid and enforceable, the federal district court based its result on application of *quantum meruit* principles, not on the contingency fee agreement.[18] The Sixth Circuit ultimately affirmed the federal district court's *quantum meruit* award to DeMoisey. *Exact Software N. A., Inc. v. DeMoisey*, 718 F.3d 535, 538 (6th Cir. 2013).

On August 1, 2012, DeMoisey filed the action underlying this appeal in Jefferson Circuit Court against Infocon, Hughes, Nijhawan, and Ostermiller

[17] The $1.4 million was inclusive of the $200,000 the federal district court had previously awarded DeMoisey.

[18]The federal district court arrived at the $1.4 million as follows:

> Hours/rate $750,000
> Difficulty, etc. $150,000
> Preclusion of Work $300,000
> Results obtained $300,000
> Professional Relationship ($100,000)
> Total: $1,400,000
> Less prior payment $200,000
> Amount due: $1,200,000 (plus interest that has accrued on the funds on deposit in the Court's escrow account)

Exact Software N.A., Inc., 2012 WL 1142476, at *15.

seeking relief for wrongful use of civil proceedings/malicious prosecution; abuse of process; and punitive damages. As against Ostermiller only, DeMoisey pled a claim for tortious interference with contractual relations. Ostermiller, Infocon, Hughes and Nijhawan moved to dismiss DeMoisey's complaint against them for failure to state a claim. By order entered January 16, 2013, the Jefferson Circuit Court granted in part, and denied in part, the motions to dismiss. The circuit court dismissed DeMoisey's claims of wrongful use of civil proceedings and abuse of process against all defendants *without* prejudice on the basis that the claims were premature in light of the fact that the malpractice action was still pending at the appellate level. The court denied the motion with respect to DeMoisey's tortious interference claims on the basis that additional discovery was necessary to determine whether DeMoisey had asserted cognizable claims against Ostermiller. Discovery on the tortious interference claims ensued.

Thereafter, Ostermiller filed a motion to dismiss the intentional interference with contractual relations claim on the basis that it was time-barred. Before the Jefferson Circuit Court ruled on the motion to dismiss, Ostermiller filed a motion for summary judgment on the tortious interference claims on the basis that DeMoisey had not identified any wrong committed by Ostermiller in causing Infocon to terminate DeMoisey. Those motions were denied by the Jefferson Circuit Court. In June of 2014, Ostermiller again sought dismissal of the tortious interference claim on the basis that the claim was time-barred, or, alternatively, that it failed as a matter of law because DeMoisey did not have a valid and

enforceable contingency fee agreement in place with Infocon. By order rendered October 3, 2014, the Jefferson Circuit Court determined as follows:

> Here the existence of a contract is barred by the doctrine of collateral estoppel. The issues in the action before the Jefferson Circuit Court, Division 4 involved the existence of a contract between DeMoisey and his former clients, the very existence of which is at issue. The Jefferson Circuit Court, Division 4 entered a final judgment that DeMoisey did not have an enforceable contract. DeMoisey was given a full and fair opportunity to litigate the existence of the contract in the matter before Division 4 of the Jefferson Circuit Court and DeMoisey was the losing litigant. There was not a contract with which to interfere. The court is unpersuaded by DeMoisey's argument that the Jefferson Circuit Court did not address the existence of a contingency fee agreement. The judgment clearly did.

The Jefferson Circuit Court then denied the statute of limitations issue as moot. This appeal and related cross-appeal followed.

III. Analysis

A. DeMoisey's Appeal

On appeal, DeMoisey asserts that the trial court granted summary judgment to Ostermiller on the tortious interference claims in error. On appeal of summary judgment, our standard of review is whether the trial court correctly found that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Tower Ins. Co. of New York v. Horn*, 472 S.W.3d 172, 173 (Ky. 2015); Kentucky Rules of Civil Procedure ("CR") 56.03. "The appellate review of a summary judgment decision involves the *de novo*

examination of the issues of law as applied to the record." *Administrative Office of Courts v. Miller*, 468 S.W.3d 323, 327 (Ky. 2015).

