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NO. 96-CA-3270-MR

ARNOLD ZEGART, MEREDITH BROSNAN,
MARCIA GOLDSTEIN, SAM GOLDSTEIN,
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LOEB, BARNETT McCULLOCH, PAGE
PENNA-SCHEIRICH, HENRY JOSEPH
SCHEIRICH, PAUL SHRADER,
PATRICIA JO SLIFKA, CLAY J.
VERMILLION, and JOYCE VERMILLION

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, JUDGE
ACTION NO. 95-CI-0584

CANFIELD-KNOF PROPERTIES, INC.,
ROBERT STEPHEN CANFIELD, and
CHRISTOPHER JAMES KNOF

APPELLEES

and: NO. 96-CA-3399-MR
CROSS-APPEAL

CANFIELD-KNOF PROPERTIES, INC.

CROSS-APPELLANT

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, JUDGE
ACTION NO. 95-CI-0584

ARNOLD ZEGART, MARCIA GOLDSTEIN,
MARTHA A. KANNAPELL, BARBARA
KELLY, BONNE LOEB, AND
BARNETT McCULLOCH

CROSS-APPELLEES

OPINION

AFFIRMING

** ** ** **

BEFORE: EMBERTON, GUIDUGLI, and MILLER, JUDGES.

MILLER, JUDGE. Arnold Zegart, Meredith Brosnan, Marcia Goldstein, Sam Goldstein, Joan Hafner, John H. Hafner, M.D., Brenda W. Hess, John L. Hess, Joyce Hyatt, Phillip L. Hyatt, Martha A. Kannapell, Mary D. Kannapell, Barbara Kelly, Richard E. Kelly, Jr., Steve H. Liddell, Bonne Loeb, Thomas M. Loeb, Barnett McCulloch, Page Penna-Scheirich, Henry Joseph Scheirich, Paul Shrader, Patricia Joe Slifka, Clay J. Vermillion, and Joyce Vermillion (Residents) bring this appeal from an October 10, 1996 order of the Jefferson Circuit Court. Canfield-Knopf Properties, Inc. (C-K), cross-appeals. We affirm on appeal and cross-appeal.

The facts are these: In 1994, C-K sought and obtained approval from the Jefferson County Planning Commission (Commission) for the development of a subdivision in the Wolf Pen Woods area of eastern Jefferson County, Kentucky. The Residents, composed of interested parties in the area, opposed the development. They registered their protest in a hearing before the Commission and, being unsuccessful, appealed to the Jefferson Circuit Court. Again unsuccessful, they brought an appeal to this Court, which met with like fate. See Wolf Pen Preservation Association, Inc. v. Louisville and Jefferson County Planning Commission, Ky. App., 942 S.W.2d 310 (1997). During the foregoing proceedings, and on February 1, 1995, C-K initiated the instant litigation against the Residents alleging, inter alia,

abuse of process and interference with contractual relations.¹ In response, the Residents filed a counter-claim against C-K for intentional infliction of emotional distress, wrongful use of civil proceedings, and abuse of process.

After extensive discovery, both sides moved for summary judgment. On July 31, 1996, the circuit court granted summary judgment dismissing C-K's complaint. On October 11, 1996, the circuit court entered summary judgment dismissing the Resident's counter-claim. These appeals followed.

Residents' Direct Appeal

On direct appeal, the Residents raise the following points of error: (1) the circuit court applied an incorrect legal standard in dismissing their claims against C-K's principal officers; (2) the circuit court erred when it refused to lift the stay on discovery before entering summary judgment against them, and (3) the circuit court erred when it entered summary judgment on their counterclaims of wrongful use of a civil proceedings and abuse of process.

We first address the dismissal of the claim of wrongful use of a civil proceeding. In Mapother and Mapother, P.S.C. v. Douglas, Ky., 750 S.W.2d 430 (1988), the Kentucky Supreme Court adopted Restatement (Second) of Torts §§674-676 (1977) as the law on this subject. Those sections referred to in the Restatement read as follows:

¹This type of suit is sometimes referred to by the parties as a "SLAPP" (strategic lawsuit against public participation). See Eastern Kentucky Resources v. Arnett, Ky. App., 892 S.W.2d 617 (1995).

