

RENDERED: MAY 11, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000089-MR

DARRELL HYCHE

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 12-CI-003928

RICHARD MOLETT; SHAWNA RATCLIFF;
AND DALE HENSLEY

APPELLEES

AND

NO. 2016-CA-001196-MR

RICHARD MOLETT

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 12-CI-003928

DARRELL HYCHE; DALE HENSLEY;
AND SHAWNA M. RATCLIFF

APPELLEES

AND

NO. 2016-CA-001247-MR

DARRELL HYCHE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 12-CI-003928

RICHARD MOLETT; SHAWNA
RATCLIFF; AND DALE HENSLEY

APPELLEES

OPINION AND ORDER
AFFIRMING IN
APPEAL NOS. 2016-CA-000089-MR
& 2016-CA-001196-MR
AND
DISMISSING IN
APPEAL NO. 2016-CA-001247-MR

** ** * * * * *

BEFORE: MAZE, TAYLOR, AND THOMPSON, JUDGES.

MAZE, JUDGE: These are consolidated appeals from summary judgment orders of the Jefferson Circuit Court. This Court heard oral arguments in this case on Tuesday, March 27, 2018, at the Bullitt County Courthouse in Shepherdsville, Kentucky.¹ Darrell Hyché appeals from the trial court's orders denying his motion

¹ On behalf of the Kentucky Court of Appeals, we would like to express our appreciation to the Circuit, Family, and District Court Judges of Bullitt County, to Circuit Court Clerk Paulita A. Keith, Bullitt County Sheriff Donnie Tinnell, and to all the personnel at the Bullitt County

to dismiss the claim against him based on qualified immunity and on the merits of a malicious prosecution claim. Richard Molett appeals from the trial court's order granting summary judgment on his defamation claims against Hyche, Dale Hensley, and Shawna Ratcliff, and on his malicious prosecution claims against Hensley and Ratcliff. We find that Hyche was not entitled to qualified immunity on the malicious prosecution claim, and the trial court's denial of his motion for summary judgment on the merits of that claim is not subject to review at this time. We further find that the trial court properly dismissed the defamation claims as untimely, and that Molett failed to establish that Hensley and Ratcliff were subject to liability for malicious prosecution claims. Hence, we affirm in Appeal Nos. 2016-CA-000089-MR and 2016-CA-001196-MR, and dismiss in Appeal No. 2016-CA-001247-MR.

I. Facts and Procedural History

The underlying facts of this case are very much in dispute. However, the parties agree that the claims in this case arose from an incident which occurred on February 6, 2011, at the Kentucky Fair and Exposition Center in Louisville. The Exposition Center was hosting a cheerleading competition with participants between the ages of eight and seventeen years old. Late in the afternoon, several mothers of participants, including Shawna Ratcliff and Amber Carper, saw Molett in the arena where the competition was taking place. Ratcliff and Carper each stated that they saw Molett stick his hands down his pants for a few seconds, and

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that they were able to see the outline of his penis through his pants. It appeared to them that Molett either had an erection or was masturbating while watching the cheerleaders. In addition, Molett had his cell phone out and appeared to be taking pictures.

After Ratcliff lodged a complaint with the Exposition Center's security, Joshua Keeling, the event planner for the competition, and Chris Brawner, the venue coordinator for the Exposition Center, both went to the area where Molett was standing. They observed conduct similar to that reported by Ratcliff and Carper, but they could not see any visible erection. Furthermore, they noted that Molett was not wearing a bracelet showing that he had paid admission to the event. After about twenty minutes, Keeling contacted Exposition Center security to escort Molett off the premises. Brawner contacted the Louisville Metro Police Department (LMPD) to intervene after Molett was removed.

