

RENDERED: December 11, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-001166-MR

JANETTA BORST AND
GEORGE BORST, III

APPELLANTS

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 96-CI-000741

CITY OF ASHLAND, KENTUCKY;
KENNETH ADAMS, Individually
and in his official capacity
as Police Officer;
CHUCK LEADINGHAM, Individually
and in his official capacity
as Police Officer;
WILLIAM SEARY, Individually
and in his official capacity
as Police Officer;
RUDY DUNNIGAN, in his
official capacity as
Mayor of the City of Ashland;
and WILLIAM FISHER, JR., in
his official capacity as
City Manager

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, DYCHE, AND GARDNER, Judges.

BUCKINGHAM, JUDGE. Janetta Borst and George Borst, III, appeal from an order of the Boyd Circuit Court which granted summary judgment to the City of Ashland (the City), three police officers of the City, the mayor of the City, and the city manager. Finding no error, we affirm.

In July 1993, a young boy was chased by a vicious dog while riding his bicycle in the City. The boy jumped off his bike and onto a parked truck, and his bicycle continued rolling until it crashed into a car parked behind the truck. Judy Adams, wife of the appellee, Officer Kenneth Adams, was exiting the car with her infant child at the time of the incident. After the dog was chased off by bystanders, Judy Adams called the police.

Officer Chuck Leadingham responded to Judy Adams' call. After speaking to the witnesses, Officer Leadingham proceeded to the Borst residence, which was apparently located in the general direction in which the vicious dog had gone. Officer Leadingham encountered Mrs. Borst and informed her of the incident involving the boy and the dog. Mrs. Borst first told Officer Leadingham that the dog he was describing matched the description of her dog, but when she was informed as to why the officer was looking for the dog, she told the officer that she only fed the dog occasionally. Officer Leadingham then attempted to speak further with both Mr. and Mrs. Borst, but they refused to continue to discuss the matter and departed for a social event.

Following the Borsts' departure, Officer Leadingham remained in the area to complete his investigation. Officer

Adams arrived on the scene and remained long enough to ensure that Officer Leadingham was filling out the correct forms. As Officer Leadingham searched for the dog, he observed a large dog through a fence surrounding the Borsts' backyard. He then separately led each witness to the rear of the residence, whereupon each identified the dog in the Borsts' backyard as being the dog that had chased the young boy on the bicycle.

After consulting with his supervisor, Officer Leadingham decided to seek a warrant charging Mrs. Borst with harboring a vicious animal in violation of a City ordinance. As the incident occurred on a Saturday, the warrant could not be obtained until the following Monday. On the day after the incident (Sunday), Officer Adams called the Borst residence and asked to speak with Mr. Borst. When Mrs. Borst informed the officer that her husband was not home, the officer asked her if her insurance would pay for the damage done to his wife's car. Mrs. Borst stated emphatically that she was not responsible for the damage and terminated the conversation.

On the following Monday, Officer Leadingham went to the office of County Attorney Jerry Vincent (Vincent) and requested a warrant for the arrest of Mrs. Borst for violating the City ordinance prohibiting the harboring of a vicious animal. The basis for the warrant was City Ordinance 133-1990, and Leadingham provided Vincent with a copy of that ordinance in accordance with the standard procedure for such actions. However, Leadingham failed to follow standard procedure by not providing Vincent a

copy of the penalty section of the ordinance. After discussing the matter with Officer Leadingham, Vincent chose to seek an arrest warrant for Mrs. Borst and instructed his office to prepare the warrant for the signature of the district judge.

Officer Leadingham then took the warrant prepared by Vincent's office to the district judge, who signed the warrant after handwriting a notation on the warrant that the offense was a Class A misdemeanor. It was subsequently learned that City Ordinance 133-1990 had been repealed and replaced by City Ordinance 95-1992. Furthermore, a violation of the new ordinance was not a Class A misdemeanor but was only a violation for which an arrest warrant was not proper.

Leadingham and another officer proceeded to the Borst residence the following morning to arrest Mrs. Borst. Mrs. Borst was eventually taken into custody and transported to the county jail, where she remained for two to three hours before being released on her own recognizance.

Vincent later offered to dismiss the charge against Mrs. Borst if she would stipulate that there was probable cause for her arrest. She refused the offer, but an agreed order was later entered under which the charge against Mrs. Borst was "filed away" and stricken from the docket. The order also provided that the Commonwealth agreed not to reinstate the charge in the future.

Mrs. Borst subsequently filed a civil suit in a federal district court against the City, Officer Adams, Officer

Leadingham, and Chief of Police Ron McBride, alleging violations of her rights under 42 U.S.C. § 1983 (hereafter § 1983) and alleging state law claims for false arrest, malicious prosecution, abuse of process, and conspiracy and harassment. Following discovery, the defendants in that suit moved for summary judgment, and the motion was referred to a magistrate for a decision. The magistrate issued a lengthy order recommending that the federal claims be dismissed and that the court refuse to exercise supplemental jurisdiction over the state claims. These recommendations were adopted by the U.S. District Court, and Mrs. Borst's federal claims were dismissed with prejudice. Her state law claims were dismissed without prejudice to her right to refile the claims in state court.

