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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000300-MR

BOBBY LEE WILSON, JR. APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 14-CI-00459

DUSTIN CLEM APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, LAMBERT, AND K. THOMPSON, JUDGES.

LAMBERT, JUDGE: Bobby Lee Wilson, Jr., has sought review of the summary judgment of the Boyle Circuit Court dismissing his claim for malicious prosecution against the Boyle County Sheriff's Department Deputy Dustin Clem.[1] We affirm.

[1] In his notice of appeal, Wilson listed the January 18, 2018, order denying his motion to vacate the summary judgment as the order from which he was taking his appeal.

The underlying matter began with the filing of a complaint by Wilson on December 15, 2014, against Deputy Clem in his individual capacity, in which Wilson sought compensatory and punitive damages related to his criminal prosecution.[2] He alleged causes of action for malicious prosecution, defamation, false light, and trespass, stating that he was wrongfully arrested based upon false allegations that he had committed a felony. Wilson's claims for trespass and defamation were dismissed by summary judgment entered August 19, 2016, although the motion for summary judgment as to his malicious prosecution claim was denied as premature.

In a renewed motion for summary judgment, Deputy Clem argued that he was entitled to a judgment as a matter of law and that he was entitled to qualified immunity from Wilson's suit. Wilson objected to the motion, arguing that he had set out a *prima facie* case for defamation and that Deputy Clem was not entitled to qualified immunity. In an order entered October 16, 2017, the circuit court granted summary judgment, concluding that Wilson failed to establish his claim for malicious prosecution because there was probable cause to support his arrest and that in any event Deputy Clem was protected by qualified immunity

[2] Wilson was charged with third-degree terroristic threatening and intimidating a participant in a legal proceeding. He was acquitted by a jury following his criminal trial.

because he was performing a discretionary action in good faith when he executed the arrest warrant.

Wilson moved the court to vacate its summary judgment, citing a change in the law for malicious prosecution cases as set forth in *Martin v. O'Daniel*, 507 S.W.3d 1 (Ky. 2016). In response, Deputy Clem stated that Wilson had misinterpreted the holding in *Martin* and had also failed to dispute the circuit court's rulings related to probable cause and qualified immunity. The circuit court denied Wilson's motion in an order entered January 18, 2018, noting that Wilson failed to file a brief within thirty days explaining how *Martin* affected its decision pursuant to its direction. This appeal now follows.

On appeal, Wilson argues that summary judgment was improper on his malicious prosecution claim and that Deputy Clem was not entitled to immunity. He has not addressed the dismissal of his trespass and defamation claims.

We shall address Wilson's second argument first, in that it encompasses a procedural issue that would ordinarily be determinative in this case. In his prehearing statement, Wilson listed the issue he proposed to raise on appeal as follows:

> #7. Issues proposed to be raised on appeal.
>
> Whether an indictment, which is based on "misleading or inaccurate" information, rises to probable cause thus

> exonerating the police against the claim for malicious prosecution, especially when "misleading or inaccurate" information was knowingly utilized. Although this case is technically not one of first impression, the case law definitely changed **during** the pendency of this action in the Boyle Circuit Court.

Kentucky Rules of Civil Procedure (CR) 76.03 addresses the prehearing conference process in the Court of Appeals and requires the appellant in subsection (4)(h) to include "[a] brief statement of the facts and issues proposed to be raised on appeal, including jurisdictional challenges[.]" CR 76.03(8), in turn, provides that "[a] party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." Wilson failed to list the qualified immunity issue in his prehearing statement, and even a strained reading of the proposed issue he did raise cannot encompass that issue. He also did not seek permission to raise the issue for good cause. Therefore, we may not consider that issue on appeal. *Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky. App. 2004) ("Since that issue was not raised either in the prehearing statement or by timely motion seeking permission to submit the issue for 'good cause shown,' CR 76.03(8), this matter is not properly before this court for review.").

In the October 17, 2017, judgment, the circuit court addressed the qualified immunity issue, holding that Deputy Clem was entitled to protection as "the execution of the arrest and search warrant, seizing the plaintiff's property, and

arresting the plaintiff, were discretionary acts that were within the defendant's authority as a police officer and taken in good faith." Because he failed to list this issue in his prehearing statement, Wilson would not normally be permitted to seek review of this ruling, and we would be constrained to affirm the judgment on appeal.

