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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001407-MR
&
NO. 2009-CA-001508-MR

BOBBY GARCIA
D/B/A AUTOBAHN AUTOMOTIVE — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 07-CI-00183

LARRY WHITAKER — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, NICKELL, AND WINE, JUDGES.

WINE, JUDGE: This is an appeal and cross-appeal from a judgment of the Pulaski Circuit Court enforcing a mechanic's lien against the owner of an automobile. In his direct appeal, Bobby Garcia argues that the trial court erred by dismissing his

claims against Larry Whitaker for malicious prosecution and abuse of process. However, we conclude that the trial court did not clearly err by granting a directed verdict on these claims. In his cross-appeal, Whitaker argues that the trial court erred by denying his motion for a directed verdict on Garcia's claims for enforcement of the lien. We conclude that this issue is not preserved for review or has otherwise been waived. Hence, we affirm on both the appeal and the cross-appeal.

The underlying facts of this case are not in dispute. Garcia owned an auto repair business in Somerset which operated under the name of Autobahn Automotive. Whitaker was the owner of a 1995 Porsche 928. In August 2006, the Porsche stopped running. After consulting with several other mechanics, Whitaker was referred to Garcia and Autobahn Automotive for repairs in September of 2006. Garcia conducted several tests and informed Whitaker that the repairs would cost between $5,000.00 and $8,000.00. He also told Whitaker that he did not need the money up front because the car would be collateral for the job. Garcia states that Whitaker approved the repairs, but Whitaker states that he only approved replacement of the timing belt.

Garcia did not conduct the repairs himself, but transported the car to a Porsche dealer in Lexington for the repairs. In December of 2006, Porsche of Lexington completed the repairs. Garcia wrote a cashier's check to the dealer for $6,689.40 and had the car hauled back to Somerset. After test driving the car,

Garcia contacted Whitaker on December 3, 2006, and told him that the car was ready.

On December 4, 2006, Garcia and Whitaker met to discuss the repairs. Garcia provided Whitaker with a bill for $7,978.74 on an Autobahn Automotive invoice. Whitaker declined to pay immediately, stating that he wanted detailed receipts for the parts used in the repairs. Garcia then left with the Porsche. The following day, Garcia again met with Whitaker. During this meeting, the two argued over the repairs and the bill.

On December 6, 2006, Garcia was contacted by the Pulaski County Attorney, who stated that Whitaker was filling out a warrant for theft. The County Attorney told Garcia to bring the receipts to his office as soon as possible. Garcia left his invoice and the Porsche of Lexington invoice at the County Attorney's office without speaking to anyone. He testified that Whitaker was at the office "filling out the warrant" while he was there.

An arrest warrant was issued by the Pulaski District Court later that afternoon. Around 6:00 p.m., a sheriff's deputy went to Garcia's home and placed him under arrest for theft by failure to make required disposition of property. Garcia testified that Whitaker was present at the time and that he was instructed to tell Whitaker where the Porsche was located. Garcia showed Whitaker to the car and Whitaker left with it. Thereafter, the officer handcuffed Garcia and took him to the detention center. Garcia was held overnight at the detention center and his bond was initially set at $10,000.00 full cash. The next day, Garcia was arraigned

and his bond was reduced to $1,000.00. He paid the bond and was released soon afterward. Garcia appeared at several later hearings, but Whitaker never appeared and the charges were eventually dismissed.

In January 2007, Garcia filed a mechanic's lien against Whitaker's Porsche for the repair cost of $7,978.74, plus a $50.00 towing fee. Shortly thereafter, Garcia filed this action against Whitaker to recover on that lien. He also sought damages against Whitaker for false imprisonment, malicious prosecution, abuse of process, slander, libel, and outrageous conduct. Whitaker generally disputed the bill and filed a counterclaim alleging that Garcia had improperly filed the lien.

The matter proceeded to a jury trial in March of 2009. At the close of Garcia's case, Whitaker moved for a directed verdict on all tort claims. The trial court granted the motion, finding no evidence that Whitaker had made any materially false statement in filing the criminal warrant against Garcia. The trial court submitted the remaining claim to the jury, which returned a verdict for Garcia in the amount of $8,029.70. Garcia filed a motion to alter, amend or vacate pursuant to Kentucky Rule of Civil Procedure ("CR") 59.05, and for a new trial pursuant to CR 59.01, arguing that the trial court improperly dismissed his claims for malicious prosecution and abuse of process. The trial court denied those motions. This appeal and cross-appeal followed.

In his direct appeal, Garcia argues that the trial court erred by directing a verdict in Whitaker's favor on his claims for malicious prosecution and

abuse of process. He argues that he made *prima facie* cases on both claims. On a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998). The motion cannot be granted "unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Id.* at 18-19. On appellate review of a directed verdict, we will not disturb the trial court's decision unless it was clearly erroneous. *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 821 (Ky. 1992).

On Garcia's first claim, there are six basic elements necessary to the maintenance of an action for malicious prosecution: "(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 v. Drasin*, 621 S.W.2d 895, 899 (Ky. 1981). Historically, the tort of malicious prosecution is one that has not been favored in the law. *Prewitt v. Sexton*, 777 S.W.2d 891, 895 (Ky. 1989); *Reid v. True*, 302 S.W.2d 846, 847-48 (Ky. 1957). Accordingly, one claiming malicious prosecution must strictly comply with the elements of the tort. *See Prewitt*, 777 S.W.2d at 895; *Raine*, 621 S.W.2d at 899.

