

Maynard's participation as a resident in the University's surgical residency program. The University's decision to terminate Maynard from the program resulted in both state and federal litigation, culminating in the instant appeal.

On appeal, Maynard challenges the trial court's final judgment entered on the jury's verdict finding against him on his breach of contract, breach of duty of good faith, and retaliation claims and finding in favor of the University on its counterclaim for malicious prosecution. Maynard argues that the jury's verdict on the University's counterclaim is barred by law and that the trial court committed reversible error in denying his motion to sever his claims from the University's counterclaim for trial. We reverse.

As a participant in the University's surgical residency program, Maynard entered into a contract with the University that regulated the terms and conditions of his continued participation in the five-year program. As Maynard completed his fourth year of the program, he was advised by the University that there were concerns about his progress in the program. An agreement was reached as to what the University expected of him; however, there was no agreement as to whether the University's concerns were valid. As a result, Maynard filed discrimination complaints with the Equal Employment Opportunities Commission ("EEOC") and the Florida Commission on Human Relations ("FCHR") in December 1999, alleging that he was the victim of racial discrimination.

On April 17, 2000, Maynard was notified by the University that his contract had been terminated and that he was no longer a resident in the program. In August 2000, Maynard filed a nine-count complaint against the University in the United States

District Court for the Middle District of Florida. The complaint included a claim for breach of contract, several claims under Title 42, United States Code Section 1983, several claims under sections of the Florida Constitution, a claim for Equal Protection under the United States Constitution, and a claim for violation of Title VII of the Civil Rights Act of 1964. In response, the University moved for summary judgment.

In September 2002, the federal district court granted the University's motion for summary judgment. The district court concluded that the Eleventh Amendment to the United States Constitution divested the federal courts of jurisdiction over certain claims made by a citizen against a state. This applied to the Equal Protection claim, the alleged violations of 42 USC § 1983, and the breach of contract claim. Finally, the federal district court ruled against Maynard on count four, the alleged violation of Title VII, finding that he had failed to plead a prima facie case. Specifically, the district court found that Maynard had not alleged that other similarly situated individuals were treated differently than himself. The district court's ruling was thereafter affirmed on appeal by the Eleventh Circuit Court of Appeals.

Immediately thereafter, Maynard filed his three-count complaint in the Thirteenth Judicial Circuit. In his complaint, Maynard alleged breach of contract, breach of implied duty of good faith and fair dealing, and retaliation under the Florida Civil Rights Act. In response, the University filed its answer and included counterclaims for malicious prosecution and abuse of process. The University alleged that the ruling of

the federal district court resolved all of the issues and that the filing of "this civil suit" was motivated by malice and intended to embarrass the University.¹

During the course of the litigation, Maynard moved to sever his claims from those of the University. He argued that to allow the jury to learn of the federal district court's ruling would prejudice the jury's consideration of his claims. The University argued that the counterclaims were compulsory and should be tried along with Maynard's claims. The trial court denied Maynard's motion, and the issues proceeded to jury trial. The jury found for the University both on Maynard's claims and on the University's counterclaims. Based on the jury's verdict, the trial court entered a final judgment ordering Maynard to pay the University \$167,993 for the malicious prosecution claim.

Following the entry of final judgment, Maynard filed a motion to set aside the verdict and judgment on the malicious prosecution counterclaim and a motion for new trial. The basis of the motion to set aside was that the University lacked standing to file the claim, rendering the judgment null and void due to the trial court's lack of jurisdiction. At the hearing, Maynard pointed out that pursuant to Cate v. Oldham, 450 So. 2d 224 (Fla. 1984), the University, as a state entity, could not maintain an action for

¹ The basis of the counterclaim filed by the University is not totally clear. After alleging that the federal district court ruled in favor of the University on "the merits and in its defense of the claims alleged in the Federal case," the University then alleged that "Maynard caused this civil suit to occur as a result of malice and in an attempt to embarrass USF by falsely alleging race discrimination." Whether the phrase "this civil suit" refers to the federal case or the instant case is subject to interpretation. However, the counterclaim also alleges that the University was damaged as a result of the federal case and that Maynard did not have probable cause to prosecute the federal case. Finally, the counterclaim prayed for fees, expenses, and costs expended by the University in defending itself. All of this language seems to suggest that the malicious prosecution was premised on Maynard's having filed the federal case.

malicious prosecution against one who has sued the state without success. Maynard suggested that this prohibition on the state seeking relief on a malicious prosecution claim was tantamount to the court lacking jurisdiction to hear the claim and that any relief awarded was a nullity. He further argued that if the trial court granted his motion to set aside the malicious prosecution verdict, he would be entitled to a new trial on his claims because much of the evidence admitted in support of the malicious prosecution claim was prejudicial to his claims and would have been inadmissible but for the malicious prosecution claim.

