

RENDERED: JULY 21, 2017; 10:00 A.M.
 NOT TO BE PUBLISHED

**Commonwealth of Kentucky
Court of Appeals**

NO. 2016-CA-000045-MR

CHARLES T. LICKTEIG, II

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 11-CI-006897

SGT. JAMES M. SCHWAB, JR.

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: COMBS, D. LAMBERT AND THOMPSON, JUDGES.

LAMBERT, D., JUDGE: Charles T. Lickteig, II appeals from a ruling by the Jefferson Circuit Court granting summary judgment in Lickteig's malicious prosecution action against Louisville Metro Police Sergeant James M. Schwab, Jr. Our review of the matter focuses on whether the trial court committed reversible error in granting the summary judgment where alleged factual issues exist

regarding whether probable cause supported the complaint in the underlying criminal action. We find that the trial court correctly determined probable cause existed, and, consequently, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

This appeal ultimately originated in a traffic incident occurring on August 23, 2010. Theresa Roth, who at the time worked as secretary for the chief of the Louisville Metro Police Department (“LMPD”), called 911 and Schwab’s personal cellular phone number to report witnessing a man masturbating in his car while the two vehicles sat next to each other in traffic at a stoplight. Lickteig, on the other hand, describes Roth’s allegations as entirely fabricated, having been made solely for the purpose of exacting revenge against him in a “road rage” incident.

Roth provided Schwab with a description of the man she saw, and the license plate number of his vehicle. Using that information, Schwab put together an array of six photographs of men fitting Lickteig’s general description. This array included Lickteig’s own driver’s license photo, slightly enlarged and cropped so that his face appeared more prominently among the photos in the array. Schwab presented this array to Roth, allegedly advising her that the perpetrator’s photograph was among the six. She positively identified Lickteig’s photograph as the man she saw.

Lickteig described the ensuing investigation by Schwab as “conspicuously thin.” Schwab went to the scene, and found two security cameras

which might have captured the incident, one located at a synagogue and the other at an ATM. Schwab reviewed a portion of the synagogue cameras recording and determined that it provided an inadequate view of the street. Schwab determined the ATM's camera was angled too low to have captured any useful footage, and decided to forego reviewing that footage.

Schwab made several attempts to contact Lickteig by phone to take a statement, only reaching him once, resulting in a brief conversation. Lickteig stated that he thought he knew why Schwab was calling, and declined to answer any questions without consulting with an attorney.

Schwab prepared a criminal complaint, and submitted it to his supervisor to review and an assistant Jefferson County Attorney, who both saw no issue with it. The complaint charged Lickteig with second-degree indecent exposure, specifically alleging the facts as Roth relayed them to Schwab:

Defendant unlawfully exposed his genitals to victim, Theresa M. Roth, while he was in traffic in a vehicle at Limekiln Lane and US 42. The victim was stopped in traffic next to deft's vehicle. When the victim looked over at deft, deft had his genitals exposed and was masturbating. Deft looked at the victim and knew that she saw him. Deft then drove off. A short time later, the victim was able to obtain the license plate number of the vehicle deft was driving. LMPD was called (8010065880). Deft is the registered owner of the vehicle he was driving. The victim was able to positively ID deft thru photo pack.

This complaint was duly authorized by a judge of the Jefferson County District Court.

After the issuance of the complaint, Lickteig hired a private investigator, who located Catherine Stone, an eyewitness to the confrontation between Lickteig and Roth.

The matter proceeded to a bench trial on July 14, 2011. Roth provided testimony consistent with the description of events in the complaint. Schwab testified regarding his investigation, which is described herein.

Lickteig also testified on his own behalf. He admitted being involved in an incident in traffic, but denied exposing himself. He instead testified that Roth instigated the event, riding his bumper, aggressively passing him, crossing into his lane, then abruptly slamming on her brakes, forcing him off the road and into the yard of a residence abutting the road. He further testified that Roth exited her vehicle to confront him.

Stone testified that she witnessed a woman (Roth) confronting a man (Lickteig), and upon noticing someone was there, Roth turned to Stone and told her that the man had exposed himself to Roth in a nearby park (rather than in his vehicle). Stone further testified that Roth said she was “going to get him.”

The District Court explicitly noted that it found Roth’s testimony credible, but nonetheless entered a verdict of acquittal. The court reasoned that even assuming that Lickteig had been masturbating in traffic on a public roadway, the evidence failed to establish an essential element of the offense, specifically that Lickteig had intended to draw Roth’s attention to himself. The evidence

established, according to the trial court, that the contact was incidental, rather than intentional.

Lickteig filed the instant civil action on October 21, 2011, seeking damages for malicious prosecution from Schwab. After some discovery had been taken, Schwab moved for summary judgment, asserting a defense of qualified official immunity, and also that no genuine issue of material fact existed as to the issue of probable cause. The trial court¹ concluded that Schwab was not entitled to immunity, but granted the motion based on the latter argument.

Lickteig then appealed the judgment to this Court. In an unreported opinion² we reversed the entry of the judgment, and remanded the matter for further proceedings. Schwab did not appeal the trial court's ruling on the immunity issue. We concluded that the entry of summary judgment by the trial court was premature, owing to the lack of meaningful opportunity to conduct discovery.³ The majority's opinion did not address the merits of Lickteig's argument regarding probable cause.

¹ This court's use of the phrase, "trial court," refers to the Jefferson Circuit Court, which conducted the proceedings leading directly to this appeal, and not the Jefferson District Court, which presided over Lickteig's criminal trial proceedings.

² *Lickteig v. Schwab*, 2013-CA-000653-MR.