The plaintiff in a malicious prosecution action has the burden of establishing a lack of probable cause. *Collins v. Williams*, 10 S.W.3d 493, 496 (Ky. App. 1999). Whether probable cause exists is generally a question of law for the court to decide. *Id.* Since the absence of probable cause is an essential element of the tort, the fact that the plaintiff filed the action upon advice of counsel is a complete defense. *Mayes v. Watt*, 387 S.W.2d 872, 873 (Ky. 1964). The advice of counsel need not be sound. *Id.* All that is necessary is that the plaintiff acted upon advice of counsel after full disclosure of all material facts. *Flynn v. Songer*, 399 S.W.2d 491, 494 (Ky. 1966). The rule applies regardless of whether the counsel is a private attorney or a public prosecuting attorney. *Smith v. Kidd*, 246 S.W.2d 155, 159 (Ky. 1951).

In this case, the trial court found no evidence that Whitaker had made any materially false statement on which the County Attorney or the district court judge would have relied. Garcia argues that Whitaker failed to disclose that there was an outstanding repair bill on the Porsche. Garcia also alleges that Whitaker falsely stated that he refused to provide the receipts for the purchase of parts for the automobile. Garcia testified that he turned those receipts over to the County Attorney's office prior to the issuance of the warrant. Garcia contends that the warrant was false and misleading without these omitted facts. Consequently, he maintains that Whitaker was not entitled to rely on the advice of the County Attorney.

However, Whitaker clearly alleged in the warrant that he had hired Garcia to work on his automobile and that the dispute concerned Garcia's failure to provide detailed receipts for the parts. As the trial court noted, these facts are true and clearly indicate that there was a dispute over a repair bill. Furthermore, Garcia testified that he dropped off the receipts with a secretary at the County Attorney's office. Garcia did not speak with anyone at the time, but he saw Whitaker while he was there. There was no evidence that Whitaker knew Garcia had turned over the receipts at the time he prepared the warrant. Thus, while Whitaker's statement in the warrant may have been inaccurate, Garcia cannot show that it was knowingly false or misleading at the time he made it. Consequently, Whitaker was entitled to rely on the advice of the County Attorney in seeking the warrant.

We disagree with the trial court, however, that the abuse of process claim directly flows from the malicious prosecution claim. While lack of probable cause is an element of malicious prosecution, it is not an element of abuse of process. *Simpson v. Laytart*, 962 S.W.2d 392, 394 (Ky. 1998). Rather, abuse of process consists of the employment of legal process for some purpose other than that which it was intended by the law to effect. *Id.* "The essential elements of an action for abuse of process are (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding." *Id.* "Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process is required and there is no liability where the

defendant has done nothing more than carry out the process to its authorized conclusion even though with bad intentions." *Id.* at 394-95.

While we disagree with the trial court's initial reasons for dismissing the abuse of process claim, we conclude that the trial court properly granted a directed verdict on this claim. Garcia alleges that Whitaker obtained the warrant to recover his vehicle without paying the repair bill. In its order denying Garcia's motion for a new trial, the trial court stated that the testimony did not support this claim.

However, Whitaker admits that he sought the arrest warrant to obtain possession of his automobile. We question whether this is a proper use of a criminal warrant. Nevertheless, the gist of the tort of abuse of process is the use of legal process as a means to secure a collateral advantage *outside* of the regular course of the proceeding. *Flynn v. Songer*, 399 S.W.2d at 495. While advice of counsel is not a defense to an abuse of process claim, *id.*, Whitaker is not liable for the County Attorney's or the police's mistake of law concerning the appropriate remedy.

In this case, the sheriff's deputy required Garcia to turn over the Porsche to Whitaker when he was arrested. Even if this was in violation of Garcia's lien rights, the County Attorney and the police were responsible for the action. There is no evidence that Whitaker took any action outside of the course of the criminal process. Therefore, Whitaker is not liable for abuse of process.

Garcia also alleges that the County Attorney told him that Whitaker had agreed to pay the bill if Garcia would plead guilty to some charge. But on its face, this allegation does not suggest that Whitaker was attempting to gain some collateral advantage over Garcia. At most, it indicates only that Whitaker was seeking some kind of stipulation to probable cause. While we do not necessarily approve of this, we cannot say that it was clearly improper within the scope of the criminal proceeding.

In his cross-appeal, Whitaker argues that the trial court erred by allowing Garcia's claim for recovery on the bill to go to the jury. Whitaker maintains that Garcia's only entitlement to recovery sounds in *quantum meruit*, and that Garcia is barred from equitable recovery due to his unclean hands. However, Whitaker provides no cite to the record indicating that he preserved this argument for review, as required by CR 76.12(4)(c)(v). Furthermore, Whitaker's counsel conceded at trial that a jury issue existed concerning his allegations of fraud against Garcia (Video Record 3/17/09, 3:28:42). Thus, Whitaker has waived any objection to the trial court's submission of this issue to the jury. Therefore, we decline to consider this issue further.

Accordingly, the judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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