However, our Supreme Court's opinion in *Martin*, *supra*, effectively eliminates the qualified immunity defense in malicious prosecution claims.

> Acting with malice and acting in good faith are mutually exclusive. Malice is a material fact that a plaintiff must prove to sustain a malicious prosecution claim. [*Raine v. Drasin*, 621 S.W.2d 895, 899 (Ky. 1981)]. But, it is also a fact that defeats the defendant's assertion of qualified official immunity. Official immunity is unavailable to public officers who acted "*with the malicious intention* to cause a deprivation of constitutional rights or other injury . . . ." [*Yanero v. Davis*, 65 S.W.3d 510, 523 (Ky. 2001)] (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).
>
> It thus becomes apparent that the very same evidence that establishes the eponymous element of a malicious prosecution action simultaneously negates the defense of official immunity. In simpler terms, if a plaintiff can prove that a police officer acted with malice, the officer has no immunity; if the plaintiff cannot prove malice, the officer needs no immunity.

Martin, 507 S.W.3d at 5. "Therefore, in the context of a malicious prosecution claim against state law enforcement officers, the issue of qualified official immunity is superfluous. . . . [W]hen a plaintiff must prove malice to sustain his

cause of action, a defense of qualified official immunity has little meaning and no effect." *Id.* at 5-6. For this reason, the circuit court's ruling that Deputy Clem was entitled to qualified official immunity is superfluous, and Wilson's failure to list this as an issue in his prehearing statement is harmless for purposes of his appeal of the summary judgment. Therefore, we shall address the merits of Wilson's first argument.

Wilson argues that Deputy Clem acted with malice in that he claims the deputy testified falsely when he instituted a criminal charge against him. Wilson relies upon *Martin* to support his argument for reversal. Deputy Clem disputes Wilson's assertion and argues that this Court should affirm the circuit court's ruling. We agree with Deputy Clem and hold that Wilson failed to present sufficient evidence to create a genuine issue regarding the material fact that his criminal prosecution was based on probable cause.

Since 1981, Kentucky courts have turned to *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981), for the elements of a malicious prosecution cause of action. *Martin* abrogated *Raine* and subtly revised those elements.[3] The Court said:

[3] The Supreme Court's main concern appears to be that "*Raine* unfortunately defines the elements of malicious prosecution with reference to the parties' status in the underlying action rather than the more conventional use of their status as parties in the malicious prosecution action." *Martin*, 507 S.W.3d at 8 n.3. Before revising the elements, the Supreme Court set out the *Raine* elements. In general, the elements are the same. Specifically, there has been no change regarding the need to establish the want or lack of probable cause.

> We hereby abrogate our expression of the malicious prosecution elements set out in *Raine v. Drasin* in favor of the following articulation. 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;

Raine identifies six elements of a malicious prosecution claim and enumerates them as follows:

> (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 [meaning *defendant* in the malicious prosecution action];
> (3) the termination of such proceedings in defendant's [meaning *plaintiff's* in the malicious prosecution action] 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.

621 S.W.2d 895, 899 (Ky. 1981).

Martin, 507 S.W.3d at 7-8 (emphasis added).

> 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.

Martin, 507 S.W.3d at 11-12 (emphasis added).

In this case, the circuit court first found Deputy Clem could prevail on liability grounds, stating:

> [Wilson] is unable to satisfy the element of lack of probable cause. Kentucky courts have consistently held that "it is axiomatic that where there is a specific finding of probable cause in the underlying criminal action . . . a malicious prosecution action cannot be maintained." Broaddus v. Campbell, 911 S.W.2d 281[, 283] (Ky. App. 1995).
>
> With regard to malicious prosecution claims, probable cause is defined as "that which would induce a man of ordinary prudence to believe that the person prosecuted had committed a crime." Garcia v. Whitaker, 400 S.W.3d 270[, 274] (Ky. 2013). Furthermore, "a grand jury indictment raises a [rebuttable] presumption of probable cause."[4] Davidson [v. Castner-Knott Dry Goods Co., 202 S.W.3d 597, 607 (Ky. 2006) (citations omitted)]. In the instant action, not only did Deputy Clem obtain a search warrant and arrest warrant/criminal complaint after a Judge had reviewed the information, the grand jury also indicted the plaintiff. As such, the

[4] This citation, in the *Davidson* opinion, correctly reads: "while a grand jury indictment raises a presumption of probable cause, this presumption can be rebutted by the plaintiff." *Davidson v. Castner-Knott Dry Goods Co., Inc.*, 202 S.W.3d 597, 607 (Ky. App. 2006) (citing *Conder v. Morrison*, 275 Ky. 360, 121 S.W.2d 930, 931-32 (1938)).

