MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

Robert J. Nice
John G. Shubat
The Nice Law Firm, LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES

Dina M. Cox
J. Neal Bowling
Lewis Wagner, LLP
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Robert E. Lehman,
Appellant-Plaintiff,

v.

Steven F. Fillenwarth, Christine M. Stolle, and Fillenwarth & Stolle, LLC a/k/a Fillenwarth & Associates,
Appellees-Defendants

October 28, 2021

Court of Appeals Case No. 21A-PL-538

Appeal from the Marion Superior Court

The Honorable David J. Dreyer, Judge

Trial Court Cause No. 49D04-1609-PL-34988

Vaidik, Judge.

Case Summary

[1] In 1985, the Marion Superior Court entered a decree dissolving the marriage of Robert E. Lehman and Michele B. Lehman. Twenty-five years later, in 2012, Michele filed a motion to set aside the divorce decree alleging, among other things, that the decree was invalid because she wasn't served with the petition for dissolution and didn't waive service. Michele also filed a new petition for dissolution as a placeholder if the trial court granted the motion to set aside. The court denied Michele relief. Robert then sued Michele's attorneys for malicious prosecution and attorney deceit. The trial court entered summary judgment for the attorneys, and Robert now appeals. We affirm.

Facts and Procedural History

[2] Robert and Michele married in June 1981. Robert was an attorney at the time, and Michele was a homemaker.[1] They had one child, a daughter born in November 1981. On December 17, 1984, Robert filed a petition to dissolve the parties' marriage in Marion Superior Court (Cause No. S784-1598). He also filed a waiver of service and consent to jurisdiction purportedly signed by Michele. In March 1985, Michele signed a settlement agreement, though she later claimed she signed it under duress and without knowing what it was.

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[1] Robert was subsequently disbarred. *See In re Lehman*, 901 N.E.2d 1097 (Ind. 2009).

Thereafter, Robert filed the settlement agreement and another document purportedly signed by Michele—a waiver of final hearing. In April 1985, the trial court issued a decree of dissolution, which incorporated the settlement agreement ("the 1985 Decree"). Appellant's App. Vol. V p. 64.

[3] Following the issuance of the 1985 Decree, Robert and Michele continued to live together as a family for twenty-seven years, until March 2012. That month, Michele met with attorneys Steven F. Fillenwarth and Christine M. Stolle ("the Attorneys") to discuss the validity of the 1985 Decree. Michele told them (1) she was never served with the petition for dissolution; (2) she didn't remember signing the waiver of service and consent to jurisdiction and didn't think the signature on the document was hers; (3) she signed a document that turned out to be the settlement agreement but did so under duress; and (4) she didn't know the 1985 Decree had been issued. In addition, Michele said she and Robert filed joint tax returns after the 1985 Decree was issued. The attorneys reviewed the divorce file, researched the law, interviewed witnesses (including Robert and Michele's daughter), and hired a handwriting expert, who concluded Michele didn't sign the waiver of service and consent to jurisdiction.

[4] In May 2012, the Attorneys filed a motion to set aside the 1985 Decree under Indiana Trial Rule 60(B). Appellant's App. Vol. III p. 2. The motion to set aside set forth three claims: (1) the trial court had "no jurisdiction" over Michele in the original divorce action given Robert's failure to serve Michele with the petition for dissolution and "the fraudulently executed Waiver of Service and Consent to Jurisdiction"; (2) Robert had perpetrated a "fraud on

the [c]ourt"; and (3) Robert and Michele's behavior over the next twenty-seven years, including filing joint tax returns and holding themselves out to the public as husband and wife, evidenced a rescission of the 1985 Decree. *Id.* at 3. In conjunction with the motion to set aside, the Attorneys filed a new petition for dissolution, which was intended to allow Michele to divorce Robert if the motion to set aside was granted. *Id.* at 11.[2]

[5] During discovery, the Attorneys learned of evidence unfavorable to Michele's case, including that Robert and Michele had stopped filing joint tax returns in 1995 and Michele had applied to the Social Security Administration in 2011 indicating she was divorced and had not been married for over ten years. The Attorneys expressed "concern" to Michele about these and other discoveries, but Michele gave explanations that satisfied them. *Id.* at 67. For example, Michele told the Attorneys she indicated she was divorced on the application because "she had seen the trouble that [she and Robert] had gotten into with the tax issues and she was scared to death of that." *Id.*