The University argued that a lack of standing is not the same as lack of jurisdiction and that Maynard had waived this defense by failing to plead it as an affirmative defense. The trial court denied Maynard's motion to set aside the verdict and judgment and his motion for new trial. Maynard now appeals the final judgment.

To resolve the challenge to the judgment on the malicious prosecution claim, we must first determine if the University may bring such a claim and, if not, whether this defense is waived if not pleaded as an affirmative defense. We begin with an analysis of Cate, 450 So. 2d 224. In that case, the Florida Supreme Court responded to a certified question posed by the Eleventh Circuit Court of Appeals: "Under the common law of Florida, may a state official who has been sued in his official capacity for alleged negligence in the exercise of his official duties, maintain an action for malicious prosecution against plaintiffs in the negligence action?" Id. at 224. The supreme court responded in the negative.

The facts of Cate are complex. Mary Bradham died as the result of a battery committed by her estranged husband. Kenneth Cate, on behalf of Bradham's

estate, filed a wrongful death action against the state and Gordon Oldham, the state attorney. In that action, Cate alleged that Oldham knew of Bradham's husband's dangerous propensities but that he did not properly investigate and prosecute the husband. The action ended with the trial court entering a summary judgment in favor of the defendants. Oldham individually then filed a malicious prosecution action against Cate and his law firm, alleging that the action was based on malice. Subsequently, the state and Oldham in his capacity as state attorney filed an additional malicious prosecution action against Cate.

Cate moved to dismiss the individual action, but the motion was denied. Cate then filed a petition for injunctive relief and declaratory relief in the federal district court. He alleged that the malicious prosecution actions were a violation of his first amendment right to free speech. The federal district court dismissed Cate's petition related to the state and Oldham in his official capacity. Cate appealed that ruling to the Eleventh Circuit, which then certified the question to the Florida Supreme Court.

The Florida Supreme Court determined that the right to present a complaint to the government regarding the government's conduct is essential. The court also determined that at common law there must be a showing of special damage before an action of malicious prosecution could be brought. That is, establishing the malicious nature of the prosecution was insufficient. With these two findings, and after a review of the scarce case law on the subject, the Florida Supreme Court concluded: "There simply is no historical basis for a state officer to retaliate with a malicious prosecution action when he has been sued in his official capacity. Malicious prosecution is considered a personal tort. The gravamen of the action is injury to

character." Id. at 227 (citation omitted). Based on this conclusion, the court determined that the common law of Florida does not allow a state official who has been sued in his official capacity to "maintain" a malicious prosecution action. Id.

Subsequently, the Eleventh Circuit read this holding in a broader context: "The State of Florida provides extra security for this right by forbidding state officials or state entities from suing citizens for malicious prosecution. See Cate v. Oldham, 450 So. 2d 224, 225-26 (Fla. 1984)." United States v. Pendergraft, 297 F.3d 1198, 1207 at n.7 (11th Cir. 2002). This broader interpretation is based on the Cate court's discussion of other decisions which suggest that allowing such suits by the state would result in "self-censorship." Cate, 450 So. 2d at 227. Critics of the state would be "foreclosed" from bringing any complaint, fearing the expense if they failed to prove their allegations. Id. Although the Eleventh Circuit's analysis of Cate is not controlling, based on our own reading of Cate, we find Pendergraft persuasive. Accordingly, we conclude that a state entity which has been sued may not "maintain" a malicious prosecution action against the individual who brought the original action.

The next question to be resolved is whether Maynard waived this defense by failing to raise it as an affirmative defense in the trial court proceeding. The University cites the Florida Supreme Court's decision in Krivanek v. Take Back Tampa Political Committee, 625 So. 2d 840 (Fla. 1993), as support for this proposition. In that case, the committee sought mandamus relief in the trial court, asking that Krivanek, the Hillsborough County Supervisor of Elections, be ordered to count the signatures of certain voters in its petition drive. The trial court granted the relief, and that decision was affirmed by this court. Krivanek v. Take Back Tampa Political Comm., 603 So. 2d

528 (Fla. 2d DCA 1992). Upon seeking review in the Florida Supreme Court, Krivanek raised for the first time the issue of whether the committee had standing to seek such relief. The supreme court came to the following conclusion:

With regard to the first issue, we find that Krivanek has waived the right to raise the issue of standing because this issue has been raised for the first time in her petition to this Court. The issue of standing should have been raised as an affirmative defense before the trial court, and Krivanek's failure to do so constitutes a waiver of that defense, precluding her from raising that issue now. See, e.g., Cowart v. City of West Palm Beach, 255 So. 2d 673 (Fla. 1971).