According to DeMoisey, the Jefferson Circuit Court failed to appreciate that his complaint actually set forth separate and distinct tortious interference claims against Ostermiller: 1) tortious interference with contractual relations; and 2) tortious interference with prospective contractual relations/business advantage.[19] We agree with DeMoisey that his complaint

[19] DeMoisey's tortious interference claim against Ostermiller is set out in paragraphs 181 through 194 of his complaint as follows:

> 181. J. Fox DeMoisey maintained contractual relations with, and had prospective contractual relations with Infocon Systems, Inc. by virtue of his representation of that corporation and the fees he had earned and was due by virtue of such relations.
>
> 182. J. Fox DeMoisey had a prospective business advantage by virtue of his representation of Infocon Systems, Inc., as well as the fees he had earned, and was due from Infocon Systems, Inc.
>
> 183. As set forth above, Ostermiller pursued a scheme by which he maliciously and without proper basis, caused the termination of Mr. DeMoisey's relationship and representation of Infocon Systems, Inc., and otherwise improperly interfered with J. Fox DeMoisey's representation of and relationship with Infocon Systems, Inc.
>
> 184. Ostermiller was aware of Mr. DeMoisey's relations with Infocon Systems, Inc. and intended to cause the disruption and/or cessation of that relationship.
>
> 185. Ostermiller's interference with J. Fox DeMoisey's relationship with Infocon Systems, Inc. was done knowingly, intentionally and without justification.
>
> 186. Ostermiller's actions in damaging and ending Mr. DeMoisey's relationship with Infocon Systems, Inc., and injuring Mr. DeMoisey's prospective business advantage as set forth above, evidenced malicious intent on the part of Ostermiller.
>
> 187. The actions of Ostermiller not only injured J. Fox DeMoisey but also Infocon itself.

sufficiently (although perhaps not entirely clearly) pled both a claim for tortious interference with contractual relations and a claim for tortious interference with prospective contractual relations/business advantage. As recognized by this Court in *Snow Pallet, Inc. v. Monticello Banking Co.*, 367 S.W.3d 1, 5-6 (Ky. App. 2012), those claims have separate elements and, therefore, must be analyzed differently.

We begin with DeMoisey's claim for tortious interference with contractual relations. The elements of a claim for tortious interference with contract are as follows: (1) the existence of a contract; (2) the defendant's

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> 188. Ostermiller's malicious and self-serving actions decreased the recovery which Infocon Systems, Inc. could have achieved, should have achieved and was properly due, within the Exact litigation.
>
> 189. Ostermiller's actions were self-serving and not in the interests of Infocon Systems, Inc. and were based upon personal avarice.
>
> 190. Ostermiller's actions beginning during the course of his "secret" representation of Hughes and Nijhawan and continuing thereafter, were undertaken with actual malice and the intent to harm Mr. DeMoisey.
>
> 191. Ostermiller's actions, as set forth herein, were not based upon any good faith desire to protect the legitimate business or legal interests of Infocon Systems, Inc.
>
> 192. Ostermiller's actions, as set forth herein, were motivated only by self-enrichment and personal benefit.
>
> 193. Ostermiller's actions have led to his billing Infocon and/or Robert Hughes and Deepak Nijhawan at least $213,588.51 over the course of the last five years with no benefit whatsoever being achieved by Infocon from such billed services.
>
> 194. J. Fox DeMoisey has suffered actual damages by virtue of the actions taken by Ostermiller in tortiously interfering with his relations with Infocon Systems, Inc.

knowledge of the contract; (3) that the defendant intended to cause a breach of that contract; (4) that the defendant's actions did indeed cause a breach; (5) that damages resulted to the plaintiff; and (6) that the defendant had no privilege or justification to excuse its conduct. *Id.*

The Jefferson Circuit Court granted summary judgment on the basis that DeMoisey could not prevail as a matter of law because the prior Jefferson Circuit Court action between DeMoisey and his clients resulted in a determination that the contingency fee agreement was invalid. DeMoisey acknowledges this finding, but asserts that his contingency fee agreement was voidable not void. He maintains that because the agreement was merely a voidable agreement, it can properly form the basis of an action for tortious inference with contract.

"When a bargain is void, it is as if it never existed." 1 *Williston on Contracts* § 1:20 (4th ed.) "Bargains that are contrary to express statutes or to the policy of express statutes are illegal bargains, and any such illegality voids the entire purported contract. A bargain which is plainly illegal is a nullity and void ab initio." *Id.* In contrast, "[a] voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance." *Id.*

In *Lonnie Hayes & Sons Staves, Inc. v. Bourbon Cooperage Co.*, 777 S.W.2d 940, 942 (Ky. App. 1989), Hayes charged that Glenmore Distilleries Company "tortiously, willfully and maliciously" interfered with its contractual

rights by causing the Bourbon Cooperage Company to repudiate its oral agreement with Hayes to purchase "all of the staves Hayes could produce." The trial court ruled that Hayes's counterclaim was barred by the Statute of Frauds contained in KRS[20] 355.2–201 because none of the documents in the case supported the existence of a contract between Bourbon and Hayes concerning Bourbon's purchase of Hayes's output of staves. In reversing the trial court, we noted that even if a writing was required by KRS 355.2–201, the existence of an oral contract would be sufficient to support a claim for tortious interference with contract. *Id.* at 942-43 ("We also note that even if the oral contract had been properly ruled unenforceable under KRS 355.2–201, it appears Hayes could still maintain an action for tortious interference with the contract.").