[6] Robert filed a motion to dismiss under Indiana Trial Rule 12(B), which the trial court denied. The matter then proceeded to a final hearing on the merits of Michele's claims, which was held over the course of several days in 2013 and 2014. Following Michele's case-in-chief, Robert moved for involuntary

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[2] The motion to set aside was filed in the original divorce action, Cause No. S784-1598. The second petition for dissolution was filed in a different cause number but was eventually consolidated into Cause No. S784-1598. *See* Appellees' Br. p. 39.

dismissal under Indiana Trial Rule 41(B). The court took the matter under advisement and later entered an order granting Robert's 41(B) motion. Regarding the lack-of-jurisdiction claim, the court found:

> 19. Wife executed a waiver of service and consent to jurisdiction, filed on December 17, 1984. The Court has carefully considered the testimony of Wife as well as Wife's handwriting expert. Wife does not remember signing the pleading and her expert's testimony was not persuasive. The evidence, in the determination of the Court[,] is simply deficient.

Id. at 18. Regarding the fraud claim, the court found:

> 22. Wife failed to present sufficient evidence to meet her burden of proof in demonstrating any of her allegations. The totality of Wife's evidence does not support a finding of fraud. . . .
>
> 23. The Settlement Agreement contains numerous hand-written changes, initialed by the parties, which only served to benefit Wife. Those initialed changes demonstrate that Wife reviewed the terms of the Settlement Agreement and understood those terms well enough to make agreed changes to the document.
>
> 24. Wife had been married and divorced prior to the marriage to Robert Lehman. She was represented by counsel in her prior divorce. Wife was certainly aware of her rights to follow up with contacting a lawyer.
>
> 25. Wife's claim that Husband concealed the dissolution action from her for over 27 years is simply not credible. The parties have filed separate tax returns (single, not married) since 1995; Wife filed for Social Security Benefits indicating she was divorced and was never married for more than 10 years; Wife testified, under

> oath, in a trial in Hamilton County that she was no longer married; and that Wife executed a promissory note to Husband indicating her understanding that the parties divorced in 1985. Wife has told a number of friends and family members about the divorce, including the parties' daughter and Petitioner's brother. Some of those friends were made aware of the divorce by Wife as early as 1995. Wife, by her own admission, found the signed and file-marked copies of the dissolution papers in 1995. She saw . . . a dissolution attorney[] around the time she found those documents. Wife sat on any rights that she may have had by not acting upon the divorce for 18 years.
>
> 26. Wife has failed to present sufficient evidence to meet her burden of proof in demonstrating Husband has committed fraud upon the Court. . . .

Id. at 19-20. Regarding the rescission claim, the court found:

> 30. While it is true that Husband did not provide a condo for Wife or pay the support figure detailed in their settlement, the parties clearly severed themselves financially at the time of the dissolution. The parties did not maintain joint bank accounts, debts or own property jointly. The fact that both parties "pretended" to be married for many years or chose to keep the details of their divorce private, simply does not prove rescission of the Settlement Agreement. Wife has failed to present sufficient evidence to meet her burden of proof in demonstrating that Husband has rescinded the Settlement Agreement.

Id. at 21.

[7] Robert sought to recover attorney's fees from Michele under the frivolous-action statute, Indiana Code section 34-52-1-1; however, the trial court denied his request. Robert appealed, and we held the court didn't abuse its discretion in

denying Robert's request for attorney's fees. *See Lehman v. Lehman*, No. 49A02-1512-DR-2225, 2017 WL 1279803 (Ind. Ct. App. Apr. 6, 2017), *trans. denied*. We explained that although Michele "lost on the merits," "her loss did not render her claim frivolous, unreasonable, or groundless" as the court had to "traverse[] [an] arduous maze of motions, amendments, and responses and manage[] the tensions and conflicting stories of the parties." *Id.* at *6.