Krivanek, 625 So. 2d at 842.

A plain reading of this language, upon which the University relies, suggests that the failure to raise the standing issue as an affirmative defense is a bar to further consideration. However, when we examine the case the Krivanek court cites, that proposition is not so clear. In Cowart, 255 So. 2d 673, the issue was whether the natural father of a child born out of wedlock had standing to pursue an action for the wrongful death of his son. At trial, the legitimacy of the child was never raised, and the jury returned a verdict of \$20,000 in favor of the father. It was not until the case was on appeal before the Fourth District that the city raised standing as a defense for the first time. The Fourth District ruled that the issue of standing involved a "fundamental right" and could be raised for the first time on appeal. City of W. Palm Beach v. Cowart, 241 So. 2d 748, 750 (Fla. 4th DCA 1970). In reaching that decision, the Fourth District relied on Love v. Hannah, 72 So. 2d 39 (Fla. 1954).

However, when the Florida Supreme Court reviewed the Fourth District's opinion in Cowart, it determined that the district court had misread the holding in Love.

The issue in Love was who had standing to bring a wrongful death action under the statute in effect at that time. The administrator of an estate had filed a wrongful death action that had proceeded to jury trial resulting in a verdict for the plaintiff. The defendant did not raise the issue of standing by an affirmative defense. However, following the trial, the defendant did move for summary judgment and new trial. The motion for summary judgment raised the issue of whether the plaintiff had the standing to "maintain" the suit.

Based on this set of facts, the Love court concluded:

It is generally true that on appeal the parties are restricted to the theory of the case as tried in the lower court. This principle has certain well recognized exceptions, one of which is that if an error in the lower court affects fundamental rights, it may be raised for the first time on appeal. Moreover, in this case it cannot be said that the question which we are discussing was raised [for] the first time here. On the contrary, the motion for new trial, on the ground that the verdict was contrary to the law and the evidence, raised the question in its broadest sense, and the motion for summary judgment—even if not properly filed—brought such fact to the Court's attention during the term and a review of the lower Court's ruling on those points is not raising the question here for the first time.

Love, 72 So. 2d at 43 (citations omitted).

In Cowart, 255 So. 2d 673, the Florida Supreme Court pointed out that the district court erred in applying Love by focusing on the initial language that presumably allows one to raise a "fundamental right" for the first time on appeal. The supreme court further noted that the basis of its holding in Love was the fact that the issue of standing had been raised at the trial court, albeit after the jury's verdict. Applying this portion of the holding of Love, the court determined that the district court had erred in ruling that the issue of standing could be raised for the first time on appeal. Cowart, 255 So. 2d at

674-75. In so ruling, the Cowart court did not recede from the language in Love that suggests that if the issue is raised in the trial court, even after the verdict is rendered, the issue is preserved.

Based on this review, we reject the University's argument that because Maynard did not raise standing as an affirmative defense prior to trial, he waived the issue. Our reading of Cowart, 255 So. 2d 673, leads us to conclude that the pertinent question is whether the issue was raised at the trial court, not how it was raised. That is, when read in light of Love, the language that the University cites supports the conclusion that standing may not be raised for the first time on appeal; however, it does not necessarily require that standing be raised only by means of an affirmative defense.

Here since Maynard did raise the issue of standing below in his motion to set aside the verdict and judgment, we now have before us the issue of standing in a procedural posture similar to that before the Love court. Based on the ruling in Love and considering that the Cowart court tacitly approved Love, by using this particular procedural posture to factually distinguish Cowart from Love, we conclude that the standing issue has not been waived and that the trial court erred in not granting the motion to set aside the verdict and judgment on the malicious prosecution claim. Accordingly, we reverse and remand with instructions that the trial court set aside the judgment against Maynard on the malicious prosecution claim and enter an order dismissing the claim.