In *Goodman v. Goldberg & Simpson, P.S.C.*, 323 S.W.3d 740 (Ky. App. 2009), we considered yet another claim of tortious interference with contract where the validity of the underlying contract was at issue. In *Goodman*, the appellant, Philip Goodman, appealed from a summary judgment granted in favor of Goldberg & Simpson, P.S.C., Steven A. Goodman, and Wayne F. Wilson, dismissing his tort claims relating to the distribution of assets from the estates of Leah and Lawrence Goodman. The appellant maintained that the appellees had distributed the decedent's estate in contravention of an oral agreement whereby the decedent, Lawrence Goodman, prior to his death promised to devise one-half of his estate to appellant in consideration of appellant's promise not to pursue civil and

[20] Kentucky Revised Statutes.

criminal charges against the decedent. We affirmed the trial court's dismissal on the ground that the appellant could not prove that a valid contract existed between himself and the decedent because pursuant to KRS 394.540(1), a contract to make a will or devise can only be established if it is in writing. Since there was no written contract between the parties, we held the appellant could not establish a tortious interference with contract claim.

In so holding, we distinguished *Hayes* as follows:

> Philip cites *Lonnie Hayes & Sons Staves, Inc. v. Bourbon Cooperage Co.*, 777 S.W.2d 940, 942 (Ky.App.1989), in support of the proposition that the enforceability of a contract is not a precondition to a tort action regarding the performance of a contract. This argument is misplaced because *Lonnie Hayes* dealt with the Statute of Frauds, KRS 355.2–201(1). The Statute of Frauds concerns the enforceability of certain types of contracts whereas KRS 394.540(1) specifically concerns the formation of contracts to execute a will. The supposed contract in this case did not conform to the requirements of KRS 394.540(1). According to the clear language of that statute, no contract was formed. By way of comparison, the Statute of Frauds simply prohibits the enforceability of certain otherwise properly formed contracts that are not in writing. In the *Lonnie Hayes* case, the contract at issue was valid, but unenforceable by virtue of the Statute of Frauds. In the present case, there was no valid contract as a matter of law.

Id. at 745-46.

Hayes and *Goodman* read together give us the following rule: a voidable contract, like the one in *Hayes*, can support a claim for tortious interference with contract whereas a void contract, like the one in *Goodman*,

cannot. Therefore, we must determine whether the contingency fee contract in this case is void or voidable.

DeMoisey argues that the contingency fee agreement he reached with Hughes was merely voidable at Infocon's option as opposed to being void as a matter of law. DeMoisey goes on to assert that, but for Ostermiller's interference, Infocon would have honored the contingency agreement notwithstanding the fact that it was not in compliance with SCr 3.130–1.5(a).

We disagree with DeMoisey that the oral contingency fee agreement he reached with Hughes nearly two years into the litigation was merely voidable by Infocon as opposed to void. "In a contingency fee arrangement, a written contract is required." *Lofton v. Fairmont Specialty Ins. Managers, Inc.*, 367 S.W.3d 593, 597 (Ky. 2012). When DeMoisey failed to present Infocon with a written contingency fee agreement within a reasonable time of *commencing* his representation in the Exact litigation, he lost the ability to charge a contingency fee. His later attempts to secure an agreement for a contingent fee with Hughes where not sufficient to create a valid contingency fee arrangement with Infocon. Even if Hughes had expressed some agreement with Infocon paying DeMoisey a contingent fee later in the litigation, it is clear to us that a written contingency fee agreement was not presented to Infocon until some two years or more into the litigation.

This situation is quite similar to the alleged contingency fee agreement our Supreme Court confronted in *Kentucky Bar Ass'n v. Womack*, 269

S.W.3d 409, 410 (Ky. 2008), an attorney discipline case. In *Womack*, the respondent agreed to represent a husband and wife in a foreclosure action. The attorney met with the husband and agreed to take on the representation. The respondent asserted that the husband agreed to a contingent fee, but there was no written contingency fee agreement presented to the couple at this time. After the foreclosure, a sum of $33,946.77 was sent to the respondent, as the wife's share of the proceeds.[21] The respondent sent a written letter to the wife explaining that he had taken 20% of the $33,946.77 as his contingency fee. The couple filed a bar complaint on the basis that the respondent had charged a contingency fee without having a written agreement in place with them. On review, our Supreme Court considered whether it was proper to sanction the respondent both for his failure to have a written agreement and for charging an unreasonable contingent fee. The Supreme Court explained that the unreasonable nature of the fee was a moot issue because there was never a valid/enforceable contingent fee agreement in place in the first instance:

> The claim that he charged an unreasonable contingency fee assumes that he was entitled to charge *some* contingency fee. However, because he did not have a *written agreement* with the Parkses, as alleged in Count II, he was *not* entitled to charge a contingency fee and could charge only according to his hourly rate. In fact, any ethical failure on Respondent's part regarding his fee was improperly charging a contingency and refusing to return any excess over his hourly rate—both of which are covered by Counts II and III. A finding of guilt under Count I would essentially be a finding that he was guilty of an ethical violation on a non-existing contingency fee,

[21] The IRS had a tax lien against the husband so his entire portion went to the IRS.

> the propriety of which has already been judged elsewhere in this Opinion.

Id. 413-14; *see also Kentucky Bar Ass'n v. Thornton*, 392 S.W.3d 399, 415 (Ky. 2013) ("We conclude that Thornton failed to reduce a contingency fee agreement to writing in violation of SCR 3.130–1.5(c). It was therefore improper for Thornton to collect the one-third contingency fee."); *Webster v. Kentucky Bar Ass'n*, 183 S.W.3d 174, 176 (Ky. 2006) ("[W]e expect that with this public reprimand Webster will not take [contingency] fees again without a written client agreement as stated in that rule.").

Our Supreme Court requires contingency fee agreements to be in a writing, presented to the client within *a reasonable time*, by virtue of SCr 3.130–1.5. We believe that our Supreme Court's ethical rules regulating the practice of law in this Commonwealth are expressions of public policy.[22] An attorney is not permitted to charge or seek a contingency fee against his client's recovery unless the fee agreement complies with SCR 3.130–1.5.

It cannot be disputed that DeMoisey's breach of contract claim against Infocon in the prior action resulted in a finding by the Jefferson Circuit

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[22] Under the *Restatement (Second) of Contracts'* approach, the ethical rules governing lawyers should qualify as "legislation" capable of articulating public policy. Because the rules are adopted by a state's highest court pursuant to its authority to regulate the legal profession, they should ordinarily qualify as a source of public policy. *The Restatement (Third) of the Law Governing Lawyers* similarly takes the position that a violation of an ethical rule of the legal profession may result in forfeiture of the lawyer's fee because the ethical rules are a source of a lawyer's duty to a client.

Alex B. Long, *Attorney-Client Fee Agreements That Offend Public Policy*, 61 S.C. L. Rev. 287, 300 (2009).

Court that the alleged contingency fee agreement did not comply with SCr 3.130 (1.5).[23] The Jefferson Circuit stated in its written order and opinion: "DeMoisey's contingency fee agreement is unenforceable under SCr 3.130 (1.5) . . . an oral promise to pay a contingency fee is unenforceable."

Where an agreement in its very nature is forbidden as a matter of public policy, "it is then *ipso facto* void, and neither party can maintain an action upon it, regardless of what the other may or may not have done under it." *Kentucky Ass'n of Highway Contractors v. Williams*, 213 Ky. 167, 280 S.W. 937, 939 (Ky. 1926). Because an agreement which is void cannot form the basis of a claim for tortious interference with contractual relations, *Goodman*, 323 S.W.3d at 745-46, the circuit court was correct in granting summary judgment to Ostermiller.[24] *See Liability for Interference with Invalid or Unenforceable*

[23]"[A] party is bound by a prior adjudication against it on an issue if the prior issue was an essential component of that action, even though the parties were not completely identical in each action." *Miller v. Admin. Office of Courts*, 361 S.W.3d 867, 872-73 (Ky. 2011) (quoting *Jellinick v. Capitol Indem. Corp*., 210 S.W.3d 168, 171 (Ky. App. 2006). Thus, we are bound by the Jefferson Circuit's factual finding in the prior malpractice action.

[24] While not bound by federal authority applying Kentucky law, we find the Sixth Circuit's analysis in *Martello v. Santana*, 713 F.3d 309, 310 (6th Cir. 2013), as to why agreements in violation of the ethical rules are void to be well grounded. In *Martello*, a doctor (who also had a law degree, but was unlicensed) and an attorney entered into an agreement whereby the lawyer promised to pay the doctor a percentage of recovery on certain cases the doctor referred to him. A disagreement arose between the two and the doctor sued the lawyer in federal court for breach of contract, fraud and fraudulent concealment of settlement, and breach of fiduciary duty claims. On appeal, the Sixth Circuit concluded that the agreement violated the provision prohibiting fee sharing with non-lawyers set forth in Kentucky Rules of Professional Conduct. As such, the Sixth Circuit held that the agreement was void and could not support a breach of contract claim, even if it might result in a windfall to the lawyer. The Sixth Circuit explained its rationale for voiding the agreement as follows:

> Martello asserts that voiding these contracts would create a windfall for Santana at Martello's expense. This argument, while possibly true, is unpersuasive. The Rules of Professional Conduct were not created to protect non-lawyers who enter into contracts

Contract, 96 A.L.R.3d 1294 § 2 (1979) ("All of the cases in this annotation involving invalid contracts support the view that, regardless of the particular ground for invalidity, such as contracts in restraint of trade or those containing covenants not to compete, there is no liability for interfering with an invalid contract.").