> plaintiff [Wilson] has the burden to rebut the presumption of probable cause and has failed to do so.

Wilson argues that he rebutted the indictment-based presumption of probable cause by alleging Deputy Clem's grand jury testimony was "exaggerated and misleading[.]" In his reply brief, he states that "Officer Clem testified falsely at both Bobby Wilson's criminal trial and before the Boyle County Grand Jury." However, Wilson offered no other proof – nor any further elaboration of these allegations – to rebut the presumption of probable cause. Allegations alone do not constitute affirmative evidence sufficient to defeat a properly supported motion for summary judgment. *See Educ. Training Systems, Inc. v. Monroe Guar. Ins. Co.*, 129 S.W.3d 850, 853 (Ky. App. 2003) (pleadings are not evidence).

Wilson cites to *Robertson v. Lucas*, 753 F.3d 606 (6th Cir. 2014), as support for his argument. In affirming the summary judgment, the Sixth Circuit said,

> Appellants failed to present any particularized evidence demonstrating that the individual appellees relied on an arrest warrant they knew had issued without probable cause. Nor did appellants produce evidence demonstrating that any individual appellee influenced [a witness's] grand jury testimony, causing him to lie to or mislead the grand jury, thereby leading to appellants' arrests.

Id. at 619. But this case supports Deputy Clem's argument for affirming the circuit court's judgment. Like the appellants in *Robertson*, Wilson has directed this Court

only to his allegations, *but not to any evidence*, that Deputy Clem knew there was an absence of probable cause. On that basis, we must affirm the circuit court's grant of summary judgment in favor of Deputy Clem as a matter of law.

For the foregoing reasons, the judgment of the Boyle Circuit Court is affirmed.

ACREE, JUDGE, CONCURS.

THOMPSON, K., JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

THOMPSON, K., JUDGE, CONCURRING IN RESULT ONLY: I write separately to express my disagreement with the majority's view that Wilson's failure to list the issue of qualified official immunity in his prehearing statement would preclude this Court from reviewing the issue. However, I concur with the result. Despite its view, the majority addresses the issue and correctly holds that qualified official immunity does not apply to a malicious prosecution claim. I also agree with the majority that Wilson has not created a genuine issue of material fact that his criminal prosecution was without probable cause. Therefore, I concur in the result reached but take this opportunity to discuss whether an issue not raised in a prehearing statement may nevertheless be considered by this Court. It is a question that is not novel to this case and one that unfortunately has been resolved

by some members of this Court adversely to parties seeking review by taking a strict compliance approach to a rule designed to benefit those same parties.

I begin by pointing out that the prehearing statement is not a step in the perfection of an appeal but, instead, is a step in the process of obtaining a prehearing conference provided for in Kentucky Rules of Civil Procedure (CR) 76.03. While not called such, the prehearing conference is akin to mediation serving to dispose of appeals by settlement prior to a decision through the traditional time-consuming and often expensive appellate process. It is an informal procedure, not conducted with the usual formalities of a court proceeding and may even be by telephone. CR 76.03(9). While it has proven a successful tool for this Court in managing its caseload, foremost it is a process to benefit litigants willing to resolve their cases by settlement and spare them the time and cost of a full-blown appeal.

Despite its usefulness as a screening tool by Court of Appeals staff to determine if a case is appropriate for prehearing conference, the prehearing statement does not serve notice of any substantive matter upon the opposing party. Moreover, after a prehearing conference is held or denied, the function of the prehearing statement ends. Although I cannot speak for the entire Court, I can say that in my review of assigned cases, the prehearing statement is nothing more than another document in the file and its function superseded by the parties' respective

briefs. Nevertheless, flaws in prehearing statements have denied appellants the right to have their cases decided on the merits. I do not believe dismissal on such grounds comports with decisions of our Supreme Court.

In *Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986), our Supreme Court set our appellate procedural jurisprudence on a path of substantial compliance. Once jurisdiction is conferred on an appellate court, compliance with procedural rules is no longer applied heavy-handedly. Instead, this Court may exercise its discretion to dismiss an appeal for noncompliance with appellate rules only after measuring that discretion against three objectives sought to be furthered by substantial compliance; "achieving an orderly appellate process, deciding cases on the merits, and seeing to it that litigants do not needlessly suffer the loss of their constitutional right to appeal." *Id*. at 482.