[8] In September 2016, Robert sued the Attorneys for malicious prosecution and attorney deceit in Marion Superior Court.[3] *See* Appellees' App. Vol. II p. 2. Thereafter, Robert moved for partial summary judgment "on the issue of probable cause," Appellant's App. Vol. V p. 2, and the Attorneys moved for summary judgment.

[9] Following a hearing, the trial court entered an order denying Robert's motion for partial summary judgment and granting the Attorneys' motion for summary judgment in March 2021. Regarding the malicious-prosecution claim, the court found:

> Because the undisputed evidence shows that the [Attorneys] had probable cause to pursue Michele's claims, they are entitled to judgment as a matter of law on [Robert's] malicious prosecution claim.

[3] In 2014, Robert sued Michele for malicious prosecution and abuse of process. *See* Cause No. 49D06-1408-CT-2617. In 2017, the trial court dismissed the case for failure to prosecute. Robert filed a motion to reinstate the case, which the court denied.

Appellant's App. Vol. II p. 50. Regarding the attorney-deceit claim, the court found:

> The undisputed evidence here shows that the [Attorneys] did not engage in any fraudulent, collusive, malicious, or tortious conduct, nor did they make any statement which they knew to be untrue or with reckless disregard for the truth.
>
> For this reason, the [Attorneys] are entitled to judgment as a matter of law on [Robert's] attorney deceit claim.

Id. at 51.[4]

[10] Robert now appeals.

Discussion and Decision

[11] Robert appeals the trial court's entry of summary judgment for the Attorneys. We review motions for summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). That is, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C).

[4] The trial court also found collateral estoppel precluded Robert's claims. Because we are affirming the trial court's grant of summary judgment for the Attorneys on other grounds, we do not address collateral estoppel.

I. Malicious Prosecution

[12] Robert contends there are genuine issues of material fact as to his malicious-prosecution claim and therefore the trial court erred by entering summary judgment for the Attorneys on this issue. The essence of malicious prosecution rests on the notion that the plaintiff—in this case, Robert—has been improperly subjected to legal process. *City of New Haven v. Reichhart*, 748 N.E.2d 374, 378 (Ind. 2001). There are four elements of a malicious-prosecution claim: (1) the defendant instituted or caused to be instituted an action against the plaintiff; (2) the defendant acted with malice in doing so; (3) the defendant had no probable cause to institute the action; and (4) the original action was terminated in the plaintiff's favor. *Id.*

[13] Malicious prosecution "is not generally favored in our legal system, and thus its requirements are construed strictly against the party bringing the action." *Wong v. Tabor*, 422 N.E.2d 1279, 1283 (Ind. Ct. App. 1981). Indiana's law on malicious prosecution recognizes an attorney's duty to seek "any and all possible relief" for their client and cautions courts confronted with malicious-prosecution claims brought against an attorney (as opposed to a litigant) to be "ever mindful that an attorney's role is to facilitate access to our judicial system for any person seeking legal relief." *Id.* at 1285, 1289; *see also id.* at 1286 ("Mere negligence in asserting a claim is not sufficient to subject an attorney to liability for the bringing of suit. To create liability only for negligence, for the bringing of a weak case, would be to destroy his efficacy as advocate of his client and his

value to the court, since only the rare attorney would have the courage to take other than the 'easy' case." (cleaned up)).

[14] At issue here is whether there are any genuine issues of material fact regarding whether the Attorneys had probable cause to file the motion to set aside and second petition for dissolution. An attorney has probable cause to pursue a claim on behalf of their client when (1) the attorney holds a subjective belief the claim merits litigation and (2) objectively, "the claim merits litigation against the defendant in question on the basis of the facts known to the attorney when suit is commenced." *Id.* at 1288. A claim objectively merits litigation unless "no competent and reasonable attorney familiar with the law of the forum would consider that the claim was worthy of litigation on the basis of the facts known by the attorney who instituted suit." *Id.* The relevant inquiry is whether probable cause existed when suit was commenced; the ultimate result of an action is not dispositive.