The sixth element necessary to prevail on a tortious inference with contract claim is that the defendant "had no privilege or justification to excuse its conduct." *Snow Pallet*, 367 S.W.3d at 5-6. While not analyzed by the circuit court, we also believe that summary judgment in favor of Ostermiller would have been proper under this factor as well.[25]

The *Restatement (Second) of Torts* § 772 (1979) provides that:

> One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person
> (a) truthful information, or
> (b) honest advice within the scope of a request for the advice.

Id. Comment c to this section of the *Restatement* explains:

> The rule as to honest advice applies to protect the public and private interests in freedom of communication and friendly intercourse. In some instances the rule protects

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with attorneys, but were instead designed to ensure both that the judicial process is ethical and to protect potential clients.

Id. at 314.

[25] "[I]t is well-settled that an appellate court may affirm a lower court for any reason supported by the record." *McCloud v. Commonwealth*, 286 S.W.3d 780, 786, fn. 19 (Ky. 2009).

> the public and private interests in certain professions or businesses. Thus the lawyer, the doctor, the clergyman, the banker, the investment, marriage or other counselor, and the efficiency expert need this protection for the performance of their tasks. But the rule protects the amateur as well as the professional adviser. The only requirements for its existence are (1) that advice be requested, (2) that the advice given be within the scope of the request, and (3) that the advice be honest. If these conditions are present, it is immaterial that the actor also profits by the advice or that he dislikes the third person and takes pleasure in the harm caused to him by the advice.

Id.

There is no allegation by DeMoisey that Ostermiller unilaterally sought out Infocon. Rather, a review of the record reveals that following the March 2, 2007, meeting with DeMoisey, Hughes and Nijhawan became dissatisfied with DeMoisey's representation and suggestions regarding his fee. At some point, on or before March 12, 2007, Hughes and Nijhawan contacted Ostermiller and sought his legal advice concerning DeMoisey's fee. While DeMoisey may disagree with the advice Ostermiller gave, there has been no showing on his part that the advice was untruthful. In fact, if part of that advice was that DeMoisey was not entitled to collect a contingency fee for lack of a *timely* writing, then that advice has proven to be correct. That Ostermiller was compensated for his work on the fee dispute does not make his "interference" wrongful. *See, e.g., Koch v. Mut. of Enumclaw Ins. Co.*, 108 Wash. App. 500, 508, 31 P.3d 698, 702 (Wash. App. 2001), publication ordered (Sept. 12, 2001) ("The

protection of § 772 would be illusory if the fact that the advisor was paid for the advice automatically raised an inference of dishonesty or bad faith.").

Clients should be free to question their dealings with attorneys and seek out legal advice if they feel they have been wronged somehow. So long as the advice is requested, an attorney who advises a client that there may be defenses to another lawyer's contingency agreement or that such an agreement may not be valid, should not be subject to a later claim for tortious inference.[26] Any rule to the contrary would place improper and undue barriers on the attorney-client relationship, and prevent attorneys from giving the undivided loyalty required of them. *See, e.g., Walsh v. O'Neill*, 350 Mass. 586, 590, 215 N.E.2d 915, 918 (Mass. 1966) ("There is, we think, a strong public policy to assure one in need of legal help freedom to select an attorney, to change attorneys, and to seek and obtain advice as to the competency and suitability of any attorney for the particular need of the client."); *Joseph P. Caulfield & Associates, Inc. v. Litho Prods., Inc.*, 155 F.3d 883, 891 (7th Cir. 1998).

We now turn to DeMoisey's claim for tortious interference with prospective contractual relations/business advantage. As pointed out by

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[26] We find the *Restatement (Third) of the Law Governing Lawyers* § 57 (3) (2000) instructive on this point. It provides:

> A lawyer who advises or assists a client to make or break a contract, to enter or dissolve a legal relationship, or to enter or not enter a contractual relation, is not liable to a nonclient for interference with contract or with prospective contractual relations or with a legal relationship, if the lawyer acts to advance the client's objectives without using wrongful means.

Id.