Molett's version of events are much different. Molett worked as a bellhop for the nearby Crowne Plaza Hotel, and his duties included transporting hotel guests to and from the Exposition Center. He states that he had arranged to meet a guest named Sherry who had left her daughter's sweatpants in a bag near the bell stand at the hotel. Molett states that he went home, changed clothes and drank a beer, and then returned with the bag. When Sherry never appeared, he went inside so see if he could find her. Molett tried calling the number that Sherry left him, but he could not connect. Molett admits that he went to the bathroom and

may have adjusted himself after, but he denies any improper conduct. Molett states he was approached by security as he was starting to leave.

After Molett left the building, he was approached by LMPD Officers Darrell Hyche and Dale Hensley. Officer Hyche stated that Molett had a wet spot on his pants, and both officers stated that he appeared to be intoxicated. The officers handcuffed Molett and detained him in the police car. Officer Hensley reported the witness statements to Officer Hyche.² However, he did not save his interview notes. Based on that information, Officers Hyche and Hensley arrested Molett for alcohol intoxication, criminal trespassing, disorderly conduct, and indecent exposure. Officer Hensley later contacted Molett's employer and told them of the nature of Molett's arrest. The arrest and the allegations of Molett's conduct were reported widely in the news media.

Subsequently, the Commonwealth amended the indecent exposure charge to first-degree sexual abuse. Molett's counsel in the criminal proceeding stated that Officer Hyche pressed for the enhanced charge and for the continuation of all the criminal charges. Officer Hyche stated that all prosecution decisions were made by the County Attorney's office. But prior to trial, the Commonwealth voluntarily dismissed all charges except for disorderly conduct. That charge proceeded to a jury trial in the Jefferson District Court. Officer Hyche and Ratcliff both testified at the trial, but Ratcliff's testimony about Molett's behavior was

² There is a factual dispute whether Officer Hensley actually interviewed Ratcliff and Carper, or whether he merely relied upon their accounts relayed by Exposition Center security.

considerably more ambiguous than her initial report. At the conclusion of trial, the jury acquitted Molett on the disorderly conduct charge.

Thereafter, Molett brought this action asserting claims for defamation, libel, slander, malicious prosecution and abuse of process against Officer Hyche, Officer Hensley, Ratcliff and Carper.³ After considerable discovery, Officers Hyche and Hensley argued that they were entitled to summary judgment based on qualified immunity. The trial court denied the motion, concluding that a claim for malicious prosecution is not subject to qualified immunity. Officer Hyche immediately filed an appeal from this order.

Thereafter, all the defendants moved for summary judgment. They argued that the defamation claims were filed outside of the one-year statute of limitations, and that Molett failed to establish the essential elements for malicious prosecution or abuse of process. The trial court agreed that the defamation claims were untimely and granted the motion to dismiss those claims. The trial court also granted summary judgment for Officer Hensley, Ratcliff and Carper on the malicious prosecution claims, finding no evidence they had any part in the institution or continuation of the criminal charges against Molett. On the other hand, the court found that there was evidence which would support a finding that Officer Hyche had a significant role in the criminal prosecution, and that there was

³ Molett also asserted claims against the Kentucky State Fair Board, Louisville Metro Government, Keeling, Brawner, and the security officers at the Exposition Center. Those claims were dismissed by the trial court for various reasons and they are not parties to this appeal.

evidence which would support a finding of malice. Consequently, the court denied the motion for summary judgment with respect to him.

Subsequently, the trial court entered an order pursuant to CR⁴ 54.02 which designated the other summary judgment orders as final and appealable. Molett appealed from the summary judgments dismissing his defamation claims, and his malicious prosecution claims against Officer Hensley and Ratcliff.⁵ Officer Hyche filed an additional notice of appeal from the trial court's denial of his motion for summary judgment.

II. Officer Hyche's Appeals

In his first appeal, Officer Hyche argues that the trial court erred by denying his motion to dismiss based on qualified immunity. But while this appeal was pending, the Kentucky Supreme Court held that a sustained allegation of malice precludes a finding of immunity. *Martin v. O'Daniel*, 507 S.W.3d 1, 5 (Ky. 2016).⁶ Consequently, Officer Hyche clearly was not entitled to qualified immunity from Molett's malicious prosecution claim.

