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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000730-MR

J. FOX DEMOISEY AND
DEMOISEY LAW OFFICE, PLLC — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 16-CI-004196

PETER L. OSTERMILLER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, J. LAMBERT AND MAZE, JUDGES.

DIXON, JUDGE: Appellants, attorney J. Fox DeMoisey and the DeMoisey Law Office, PLLC (hereinafter collectively referred to as "DeMoisey"), appeal from an order of the Jefferson Circuit Court dismissing claims for wrongful use of civil proceedings/malicious prosecution and abuse of process against Appellee, attorney Peter L. Ostermiller. Finding no error, we affirm.

The facts underlying this matter have a long and tortured history. 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. In 1998, Infocon began doing business with Exact Software North America, Inc. ("Exact"). Specifically, Infocon was a reseller of Exact's software. However, sometime around 2002, problems developed between Exact and Infocon, and, in the spring of 2003, Exact sued Infocon in an Ohio Court of Common Pleas. Therein, Exact claimed that Infocon owed it $143,031.77 in unremitted payments from sales of Exact's software to Infocon's customers. Infocon thereafter 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 intentional interference with the contract and asserted several affirmative defenses to the collection action.

Infocon engaged DeMoisey, along with local Ohio counsel to represent it in connection with the Exact dispute. At the time, Infocon did not have the financial wherewithal to pay its counsel an hourly fee, and thus it was initially agreed that in return for his legal services, DeMoisey would receive a one-third interest in a company called Alocam. 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). Allegedly 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, and such has never been produced.

The Exact litigation dragged on for several years. 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.

Id. 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 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, John Carey, bonuses out of the settlement. In order 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. Apparently, this conversation did not sit well with Nijhawan and Hughes, who 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 believed 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 Louisville attorney Peter L. Ostermiller about representing them for the purpose of disputing DeMoisey's fee. 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 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. In early July 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 informed 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, 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. This evidently aroused suspicion with DeMoisey and he asked his associate to do some research into Exact. As a result of that research, DeMoisey's associate discovered Exact NV's T–1 Securities and Exchange Commission Report, dated July 26, 2007, that indicated no settlement had been reached in the Exact litigation.

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 believed 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 in the "Infocon Escrow Account at First Capital Bank of Kentucky, 293 Hubbards Lane, Louisville, KY 40207." 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, this was the first time DeMoisey was made aware of any potential dispute regarding either 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.

The federal district court thereafter held a hearing on September 18, 2007, during which 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, ordering that $2.5 million was to be transferred 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 further litigation. The federal district court retained jurisdiction over the charging lien as well as 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. On May 27, 2008, while the parties were still awaiting the federal district court's ruling on the

summary judgment motion, Hughes, Nijhawan, and Infocon, with Louisville attorney Ross Turner as their counsel, filed a complaint in the Jefferson Circuit Court, Division Four, against DeMoisey alleging professional malpractice and actionable misconduct related to his representation of Infocon in the Exact federal litigation. DeMoisey assumed that Ostermiller was intrinsically involved in Turner's decision to file the malpractice action. In any event, Ostermiller later entered his appearance as co-counsel[1] on behalf of Hughes, Nijhawan and Infocon. 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 state court action.

On October 22, 2009, the circuit court found that the malpractice action was time-barred and granted summary judgment in favor of DeMoisey. On August 4, 2010, the circuit court entered a second order ruling that no valid and enforceable fee agreement existed between DeMoisey and Infocon and, therefore, DeMoisey's breach of contract claim was not cognizable. As a result, any fee DeMoisey was entitled to for 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*.

[1] Turner subsequently withdrew as co-counsel.

Infocon, Hughes and Nijhawan then appealed the dismissal of their malpractice claim against DeMoisey to this Court. DeMoisey also appealed on his breach of contract claim. While the appeal was still pending, the federal district court lifted its stay and proceedings resumed concerning DeMoisey's charging lien. The federal district court conducted a bench trial on the charging lien issue in December 2011, and, on April 4, 2012, entered an order awarding DeMoisey $1.4 million in attorney's fees for services performed. However, acknowledging that the state court had already determined there was no valid and enforceable contingency fee agreement, the federal district court based its award on application of *quantum meruit* principles. The Sixth Circuit Court of Appeals 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 an action in the Jefferson Circuit Court, Division Six, against Infocon, Hughes, Nijhawan, and Ostermiller 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 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. However, the circuit court denied the motion with respect to DeMoisey's tortious interference claims, concluding 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 tortious interference with contractual relations claim on the basis that it was time-barred. Before the circuit court ruled on the motion to dismiss, Ostermiller filed a motion for summary judgment on the tortious interference claim, arguing DeMoisey had failed to identify any wrong committed by Ostermiller in causing Infocon to terminate DeMoisey. Both motions were denied.