DeMoisey, the circuit court failed to consider that this claim does not require the existence of a contract. *See Snow Pallet*, 367 S.W.3d at 5-6. To prevail on a claim for tortious interference with prospective contractual relations/business advantage a plaintiff must prove: (1) the existence of a valid business relationship or expectancy; (2) that the defendant was aware of this relationship or expectancy; (3) that the defendant intentionally interfered; (4) that the motive behind the interference was improper; (5) causation; and (6) special damages. *Id.*

"[I]t is clear that to prevail [on a claim for tortious interference with prospective contractual relations/business advantage] a party seeking recovery must show malice or some significantly wrongful conduct." *Nat'l Collegiate Athletic Ass'n By & Through Bellarmine Coll. v. Hornung*, 754 S.W.2d 855, 859 (Ky. 1988). "The context and the course of the decisions make it clear that what is meant is not malice in the sense of ill will but merely 'intentional interference without justification.'" *Id.*

Based on a review of the record, specifically DeMoisey's complaint, it appears that he imputes malice to Ostermiller based on the fact that Ostermiller has profited from representing Infocon in its fee dispute with DeMoisey. To this end, DeMoisey's complaint alleges:

> 192. Ostermiller's actions, as set forth herein, were motivated only by self-enrichment and personal benefit.
>
> 193. Ostermiller's actions have led to his billing Infocon and/or Robert Hughes and Deepak Nijhawan at least $213,588.51 over the course of the last five years with no benefit whatsoever being achieved by Infocon from such

billed services.

In *Halle v. Banner Indus. of N.E., Inc.*, 453 S.W.3d 179, 188 (Ky. App. 2014), we held that "the judicial statements privilege is applicable to claims for tortious inference with business relations and, therefore, any statements made preliminary to, or in the institution of, or during the course of litigation that were material, pertinent and relevant to such litigation cannot be used to support the claim." Ostermiller, as an attorney, was justified in advising Hughes and Nijhawan with respect to their relationship with and contingent fee, if any, owed to DeMoisey. *Id.* The fact that Ostermiller ended up profiting when Hughes and Nijhawan engaged him to challenge DeMoisey's fee does not make Ostermiller's motives in giving requested legal advice "improper." *Cullen v. S. E. Coal Co.*, 685 S.W.2d 187, 190 (Ky. App. 1983).

As explained in comment g to the *Restatement (Third) of the Law Governing Lawyers* § 57 (2000):

> So long as the lawyer acts or advises with the purpose of promoting the client's welfare, it is immaterial that the lawyer hopes that the action will increase the lawyer's fees or reputation as a lawyer or takes satisfaction in the consequences to a nonclient. Nor does a lawyer become liable to nonclients for giving with a proper purpose advice that is negligent or harms the client.

Id.

Furthermore, in the absence of a valid contingency fee agreement, DeMoisey's only valid business expectancy was to be compensated on a *quantum meruit* basis. "*Quantum meruit* literally means 'as much as he has deserved.'"

JP White, LLC v. Poe Companies, LLC, No. 2010-CA-000267-MR, 2011 WL 1706751, at *5 (Ky. App. May 6, 2011) (quoting *Black's Law Dictionary* 1255 (7th ed.1999). "However, merely because work was performed that benefited another does not necessarily warrant recovery." *Quadrille Bus. Sys. v. Kentucky Cattlemen's Ass'n, Inc.*, 242 S.W.3d 359, 365 (Ky. App. 2007). Among other elements, an attorney proceeding under a theory of *quantum meruit* bears the burden of proving the value of his services.[27] *Id.*

DeMoisey was awarded a *quantum meruit* fee with interest by the federal district court.[28] Infocon had a right to challenge DeMoisey's fee request, which it exercised. DeMoisey cannot hold Ostermiller liable simply because he represented Infocon in seeking to reduce DeMoisey's fee. To hold otherwise would be to deprive a client from ever obtaining counsel to challenge a *quantum meruit* fee request made by the client's former counsel. We cannot sanction such an outcome.

In sum, we believe there are no disputed facts in the record to support a claim for tortious interference with prospective contractual relations/business

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[27] "The party proceeding under a *quantum meruit* theory must establish the following elements:

> 1. that valuable services were rendered, or materials furnished;
> 2. to the person from whom recovery is sought;
> 3. which services were accepted by that person, or at least were received by that person, or were rendered with the knowledge and consent of that person; and
> 4. under such circumstances as reasonably notified the person that the plaintiff expected to be paid by that person." *Id.*

[28] We would be remiss if we did not point out that the $1.4 million dollars (with interest) awarded to DeMoisey in *quantum meruit* is greater than the $1.2 million dollars DeMoisey would have recovered under his alleged contingency fee agreement with Infocon.

advantage. DeMoisey had an expectancy that he would receive some fee in *quantum meruit*. He had no valid expectancy that Infocon would not challenge his request as part of the federal district court action. For this reason, Ostermiller cannot be held to have improperly interfered with DeMoisey's expectancy when he represented Infocon as related to DeMoisey's fee.