In *Kentucky Farm Bureau Mut. Ins. Co. v. Conley*, 456 S.W.3d 814 (Ky. 2015), the Court reaffirmed that after the appellate jurisdiction of an appellate court is invoked, a case should not be dismissed on procedural grounds without a showing that a party has been harmed by noncompliance. The Court stated: "To reiterate: the penalty imposed for the violation of a rule of procedure must bear a reasonable relationship to the harm caused and the seriousness of the defect." *Id*. at 820.

Our Supreme Court has specifically addressed this Court's use of the failure to comply with CR 76.03 as the basis for dismissing an otherwise perfected appeal. In *Crossley v. Anheuser-Busch, Inc*., 747 S.W.2d 600 (Ky. 1988), the appellants filed their prehearing statement in the circuit court rather than the Court of Appeals resulting in a delay in the appellate process of over three months. This Court imposed the ultimate penalty for the mistake by dismissing the appeal. *Id*. at 601. Our Supreme Court was not hesitant to correct the unjust result. It held:

> If we allow the decision of the Court of Appeals to stand, the objective of promoting an orderly appellate process may be served, but the other objectives of appellate practice will be totally defeated: The case will not be decided on the merits, and appellants will lose their constitutional right of appeal. We conclude, therefore, that the Court of Appeals abused its discretion in dismissing the appeal.

Id.

Our Supreme Court subsequently dispelled any notion this Court had that dismissal was appropriate for deficiencies in a prehearing statement. In *Capitol Holding Corp., v. Bailey*, 873 S.W.2d 187, 197 (Ky. 1994), the Court noted that in *Crossley* it previously addressed the "Court of Appeals' abuse of CR 76.03." The Court wrote with unequivocal words.

It began with the statement, it is "abundantly clear that failure to observe strict compliance with CR 76.03 is not jurisdictional." *Id*. Because the prehearing statement is not jurisdictional, "the question is one of substantial

compliance with appropriate sanctions primarily dependent upon whether and what prejudice resulted to the opposing party[.]" *Id*. Our Supreme Court then instructed this Court that "the sanctions provided for in CR 76.03(12) are not to be used as a method of docket control, nor do they justify a hypertechnical reading of the statement of issues requirement in CR 76.03(3)(i)." *Id*.

I believe in the importance of the prehearing conference and recognize the benefits of settlement of appellate cases to the parties and the Court. However, the beneficent purpose of the CR 76.03 has created a pitfall for appellate litigants as this Court is repeatedly presented with motions to dismiss appeals for noncompliance with the rule. I submit that consistent with our Supreme Court's directive, such motions should not be granted without first giving the appellant the opportunity to respond to a show cause motion. If there is no response filed, I agree the Court has the discretion to dismiss the appeal for *failure to respond the show cause*. However, if a response is filed, the Court's proper inquiry is whether a party has been harmed by the failure to comply with CR 76.03 keeping foremost in mind the three objectives of the substantial compliance doctrine.

Again, the purpose of a prehearing statement is to enlighten Court of Appeals staff as to the nature of the appeal, summary background information, and issues raised below for the sole purpose of determining whether a prehearing conference will be held. This case is a classic example where there could be no

harm in not listing the qualified official immunity issue in the prehearing statement. The parties, who have been involved in the litigation since its inception and certainly aware of the basis for the circuit court's dismissal of the action, were obviously aware that qualified official immunity was an issue.

CR 76.03 was enacted to benefit the parties by providing, at no financial cost, the opportunity to work with a trained third-party legal professional to reach a settlement of their dispute. While the prehearing conference process has been proven to be successful, the failure to comply with CR 76.03 has also proven to be fatal to many appeals, an effect not anticipated nor desired when the rule was enacted. In summary, although dismissal may by proper for failure to comply with orders of the Court, I believe that the failure to comply with CR 76.03 can only be the basis for the dismissal of an otherwise timely perfected appeal if the noncompliance has caused harm to a party.

The procedure I suggest will bring consistency to the decisions of this Court. Moreover, it will promote the purposes of deciding cases on the merits and seeing that litigants do not lose their right to appeal by failure to comply with the rule.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Jude A. Hagan Lebanon, Kentucky	Erica K. Mack Lexington, Kentucky