In his second appeal, Officer Hyche argues that the trial court erred in denying his motion for summary judgment, arguing that the existence of probable cause for the arrest would preclude Molett's claim for malicious prosecution.

However, the denial of a summary judgment motion is generally interlocutory and

⁴ Kentucky Rules of Civil Procedure.

⁵ Molett settled his claims against Carper, and she is not a party to this appeal.

⁶ At oral argument, Officer Hyche conceded that *Martin v. O'Daniel* is controlling.

is not appealable. *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886 (Ky. 2009). Apart from a denial of absolute immunity, a denial of a motion for summary judgment is subject to review only where: “(1) the facts are not in dispute, (2) the only basis of the ruling is a matter of law, (3) there is a denial of the motion, and (4) there is an entry of a final judgment with an appeal therefrom.” *Transp. Cabinet, Bureau of Highways, Commonwealth v. Leneave*, 751 S.W.2d 36, 37 (Ky. App. 1988) (citing *Gumm v. Combs*, 302 S.W.2d 616 (Ky. 1957); *Loy v. Whitney*, 339 S.W.2d 164 (Ky. 1960), and *Beatty v. Root*, 415 S.W.2d 384 (Ky. 1967)).

In this case, the trial court expressly found that there were genuine issues of material fact concerning whether Officer Hyche had probable cause for the arrest and whether he continued to pursue the criminal charges in bad faith. We recognize that the trial court’s August 8, 2016, order granted the motions by Officer Hyche and Officer Hensley to designate the entirety of the court’s December 22, 2015, order as final and appealable pursuant to CR 54.02. But while the order granting summary judgment for Officer Hensley and Ratcliff could be made final pursuant to CR 54.02, the trial court’s conclusions regarding the existence of genuine issues of material fact with respect to Officer Hyche are not reviewable at this time. *See also Abbott v. Chesley*, 413 S.W.3d 589, 602 (Ky. 2013). Therefore, we must dismiss Officer Hyche’s second appeal as taken from a non-final order.

III. Molett’s Appeal

In Molett's appeal, he first argues that the trial court erred by dismissing his defamation claims against Officer Hyche, Officer Hensley, and Ratcliff as untimely. Actions sounding in defamation are subject to the one-year statute of limitations set out in KRS⁷ 413.140(1)(d). In the current case, Officer Hyche, Officer Hensley, and Ratcliff made the allegedly defamatory reports on February 26, 2011, and Molett filed this action on July 17, 2012. Consequently, the trial court concluded that Molett's defamation claims were filed outside of the applicable limitation period.

Molett argues that the statute of limitations was tolled until November 21, 2011, when he was acquitted on the remaining disorderly conduct charge.⁸ He specifically contends the dismissal of the underlying criminal charges were necessary to provide proof of an essential element of his defamation claims. As a result, he maintains that his action, filed within one year of that date, was timely.

We disagree. Publication of the allegedly defamatory matter causes injury, thus commencing the running of the one-year statute of limitations. *Caslin v. Gen. Elec. Co.*, 608 S.W.2d 69, 70 (Ky. App. 1980). The dismissal of the criminal charges was not essential to proving the elements of Molett's defamation

⁷ Kentucky Revised Statutes.

⁸ In support of this position, Molett relies upon *Cissell v. KFC Corp.*, No. 2006-CA-001596-MR, 2007 WL 3227571 (Ky. App. 2007), an unpublished case from this Court. But in *Cissell*, this Court rejected the argument that the statute of limitations on the appellant's claims should be tolled until the underlying criminal case was resolved. Rather, the Court held that the applicable statutes of limitations commenced when the underlying causes of action accrued. *Id.* at *2.

claims.⁹ Therefore, the trial court properly dismissed the defamation claims as untimely.