Ostermiller's Cross-Appeal

Ostermiller has cross-appealed the trial court's dismissal of DeMoisey's wrongful use and abuse of process claims only to the extent that those dismissals were made *without* prejudice. Ostermiller submits to us that the dismissal of those claims should have been *with* prejudice.

The circuit court dismissed the abuse of process claims against Ostermiller without prejudice on the basis that the underlying malpractice action was not finally concluded at the appellate level at that time. Thus, the circuit court believed that the abuse of process claim against Ostermiller was premature. Ostermiller believes that the dismissal should have been with prejudice because the claim is time-barred, and, alternatively, because it is barred by the judicial privilege doctrine.

"An action for abuse of process is 'the irregular or wrongful employment of a judicial proceeding.'" *Simpson v. Laytart*, 962 S.W.2d 392, 394 (Ky. 1998) (quoting *Stoll Oil Refining Co. v. Pierce*, 337 S.W.2d 263 (Ky. 1960)). "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which that process is not designed, is subject to

liability to the other for harm caused by the abuse of process." *Sprint Commc'ns Co., L.P. v. Leggett*, 307 S.W.3d 109, 113 (Ky. 2010) (citing *Restatement (Second) of Torts* § 682 (1977)). "The essential elements of abuse of process, as the tort has developed, have been stated to be: First, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding." *Williams v. Cent. Concrete Inc.*, 599 S.W.2d 460, 461 (Ky. App. 1979).

We explicitly held in *Halle, supra,* that "the judicial statement privilege has no application to abuse of process claims." *Halle*, 453 S.W.3d at 187. Our holding in *Hall*e is equally applicable in this case. Thus, the circuit court did not err in failing to dismiss the abuse of process claim on the basis of the judicial statement privilege.

"[A]n action for abuse of process will not lie unless there has been an injury to the person or his property." *Raine v. Drasin*, 621 S.W.2d 895, 902 (Ky. 1981). In Kentucky, a personal injury claim must be brought within one year after the cause of action accrues. KRS 413.140(1)(a). Thus, we know that the statute of limitations on an abuse of process claim is one year. The question is, when does an abuse of process claim accrue?

It is correct that the statute of limitations does not begin to run on a malicious prosecution claim until the underlying litigation has been concluded. *See Dunn v. Felty*, 226 S.W.3d 68, 73 (Ky. 2007). However, "[w]hile the two torts of abuse of process and malicious prosecution often accompany one another, they are distinct causes of action." *Garcia v. Whitaker*, 400 S.W.3d 270, 277 (Ky.

2013). "The distinction between an action for malicious prosecution and an action for abuse of process is that a malicious prosecution consists in maliciously causing process to be issued, whereas an abuse of process is the employment of legal process for some other purpose other than that which it was intended by the law to effect." *Raine*, 621 S.W.2d at 902. Thus, while the determination in a malicious prosecution centers on the legal justification for the action, which cannot be resolved until the termination of the action, abuse of process centers on the motivation behind the action, which is capable of ascertaining before conclusion of the action.

"Statutes of limitations are based on the accrual of a right of action and, therefore, begin to run from the time the cause or the foundation of the right came into existence." *Jordan v. Howard*, 54 S.W.2d 613, 615 (Ky. 1932). "A cause of action accrues when a party has the right and capacity to sue[.]" *Lexington-Fayette Urban Cty. Gov't v.Abney,* 748 S.W.2d 376, 378 (Ky. App. 1988)

While no Kentucky appellate case appears to have addressed when the statute of limitations on an abuse of process claim begins to accrue, of those jurisdictions which have done so, the rule is virtually universal that the statute of limitations for an abuse of process claim commences "to run, from the termination of the acts which constitute the abuse complained of, and not from the completion of the action in which the process issued." J. A. Bock, *When Statute of Limitations*

Begins to run Against Action for Abuse of Process, 1 A.L.R.3d 953 (Originally published in 1965).