[15] There is no question the Attorneys subjectively believed the motion to set aside and second petition for dissolution merited litigation. *See, e.g.*, Appellant's App. Vol. III pp. 38 (Stolle testifying she believed there was "good ground to support" filing the motion to set aside and second petition for dissolution), 45 (Fillenwarth testifying "[t]here's no doubt in my mind that [Michele] didn't sign that waiver of service [of] process"). Rather, the question is whether these motions objectively merited litigation. When Michele met with the Attorneys, she told them: (1) she signed a document that turned out to be the settlement agreement under duress and didn't know the 1985 Decree had been issued; (2)

she and Robert lived together as a family for twenty-seven years after the 1985 Decree was issued and filed joint tax returns; (3) she didn't remember signing the waiver of service and consent to jurisdiction and didn't think the signature on the document was hers. *See*, *e.g.*, Appellant's App. Vol. VI pp. 36, 40 (Michele testifying she didn't sign the waiver of service and consent to jurisdiction); Appellant's App. Vol. V p. 99 (Michele testifying she "d[id] not believe [she] signed" the waiver of service and consent to jurisdiction), 102 (Michele testifying she didn't believe it was her signature on the waiver of service and consent to jurisdiction). The Attorneys got the divorce file, researched the law, interviewed witnesses, and hired a handwriting expert. Even though Michele ultimately failed in her quest to set aside the 1985 Decree, this does not mean the Attorneys did not have probable cause to file the motions. Attorneys aren't required to have a strong case to pursue a claim for their clients. *See Wong*, 422 N.E.2d at 1286.

[16] Robert, however, argues there is a genuine issue of material fact regarding probable cause because the Attorneys "knew [Michele] was divorced" yet still filed a second petition for dissolution. Appellant's Br. p. 86 ("In the history of Indiana jurisprudence, no law has ever permitted a lawyer to file a 'second' divorce."). Although the Attorneys knew about the 1985 Decree, they didn't think it was valid. Accordingly, they filed a motion to set aside in which they argued the trial court never acquired jurisdiction over Michele because she wasn't served with the petition for dissolution and didn't waive service. The Attorneys only filed the second petition for dissolution as a placeholder if the

trial court set aside the 1985 Decree. Appellant's App. Vol. III p. 50. Indeed, the motion to set aside set forth this rationale. *See id.* at 7 ("Finally, in light of the foregoing and given that Wife believes the Court lacked jurisdiction over the matter, Wife is filing a Petition for Dissolution of Marriage contemporaneously with the filing of this [motion].").

[17] Robert also argues there is a genuine issue of material fact regarding probable cause because Michele testified she signed the waiver of service and consent to jurisdiction, contrary to the allegations in the motion to set aside. However, this argument is based on a misreading of the record. Michele testified two times she did **not** sign the waiver of service and consent to jurisdiction:

> Q Did you ever receive any kind of summons from the Court about the dissolution proceedings?
>
> A No.
>
> Q Did you ever sign --- or did you sign the waiver of service of process?
>
> A No. I don't --- I'm not even sure I know what that is, but no.
>
> * * * * *
>
> Q Are --- you testified that you never received a summons, correct?
>
> A No, I did not receive a summons.

Q Did not sign a waiver of service of process?

A No.

Q Or did not sign a waiver of final hearing, is that correct?

A No.

Q Did you receive a copy of the agreement once it had been approved by the Court?

A No.

Appellant's App. Vol. VI pp. 36, 40. Michele's testimony she never signed the waiver of service and consent to jurisdiction is consistent with the allegations in the motion to set aside. *See* Appellant's App. Vol. III pp. 4-5 ("Wife believes that the Waiver of Service and Consent to Jurisdiction was fraudulently obtained in this matter. Wife does not believe that the signature purported to be her signature is actually her signature and Wife avers that she does not recall ever signing a Waiver of Service and Consent to Jurisdiction."). Notwithstanding Michele's denial she signed the waiver of service and consent to jurisdiction, Robert focuses on this exchange:

Q Let's talk briefly about the waiver of service of process, and the waiver of final hearing. **I believe your earlier testimony was he had you sign these documents**, is that correct?

A Yes. Oh, I'm sorry, I nodded, I'm sorry.