Molett primarily argues that the trial court erred by granting summary judgment on his malicious prosecution claims against Officer Hensley and Ratcliff.¹⁰ “[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.03. “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest*, 807 S.W.2d at 480. The trial court must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. *Id.* Since a summary judgment involves no fact-finding, this Court’s review is *de novo*, in the sense that we owe no deference to

⁹ In *Dunn v. Felty*, 226 S.W.3d 68 (Ky. 2007), the Kentucky Supreme Court held that the one-year statute of limitations for false imprisonment accrued when the plaintiff was released from the allegedly illegal restraint, not upon the favorable termination of the criminal proceedings. *Id.* at 72. The Court noted that, if there are pending criminal proceedings, the civil claim would need to be stayed until the criminal case is ended. *Id.* at 74. Likewise, a defamation claim would also need to be brought within one year of publication despite any pending criminal charges arising from those matters.

¹⁰ Molett does not appeal from the dismissal of his abuse-of-process claims.

the conclusions of the trial court. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

In *Martin v. O'Daniel*, *supra*, the Kentucky Supreme Court set out a revised list of elements for malicious prosecution. Under these elements, a malicious prosecution action may be established by showing that:

- 1) the defendant initiated, continued, or procured a criminal or civil judicial proceeding, or an administrative disciplinary proceeding against the plaintiff;
- 2) the defendant acted without probable cause;
- 3) the defendant acted with malice, which, in the criminal context, means seeking to achieve a purpose other than bringing an offender to justice; and in the civil context, means seeking to achieve a purpose other than the proper adjudication of the claim upon which the underlying proceeding was based;
- 4) the proceeding, except in *ex parte* civil actions, terminated in favor of the person against whom it was brought; and
- 5) the plaintiff suffered damages as a result of the proceeding.

Id. at 11-12.

The trial court found no evidence that either Officer Hensley or Ratcliff had any significant role in initiating, continuing, or procuring the criminal charges against Molett. We agree. Officer Hensley stated that he interviewed Ratcliff and Carper and relayed the information to Officer Hyche. He also participated in the arrest. There is no evidence that he had any other role beyond that. Officer Hyche prepared the police report and took part in the criminal proceedings. Furthermore, Officer Hensley's actions in reporting Molett's arrest to

his employer does not constitute the institution, continuation, or procurement of criminal process.

Similarly, Ratcliff merely made the initial report of her observations to the Exposition Center security, and then repeated those observations to Officer Hensley. Molett contends that Ratcliff can be liable for malicious prosecution if her false or reckless statements were material to a finding of probable cause. *Phat's Bar & Grill v. Louisville Jefferson Cty. Metro Gov't*, 918 F. Supp. 2d 654, 661 (W.D. Ky. 2013). However, *Phat's Bar* involved a federal malicious prosecution claim brought under the Fourth Amendment to the United States Constitution, rather than the state-law claim presented here.

Furthermore, the officer in *Phat's Bar* included the allegedly false statements on the arrest citation and he was an active participant in the prosecution. *Id.* at 659. In this case, Ratcliff took no part in instituting or continuing the prosecution against Molett other than her initial reports. Finally, Ratcliff's testimony at trial, even if false, was privileged and will not support a cause of action against her. *Martin v. O'Daniel*, 507 S.W.3d at 5. Given the lack of evidence on an essential element, we conclude that the trial court properly granted summary judgment for both Officer Henley and Ratcliff on Molett's malicious prosecution claims.

IV. Conclusion

Accordingly, we affirm the orders of the Jefferson Circuit Court denying summary judgment to Officer Hyche based on qualified immunity and granting summary judgment for Officer Hensley and Ratcliff. We dismiss Officer Hyche's appeal from the denial of his motion for summary judgment as it is taken from a non-final order.

TAYLOR, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

ENTERED: May 11, 2018

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/s/ Irv Maze

JUDGE, COURT OF APPEALS

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