As previously set forth, an abuse of process claim, unlike a malicious prosecution claim, does not require as an element a successful outcome in the underlying action. Rather, the focus of such a claim is whether there was a willful act in the use of the process not proper in the regular conduct of the proceeding.[29]

[29] The principle is aptly explained in a comment to the *Restatement (Second) of Torts* § 682 (1977):

> a. The gravamen of the misconduct for which the liability stated in this Section is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed under the rule stated in this Section.
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> Illustrations:
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> 1. A, the master and owner of a vessel, mortgages it to B, with a stipulation that A shall retain the possession of the vessel and make voyages in it. In order to compel A to give up the register of his vessel, to which B was not entitled under the terms of the mortgage, B causes a capias to issue in an action to recover the amount loaned, knowing that A cannot pay the money or obtain bail. A is arrested under capias and kept in prison until he gives up the register, his lack of which prevents him from making several profitable voyages. B is subject to liability to A for abuse of process, although the proceedings have not terminated in A's favor and irrespective of whether B has probable cause for the action in which the capias was issued.
>
> 2. A obtains a judgment against B for a debt owed by him. After the debt has, to his knowledge, been paid, A takes out execution on the judgment. A is subject to liability to B for abuse of process.
>
> 3. A, an attorney to whom C has entrusted the collection of a debt owed by B, assigns C's claim to D, who resides some distance

Thus, the claim rises or falls on the conduct occurring "at the time the [underlying] action was filed." *Morrow v. Brown, Todd & Heyburn*, 957 S.W.2d 722, 726 (Ky. 1997). For this reason, we hold that the cause of action for an abuse of process claim accrues at the time the conduct complained of by the plaintiff occurred, not at the termination of the underlying litigation. *See, e.g., Read v. Fairview Park*, 146 Ohio App. 3d 15, 17, 764 N.E.2d 1079, 1080 (Ohio App. 2001) ("[T]he statute of limitations for an abuse-of-process claim begins to run on the date of the allegedly tortious conduct); *Corley v. Jacobs*, 820 S.W.2d 668, 672 (Mo. App. 1991) ("A cause of action for abuse of process generally accrues, and the statute of limitations begins to run, from the termination of the acts which constitute the abuse complained of, and not from the completion of the action in which the process issued."); *Yoost v. Zalcberg*, 925 N.E.2d 763, 771 (Ind. App. 2010) ("A cause of action for abuse of process accrues when the act complained of—here, the filing of Yoost's counterclaim—is committed.").

In his complaint, DeMoisey complained that Ostermiller's alleged "abuse of process" occurred either when he convinced attorney Turner to file the malpractice action in 2007 or when Ostermiller, having taken it over, procured a

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> from B. In accordance with A's instructions D brings an action as assignee and causes a subpoena to issue at a time when it is extremely inconvenient for B to appear, A's purpose being to force B to pay the claim rather than to undergo the inconvenience of appearance. B not appearing, A causes a bench warrant to issue for his arrest under which B is fined and execution against his body is ordered. Before this order is carried out, B brings his action against A. A is subject to liability to B for abuse of process.

Restatement (Second) of Torts § 682 (1977)

baseless attorney opinion in 2008, that DeMoisey breached the standard of care. DeMoisey did not file this action until 2012. Thus, under either date, his complaint is time-barred by the one-year statute of limitations set forth in KRS 413.140.

However, DeMoisey argues that abuse of process is a continuing tort and, therefore, the statute of limitations should not accrue until total cessation has taken place. We disagree. Under the continuing tort doctrine, "where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury, or when the tortious overt act ceases[,]" and each day is considered a separate cause of action. *Stephenson v. CSX Transp., Inc.*, No. 2002-CA-001796-MR, 2003 WL 22113458, at *5 (Ky. App. Sept. 12, 2003) (citing 54 C.J.S. Limitations of Actions § 177 at 230-31 (1987)).

While DeMoisey may have continued to suffer some damage as a result of the lawsuit and/or legal opinion, the underlying tort was comprised of a single act, filing the complaint and/or opinion. Thus, DeMoisey's abuse of process claim does not meet the definition of a "continuing tort." *See No Drama, LLC v. Caluda*, 177 So. 3d 747, 752 (LA. App. 2015) ("In this case, we find that the abuse of process claim, based upon the willful and allegedly improper filing of the underlying lawsuit, is not a continuing tort. Although plaintiff alleges to have continuously sustained damages to its reputation and its finances until the dismissal of the underlying suit, the operating cause, the filing of the lawsuit, is not a continuous tort. "); *Jones v. Slay*, 61 F. Supp. 3d 806, 844 (E.D. Mo. 2014) ("The

Court concludes the Missouri continuing tort or continuing wrong doctrine does not apply to an abuse of process claim.").

IV. Conclusion

For the reasons set forth above, we AFFIRM the Jefferson Circuit Court's summary judgment on the tortious interference claims, REVERSE its dismissal of the abuse of process claim without prejudice, and REMAND this action back to the circuit court for entry of an order dismissing the abuse of process claim with prejudice.

ALL CONCUR.

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