§674. General Principle

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if

(a) he acts without probable cause, and primarily for the purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and

(b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

§675. Existence of Probable Cause

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either

(a) correctly or reasonably believes that under these facts the claim may be valid under the applicable law, or

(b) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information.

§676. Propriety of Purpose

To subject a person to liability for wrongful civil proceedings, the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based.

The existence of probable cause is a question of law for the court to decide. Prewitt v. Sexton, Ky., 777 S.W.2d 891, 894 (1989). Furthermore, the burden is on the plaintiff to prove lack thereof. Id. A review of the record reveals that the Residents failed to clear this hurdle. It presented no proof to

indicate that C-K lacked probable cause to file suit against them on the aforementioned charges.

We concur with the circuit court that C-K's "views of the facts and law were reasonable and teneble at the time [they filed suit against the Residents]." Using the resources available to them to determine the identity of the protestors, C-K filed suit against a number of persons who they believed comprised the group opposing its efforts. C-K based their lawsuit on what they believed to be a groundless appeal. They claim the appeal lacked a legal basis because the proposed subdivision plan, at the crux of the appeal, complied with all applicable zoning regulations. C-K maintains that their only motivation for filing the lawsuit was to recover the damages they incurred as a result of said appeal. In sum, we believe there existed probable cause to initiate these proceedings. For this reason, in accordance with the rule enunciated in Mapother, supra, we believe C-K was entitled to judgment as a matter of law on the claim for wrongful use of civil proceedings.

The Residents also contend that because they were precluded from conducting adequate discovery, they were unable to fully investigate C-K's defense of "advise of counsel" on the claim of wrongful use of a civil proceeding. To defeat such a claim, a party need only prove one of the defenses set forth in the Restatement. See Mapother, supra. Hence, as we have held appellees had probable cause to inititate proceedings against appellants, this argument is moot.

Next, we deal with the circuit court's dismissal of the claim of abuse of process. Simpson v. Laytart, Ky., 962 S.W.2d

392 (1998), is the most recent utterance on the subject. Therein, the Court set forth the essential elements of the tort: (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding. Both elements must be present, and there will be "no liability where the defendant has done nothing more than carry out the process to the authorized conclusion even though with bad intentions." Id. at 394-395. A willful act "usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property on the payment of money, by the use of the process as a threat or a club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." Id. at 395 (quoting W. Prosser, Handbook of the Law of Torts, Section 121 (4th ed. 1971)).

Having reviewed the record, we find nothing to indicate that C-K committed any such "willful act" as described above. Further, we assign no merit to the Residents' argument that statements made to their attorney and to the press on behalf of C-K represented coercion. As the circuit court stated, "[p]arties must be given reasonable latitude to discuss possible resolutions of the conflicts between them." Without proof of a willful act, the Residents' claim must fail. As such, we cannot say the circuit court erred on this issue.

As the outcome of the Residents' claims would be the same if the principles had been named as parties along with C-K, we deem this contention without merit.

Finally, we find no merit in the Resident's argument that the circuit court applied the wrong standard for summary judgment. We do not believe the dismissal abridged Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

C-K's Cross-Appeal

C-K based its complaint upon the allegation that the Residents pursued frivolous legal proceedings resulting in a delay of the development project and concomitant damages. We first consider C-K's claim that the Residents are guilty of an abuse of process. As herein discussed, a claim for abuse of process requires proof of (1) an ulterior motive and (2) a willful act in the use of process not proper in the regular conduct or proceeding. See Simpson, supra. As a matter of law, we do not believe the Residents were in violation of either of these principles. It seems to us that, as residents and interested parties in the area, they had a clear right to adjudicate the action of the Commission. KRS 100.347(2). The rule of law which would open the Residents to liability simply because they had pursued and lost a claim of interest to them would have an undue, chilling effect on those residents who seek to protect their areas from improper development. Further, it would render the appellate procedure in KRS Chapter 100 to no avail. No-one would risk protest. We think the trial court was correct in denying C-K's claim of abuse of process.

C-K also claims that the conduct of the Residents amounts to an interference with the contractual relationship. We

deem this contention totally without merit. See Eastern Kentucky Resources v. Arnett, Ky. App., 892 S.W.2d 617 (1995).

For the foregoing reasons, the judgments of the Jefferson Circuit Court dismissing the complaint and counterclaim are affirmed.

ALL CONCUR.

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