On June 13, 2014, this Court rendered an opinion affirming the circuit court's dismissal of the legal malpractice action. *Hughes v. DeMoisey*, 2014 WL 2632504 (Ky. App. June 13, 2014). Therein, we noted,

> Hughes and Nijhawan allege DeMoisey's negligent representation during the Exact litigation left them no other choice than to settle their claim against Exact for less than the value of their claim. For their action filed on May 28, 2008, to survive, it must have been filed within the applicable statute of limitations.
>
> The statute of limitations for legal malpractice is set forth in KRS 413.245, which provides in part:

> [A] civil action, whether brought in tort or contract, arising out of any act or omission in rendering, or failing to render, professional services for others shall be brought within one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured.

The statute has been interpreted to set forth two separate statutes of limitations: A statute limiting filing a legal malpractice action to "one year from the date of occurrence, and then a second statute providing a limit of one year ... from the date when the cause of action was, or reasonably should have been, discovered by the party injured, if that date is later in time." *Michels v. Sklavos*, 869 S.W.2d 728, 730 (Ky.1994) (internal quotations omitted). "The discovery provision of KRS 413.245 does not come into play if a suit for legal malpractice was filed within one year from the date of the occurrence. Logically, a party may not "discover" a cause of action that does not yet exist." *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 271 (Ky.App.2005) (footnote omitted). Therefore, we focus on the term "occurrence." . . .

We hold the 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 413.245 applies.

> In contrast to the occurrence limitation period, the discovery limitation period does not necessarily commence at the time of the negligence and resulting damages. Simply stated, the cause of action for legal malpractice begins when it is discovered an attorney provided poor or inadequate representation. *Conway v. Huff*, 644 S.W.2d 333, 334 (Ky.1982). "It presumes that a cause of action has accrued, i.e., both negligence and damages has occurred, but that it has accrued in circumstances where the cause of action is not reasonably discoverable, and it tolls the running of the statute of limitations until the claimant knows, or reasonably should know, that injury has occurred." *Michels*, 869 S.W.2d at 732.
>
> Based on the facts and arguments presented, an extensive analysis regarding the application of the discovery limitations period is unnecessary. Hughes, Nijhawan and Infocon allege DeMoisey's negligent representation left no recourse against Exact other than to enter into the settlement agreement on March 12, 2007. Therefore, their cause of action is premised on their knowledge of any alleged legal malpractice on March 12, 2007.

Slip op. pgs. 4-7. The Kentucky Supreme Court denied discretionary review on May 6, 2015 and ordered this Court's opinion depublished.

In the interim, in June 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 entered October 3, 2014, the 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 circuit court denied the statute of limitations issue as moot. DeMoisey then appealed the tortious interference claim to this Court. Ostermiller, in turn, filed a cross-appeal on the grounds that the wrongful use of civil proceedings and abuse of process claims should have been dismissed with prejudice.

By Opinion rendered on May 6, 2016, this Court affirmed the circuit court's grant of summary judgment on the tortious interference claims. *DeMoisey v. Ostermiller*, 2016 WL 2609321 (Ky. App. May 6, 2016). We acknowledged that while DeMoisey had sufficiently pled in his complaint both a claim for tortious interference with contractual relations and a claim for tortious interference with prospective contractual relations/business advantage, he nevertheless failed to prove the elements of either tort.

With respect to Ostermiller's cross-appeal, this Court held that the circuit court should have dismissed the abuse of process claim with prejudice.

"[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*, 246 Ky. 142, 54 S.W.2d 613, 615 (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. 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). . . .

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 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.

Slip op. pgs. 13-15.