Having determined that the University was not entitled to raise the malicious prosecution claim against Maynard, we must now address whether Maynard is entitled to a new trial on his three original claims. Maynard argues that much of the

evidence regarding the federal lawsuit that the University presented to the jury as relevant to its malicious prosecution claim was misleading and prejudicial to the jury's consideration of his claims. In particular, Maynard maintains that the trial court would not have given the following jury instruction but for the malicious prosecution claim:

Based on the record evidence in front of Judge Elizabeth Kovachevich at the time of her ruling, she held there was insufficient record evidence to establish a prima facie case of discrimination and her decision was appealed to the Eleventh Circuit Court of Appeals and the decision was affirmed.

Maynard argues that this language was prejudicial because it misrepresented the federal district court's ruling. Maynard points out that the district court did not address the merits of the breach of contract claim, but rather came to the procedural conclusion that it should be brought in state court. Maynard therefore argues that the instruction misled the jury to believe that the federal court already had ruled against Maynard on the same issues that it was to consider.

We agree that despite the other evidence presented, this instruction reasonably might have misled the jury. "As appellant points out, the test for reversible error arising from an erroneous jury instruction is not whether the instruction misled, but only whether it reasonably might have misled the jury." McPhee v. Paul Revere Life Ins. Co., 883 So. 2d 364, 368 (Fla. 4th DCA 2004). The allegations of the instant complaint were not substantively reviewed by the federal district court. The district court's summary judgment was based on the conclusions that Maynard could not sue the state in federal court and that Maynard's claim that the University had violated Title VII of the Civil Rights Act of 1964 was insufficiently pleaded. Further, although the order suggested that the State of Florida may have waived its sovereign immunity on the

breach of contract claim, the district court concluded that such a claim must be brought in the state court. Accordingly, there is a reasonable probability that the instruction given by the trial court was misleading to the jury. The basis of the federal district court's rulings on the issues before the jury was purely procedural and not controlling on the same issues raised in the state court. The ruling on the Title VII complaint was not relevant to Maynard's claims before this jury as he did not reallege this as a cause of action. Without further explanation, the lay juror could reasonably conclude that the trial court was instructing him or her that the federal court already had reviewed Maynard's claims and ruled against him. As such, Maynard is entitled to relief. Cf. Ruiz v. Cold Storage & Insulation Contractors, Inc., 306 So. 2d 153, 155 (Fla. 2d DCA 1975) ("In the final analysis, our decision must turn on whether we think there was a reasonable possibility that the jury could have been misled by the failure to give the instruction.").

Finally, the University argues that Maynard's failure to provide this court with a transcript of the trial proceedings is fatal to his request for relief. The University maintains this court cannot review the entirety of the trial to determine if the evidence and instructions presented to the jury on the malicious prosecution claim were, if admitted in error, harmful. We disagree. Although it is true that the record before us does not include a trial transcript, it does include the order on Maynard's motion in limine, which contains the language of the jury instruction at issue. That language—which instructed the jury that a federal judge had already concluded that Maynard had not proven his case in federal court—makes it clear that it is highly probable that the instruction resulted in prejudice to Maynard. This is true, especially, since the several

claims—although based on distinct and separate legal theories—involved the same factual situation.

Because we find that there is a reasonable possibility that this instruction alone was misleading despite what evidence might have been presented, we reverse the judgment on Maynard's claims and remand with instructions for a new trial on those claims alone.

Having reversed the trial court's final judgment, we need not consider issue three raised by Maynard regarding the trial court's denial of his motion for summary judgment. However, because our reversal of the final judgment is based on our reading of the Florida Supreme Court's opinions in Love, Cowart, and Krivanek, we certify the following question as one of great public importance:

IN APPLYING THE DECISIONS OF LOVE V. HANNAH, 72 SO. 2D 39 (FLA. 1954), COWART V. CITY OF WEST PALM BEACH, 255 SO. 2D 673 (FLA. 1971), AND KRIVANEK V. TAKE BACK TAMPA POLITICAL COMMITTEE, 625 SO. 2D 840 (FLA. 1993), IS THE DEFENSE OF STANDING TO BRING A CAUSE OF ACTION PRESERVED FOR APPELLATE REVIEW WHEN RAISED FOR THE FIRST TIME IN THE TRIAL COURT AFTER TRIAL BY A MOTION TO SET ASIDE BUT NOT IN AN AFFIRMATIVE DEFENSE FILED BEFORE TRIAL?

Reversed and remanded with instructions; question certified.

KELLY and VILLANTI, JJ., Concur.