Appellant's App. Vol. VI p. 41 (emphasis added). Robert claims this exchange amounts to an admission by Michele that she signed the waiver of service and consent to jurisdiction even though her "earlier testimony" was she didn't sign it. Given the context of Wife's whole testimony and the allegations in the motion to set aside, this was simply a misspeak by the parties and doesn't create a genuine issue of material fact regarding probable cause.

[18] There are no genuine issues of material fact on the issue of whether probable cause existed when the motions were filed. Because lack of probable cause is an indispensable element of a malicious-prosecution claim, Robert's claim fails as a matter of law. The trial court properly granted summary judgment for the Attorneys on this issue.[5]

II. Attorney Deceit

[19] Robert next contends there are genuine issues of material fact as to his attorney-deceit claim and therefore the trial court erred by entering summary judgment for the Attorneys on this issue. Indiana Code section 33-43-1-8 provides:

> (a) An attorney who is guilty of deceit or collusion, or consents to deceit or collusion, with intent to deceive a court, judge, or party to an action or judicial proceeding commits a Class B misdemeanor.

[5] As a result, the trial court properly denied Robert's motion for partial summary judgment on the issue of probable cause.

> (b) A person who is injured by a violation of subsection (a) may bring a civil action for treble damages.

As this Court has recognized, Section 33-43-1-8 does not create a new cause of action but, instead, trebles the damages recoverable in an action for deceit. *Shepherd v. Truex*, 823 N.E.2d 320, 327 (Ind. Ct. App. 2005), *reh'g denied*.

[20] There are three elements of a deceit claim: (1) a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; (2) it was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and (3) the other party did in fact rely upon it and was induced thereby to act to their injury or damage. *Id.* When a plaintiff brings a deceit claim against his adversary's attorney, there must be "some showing of fraud, collusion, malicious or tortious conduct" on the attorney's part toward the plaintiff. *Meier v. Pearlman*, 401 N.E.2d 31, 41 (Ind. Ct. App. 1980), *reh'g denied*.

[21] Robert claims the designated evidence shows the Attorneys committed multiple incidents of fraud. First, Robert argues the Attorneys committed fraud because they knew he and Michele were divorced yet still filed a second petition for dissolution. As explained above, the Attorneys filed the second petition for dissolution as a placeholder if the trial court set aside the 1985 Decree. This doesn't establish fraud. Next, Robert argues the Attorneys committed fraud when they alleged in the motion to set aside that Michele "had **no** knowledge of the divorce for 27 years" because they knew she found some divorce papers years before she met with them. Appellant's Br. p. 28. As the Attorneys point

out on appeal, the quoted language doesn't appear in the motion to set aside. In any event, although Michele came across some divorce papers in 1995, she said she didn't think they were "legal" or "would hold up in court." Appellant's App. Vol. III p. 90-91; *see also id.* at 68 ("The fact that she rediscovered them doesn't mean anything. It just means that she found the papers that she had signed. Doesn't mean that she knew she was divorced."). This is consistent with the allegations in the motion to set aside and doesn't establish fraud. *See id.* at 4 ("Wife, unaware that Husband had even filed a dissolution action and never having received a copy of the Decree of Dissolution and/or Final Settlement Agreement entered by the Court, had no reason to believe that Husband had dissolved their marriage, especially in light of Husband's deliberate actions in holding himself and Wife out to the public as Husband and Wife for the past twenty-seven (27) years."). Finally, Husband argues the Attorneys committed fraud when they alleged in the motion to set aside that the waiver of service and consent to jurisdiction "was fraudulently obtained" because they had no evidence to support such a claim. *See id.* at 2. As explained above, Michele told the Attorneys she didn't remember signing the waiver of service and consent to jurisdiction and didn't think the signature on the document was hers. The Attorneys also hired a handwriting expert, who said the signature wasn't Michele's. *See id.* at 69 ("We had our handwriting analyst who testified that it wasn't Michele's signature."). This, too, doesn't establish fraud. Because there are no genuine issues of material fact on the issue of whether the Attorneys engaged in fraud, the trial court properly granted summary judgment for the Attorneys.

[22] Affirmed.

[23] May, J., and Molter, J., concur.