This Court further rejected DeMoisey's assertion that the abuse of process he was alleging was a continuing tort and, therefore, the statute of limitations should not have accrued until total cessation had taken place. "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.'" *Id.* at 15. Finally, contrary to DeMoisey's argument in the instant appeal, our Opinion did not specifically resolve any issue pertaining to his wrongful use of civil proceedings claim. DeMoisey thereafter filed a motion for discretionary review in the Kentucky Supreme Court. On December 8, 2016, that court denied discretionary review and ordered this Court's opinion depublished.

In the interim, on August 30, 2016, DeMoisey filed the instant action in the Jefferson Circuit Court, Division Five, against Ostermiller asserting claims for abuse of process and wrongful use of civil proceedings. There is no dispute that the claims are substantially identical to those alleged in the prior circuit court,

Division Six, case. Ostermiller thereafter filed a motion to dismiss. By opinion and order entered February 8, 2107, the circuit court dismissed the action with prejudice, finding,

> Under applicable statutes, the limitations period for claims of wrongful use of civil proceedings/malicious prosecution is one year. See KRS 413.140(1)(c) and KRS 413.245. The one year limitations period started on May 6, 2015, when the Kentucky Supreme Court denied Infocon's motion for discretionary review [in the legal malpractice action]. The Plaintiffs filed their action nearly 16 months afterwards and are accordingly prohibited from pursuing their claim of wrongful use of civil proceedings/malicious prosecution. [footnote omitted].
>
> As for abuse of process, the Plaintiffs are precluded from pursuing this claim because the Supreme Court did not grant a motion for discretionary review of the Court of Appeals opinion relating to the Division Six case. This leaves the Court of Appeals' order that Division Six dismiss this claim with prejudice. The Court is bound by this outcome because the abuse of process claim within the immediate action is substantively identical to the one in the Division Six action.

The circuit court further stated in a footnote that it was persuaded by Ostermiller's alternative argument for dismissal of the wrongful use of civil proceedings claim, namely that DeMoisey did not prevail on the merits in the underlying legal malpractice litigation, which is a required element of that tort. Following the denial of his motion to alter, amend or vacate, DeMoisey appealed to this Court.

In this Court, DeMoisey first argues that the circuit court erred in dismissing his claim for wrongful use of civil proceedings. DeMoisey acknowledges that the circuit court properly noted that the statute of limitations for such claim is one year from the conclusion of the underlying litigation, KRS 413.140(1)(c). That applicable date was May 6, 2015, the date the Kentucky Supreme Court denied discretionary review in the legal malpractice action. Nevertheless, he points out that the circuit court ignored the significant fact that at the time discretionary review was denied in the legal malpractice case, thus finally concluding that matter, the issue of whether he could proceed with the wrongful use of civil proceedings claim was still on appeal in this Court; and we did not render our opinion until May 6, 2016. Thus, DeMoisey argues that the statute of limitations could not have begun to run until this Court ruled on Ostermiller's cross-appeal concerning whether the claim for wrongful use of civil proceedings should have been dismissed with prejudice.

Ostermiller, on the other hand, responds that because the underlying legal malpractice litigation was final on May 6, 2015, when the Kentucky Supreme Court denied discretionary review, DeMoisey's instant action filed on August 30, 2016, must be deemed time-barred regardless of any other pending issues on appeal. Ostermiller makes the tenuous assertion that despite the fact his cross-appeal on the wrongful use of civil proceedings claim was still pending, DeMoisey

was required to file a new action on that claim within the one-year statute of limitations.[2]

We are of the opinion that we need not reach the statute of limitations issue because we agree with the circuit court that because DeMoisey did not prevail on the merits in the legal malpractice action, he could not maintain a claim for wrongful use of civil proceedings regardless of when it was filed. The judgment of a lower court can be affirmed for any reason in the record. *See Kentucky Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co.*, 326 S.W.3d 803, 812 n. 3 (Ky. 2010). Thus, we can properly determine that the trial court reached the correct result for the reasons it expressed and for any other reasons appropriately brought to its attention. *Com., Corrections Cabinet v. Vester*, 956 S.W.2d 204, 206 (Ky. 1997).