³ Lickteig's counsel experienced complications relating to her pregnancy, necessitating her to considerably limit her practice on a temporary basis from mid-July of 2012 until November. She then took maternity leave from November of 2012 until the end of January of 2013. Schwab filed his motion for summary judgment in late January, prior to Lickteig's counsel's return from leave.

Upon remand, the parties continued with discovery, with both Lickteig and Schwab being deposed. Schwab again moved for summary judgment, and again the trial court granted it. This appeal ensued.

II. ANALYSIS

A. STANDARD OF REVIEW

Summary judgment is a procedural mechanism whereby the court resolves and disposes of claims which do not require a jury's input to make findings establishing the facts. The existence of an unresolved question of material fact precludes the entry of summary judgment. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). When reviewing such a motion, the trial court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences consistent with that viewing. *Bituminous Casualty Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633 (Ky. 2007). Only when it appears impossible from the record that the non-moving party can produce any evidence at trial upon which the fact-finder could possibly find in his favor should a court grant summary judgment. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). Where a party "has no evidence to support an essential element" of the claim, summary judgment is proper. *Steelvest* at 481 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

The propriety of a summary judgment, because the trial court's examination only relates to the presence of unresolved factual issues, is a question

of law, and is reviewed on appeal under a *de novo* standard. *Henninger v. Brewster*, 357 S.W.3d 920 (Ky. App. 2012).

B. THE TRIAL COURT PROPERLY CONCLUDED THAT THE RECORD

PRESENTED NO UNRESOLVED FACTUAL ISSUES

The tort of malicious prosecution has six elements that a plaintiff must prove in order to recover. Those elements are: 1) the institution of judicial proceedings; 2) by a plaintiff; 3) those proceedings are terminated in favor of the defendant; 4) malice was present in the institution of those prior proceedings; 5) the prior proceedings lacked probable cause; and 6) the defendant suffered damage as the result of the prior proceedings. *Raine v. Drasin*, 621 S.W.2d 895, 899 (Ky. 1981); *Craycroft v. Pippin*, 245 S.W.3d 804, 805 (Ky. App. 2008).

However, Kentucky law disfavors these types of action, particularly so when the underlying action is a criminal prosecution. “Such actions as this are not favored, and the right to them must not be extended, otherwise we shall soon reach a point where citizens will allow crime to go unpunished rather than risk the danger of a suit like this one should the accused perchance be acquitted; then our laws would be unenforced.” *F.S. Marshall Co. v. Brashears*, 238 Ky. 157, 37 S.W.2d 15 (1931) (quoting *Ill. Cent. R.R. Co. v. Anderson*, 206 Ky. 600, 268 S.W. 311 (1925)).

The trial court based its judgment on the absence of an unresolved question relating to the probable cause element of the tort. Case law defines “probable cause” as information which “would induce a man of ordinary prudence

to believe that the person accused had committed the crime charged.” *Garcia v. Whitaker*, 400 S.W.3d 270, 274 (Ky. 2013). We would also emphasize that probable cause is one of the lowest burdens of proof our law recognizes.

Schwab contends the trial court’s ruling, even with the dispute between Lickteig and Roth as it relates to the facts of the actual incident, was proper. Lickteig argues that the photo identification was unduly suggestive and in combination with Schwab’s failure to find Stone, should have operated to preclude a finding of probable cause.⁴

A prior finding of probable cause by a criminal court creates a rebuttable presumption of probable cause for the purpose of a subsequent malicious prosecution civil action. *Craycroft* at 806. Additionally, “[w]here sufficient undisputed facts show probable cause, the question is one of law for the court.” *Reid v. True*, 302 S.W.2d 846, 848 (Ky. 1957). The question for this Court necessarily becomes an examination of the undisputed evidence establishing probable cause.

For this portion of our analysis, we will ignore the allegedly tainted photo identification and examine only the remaining, undisputed, evidence, for the purpose of determining whether adequate evidence supported the District Court’s probable cause finding. Roth’s statement outlines the behavior which comprises the offense: she saw a man masturbating in public. Roth also provided a physical

⁴ Lickteig did not argue this position in a suppression motion before the District Court in the underlying criminal action.

description of the man, and the license plate number of his vehicle from which Schwab derived Lickteig's identity.

Kentucky appellate courts have previously held that tips from identifiable informants bear sufficient indicia of reliability to themselves create reasonable suspicion of criminal activity. *Commonwealth v. Kelly*, 180 S.W.3d 474, 478 (Ky. 2005); *Garcia v. Commonwealth*, 335 S.W.3d 444, 449 (Ky. App. 2010). Because the statement from a known and identifiable informant provided sufficient information to identify both an offense and an offender, a court could, as a matter of law, find that probable cause existed. *Reid* at 848.

Having determined that the initiation of Lickteig's prosecution was supported by probable cause, we must also conclude that the trial court properly granted summary judgment. Lickteig's allegations of a factual dispute regarding the investigation of the matter do not rebut the presumption of probable cause, and the remainder of the evidence supports such a finding—even omitting the allegedly tainted information.

III. CONCLUSION

Being unable to prove the absence of probable cause, Lickteig's claim must fail as a matter of law. Lickteig lacks evidence to prove an essential element of the tort, rendering it impossible within the contemplation of *Scifres* to offer sufficient evidence to recover. The trial court thus properly granted summary judgment in favor of Schwab. Consequently, we affirm.

COMBS, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Thomas E. Clay
Louisville, Kentucky

Andrew Thomas Lay
Louisville, Kentucky

BRIEF FOR APPELLEE:

Timothy D. Lange
Louisville, Kentucky

Susan Klein Rivera
Louisville, Kentucky