Kentucky law "generally disfavors the tort of malicious prosecution because 'all persons [should] be able to freely resort to the courts for redress of a wrong[.]'" *Garcia v. Whitaker*, 400 S.W.3d 270, 274 (Ky. 2013) (alterations in original) (quoting *Raine v. Drasin*, 621 S.W.2d 895, 899 (Ky. 1981)). As such, "claimants alleging malicious prosecution must strictly comply with each element of the tort." *Id.* To prevail on a claim for wrongful use of civil

[2] Ironically, immediately following the Kentucky Supreme Court's denial of discretionary review in the legal malpractice action, DeMoisey filed a motion to have his claims for wrongful use of civil proceedings and abuse of process "reinstated." Ostermiller objected on the grounds that the matter was still pending on appeal in our Court.

proceedings/malicious prosecution in Kentucky, a plaintiff must prove the following elements:

> (1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.

Raine, 621 S.W.2d at 899; *see also Fox v. DeSoto*, 489 F.3d 227, 237 (6th Cir. 2007).

We agree with the circuit court that DeMoisey cannot prove the third prong, namely that termination of the underlying proceedings was in his favor. In *Alcorn v. Gordon*, 762 S.W.2d 809 (Ky. App. 1988), a panel of this Court cited to Comment a to the Restatement (Second) of Torts § 660 for the proposition that "[p]roceedings are 'terminated in favor of the accused' as that phrase is used in § 653 and throughout this Topic, only when their final disposition is such as to indicate the innocence of the accused. . . . In a civil context, the phrase 'the absence of guilt or fault' could be substituted for 'innocence' and the meaning would be retained." *Id.* at 811–12. Further citing to *Lackner v. LaCroix*, 602 P.2d 393 (1979), we elaborated on this principle, stating:

> It is apparent "favorable" termination does not occur merely because a party complained against has prevailed in an underlying action. While the fact he has prevailed is an ingredient of a favorable termination, such termination must further reflect on his innocence of the alleged wrongful conduct. If the termination does not relate to the merits—reflecting on neither innocence of nor responsibility for the alleged misconduct—the termination is not favorable in the sense it would support a subsequent action for malicious prosecution.

Id. at 812 (quoting *Lackner*, 602 P.2d at 395). We therefore concluded that "dismissal of a suit for technical or procedural reasons that do not reflect on the merits of the case is not a favorable termination of the action . . . ." *Id. See also Davidson v. Castner-Knott Dry Goods Co., Inc.*, 202 S.W.3d 597 (Ky. App. 2006).

It is undisputed that the legal malpractice action at issue herein was dismissed as being time-barred. Nevertheless, DeMoisey cites to a litany of instances in the federal court, as well as the denial of discretionary review in the legal malpractice action, as evidence that he has prevailed on the merits during the course of litigation. DeMoisey fails to recognize, however, that there has never been a determination on the merits as to Hughes and Nijhawan's claim that his negligent representation during the Exact litigation left them no other choice than to settle their claim against Exact for less than the value of their claim. That DeMoisey received some favorable rulings in the federal litigation is simply irrelevant to the wholly separate allegation that he committed legal malpractice. That action was dismissed on procedural grounds without any determination of its

merits. Accordingly, the circuit court properly dismissed DeMoisey's claim for wrongful use of civil proceedings.

DeMoisey next argues that the circuit court erred in finding that *res judicata* bars his abuse of process claim because the Kentucky Supreme Court denied discretionary review of this Court's opinion in the Division Six case. DeMoisey advances a novel argument that this Court's opinion in the Division Six case, which remanded the matter for entry of an order dismissing the abuse of process claim with prejudice, should not be binding on him. DeMoisey contends that our 42-page published opinion changed then-existing law with respect to the manner in which the statute of limitations is calculated on abuse of process claims. However, although our Supreme Court denied discretionary review it also ordered our opinion to not be published. As a result, our opinion cannot be cited as precedent in other cases. It is DeMoisey's position that to apply the now-unpublished opinion to his abuse of process claim, when it cannot be used as precedent to change the calculation of the statute of limitations of any other litigant's abuse of process claim, is unconstitutional.

Without question, DeMoisey's argument is novel and thought provoking. However, it is asserted in the wrong court. Certainly, such an argument is properly addressed by the Kentucky Supreme Court. Accordingly, we must conclude that the circuit court correctly determined that DeMoisey's abuse of

process claim was barred by res judicata. *See generally Yeoman v. Commonwealth, Health Policy Board*, 983 S.W.2d 459 (Ky. 1998).

For the reasons set forth herein, the opinion and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Fox Demoisey
Jonathan E. Breitenstein
Louisville, Kentucky

BRIEF FOR APPELLEE:

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