Mrs. Borst then brought this action in the Boyd Circuit Court. The defendants enumerated in her complaint were the City, Officer Adams, Officer Leadingham, Officer William Seary,¹ Mayor Rudy Dunnigan,² and City Manager William Fisher.³ Mr. Borst was also added as a plaintiff.

After the appellees moved for summary judgment based on the findings of the U.S. District Court, the trial court granted

¹ The Borsts allege that Officer Seary issued Mrs. Borst a speeding ticket for which she was acquitted.

² Mayor Dunnigan was apparently named as a defendant because he did not respond to the Borsts' complaints in a manner satisfactory to them.

³ City Manager Fisher was apparently named as a defendant because he also did not respond to the Borsts' complaints in a manner satisfactory to them.

the summary judgment motion on grounds including res judicata, collateral estoppel, and the expiration of the statute of limitations. The Borsts then filed the appeal sub judice.

The standard for granting summary judgment has been set forth as follows:

A movant should not succeed in a motion for summary judgment unless the right to judgment is shown with such clarity that there is no room left for controversy and it appears impossible for a nonmoving party to produce evidence at trial warranting judgment in his favor. Summary judgment is to be cautiously granted and should not be used as a substitute for trial or merely for the sake of efficiency or expediency. . . . The motion for summary judgment must convince the circuit court from evidence in the record of the nonexistence of a genuine issue of material fact.

Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992), citing Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). Furthermore, "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). As factual findings are not at issue, a trial court's decision to grant summary judgment is entitled to no deference on appeal. Id. Several different legal theories and causes of action are involved in this appeal, and we will examine each of them separately herein.

The first issue is whether the statute of limitations had expired as to any of the appellees. KRS 413.140 governs actions to be brought within one year. That statute provides in pertinent part as follows:

(1) The following actions shall be commenced within one (1) year after the cause of action accrued:

(a) An action for an injury to the person of the plaintiff, or of her husband, his wife, [etc.]

. . . .

(c) An action for malicious prosecution, conspiracy, arrest, [etc.]

The events leading up to the Borsts' suit occurred in July and August, 1993. Mrs. Borst's federal suit was filed in July 1994 and dismissed in May 1996. Her state claim was then filed in August 1996.

Mrs. Borst's claims against the City, Officer Adams, and Officer Leadingham were not time barred. KRS 413.270 allows a plaintiff ninety days to refile an action in a proper court if the court in which the action was previously filed determines that it has no jurisdiction over the action. Her state action was timely filed as to those defendant parties who were also defendants in the federal action, as the federal court refused to exercise jurisdiction over her state claims on May 7, 1996, and she filed her complaint in state court on August 5, 1996. The claims against the three who were not defendants in the federal action (Seary, Dunnigan, and Fisher) were barred by the one-year

statute of limitations, with the exception of the claim for the intentional infliction of emotional distress which carries a five-year statute of limitations. See Craft v. Rice, Ky., 671 S.W.2d 247, 251 (1984).⁴ Also, as Mr. Borst was not a party-plaintiff in Mrs. Borst's federal action, his claims against all appellees are barred by the expiration of the statute of limitations, with the exception of the intentional infliction of emotional distress claim.

The appellees argue that the Borsts' complaint is barred by res judicata and collateral estoppel due to the actions of the federal court. This argument rests upon the proposition that, although Mrs. Borst's state law claims were not expressly decided by the federal court, the federal court made findings on those claims which were essential to its judgment on her federal claims. On the other hand, the Borsts argue that res judicata and collateral estoppel do not apply because the federal court expressly refused to exercise jurisdiction over Mrs. Borst's state law claims.

The Borsts' complaint appears to allege that they are entitled to damages under § 1983. The federal court dismissed Mrs. Borst's § 1983 claims with prejudice. A federal court judgment is "entitled to full faith and credit in the state courts." Waddell v. Stevenson, Ky. App., 683 S.W.2d 955, 958

⁴ 42 U.S.C. § 1983 claims in Kentucky are governed by the one-year statute of limitations found in KRS 413.140. Collard v. Kentucky Board of Nursing, 896 F.2d 179 (6th Cir. 1990). Thus, any claims on these grounds are also time barred.

(1984). Therefore, any § 1983 claims raised by the Borsts in their state law claims are barred by res judicata.

A more difficult question exists as to whether the state law claims raised by the Borsts are barred by res judicata or collateral estoppel. The federal court expressly reserved Mrs. Borst's right to refile her state law claims in state court; however, he also adopted the report of the magistrate. The magistrate's report contains a detailed and lengthy analysis of Mrs. Borst's state law claims in the process of making ultimate findings on her federal claims. As we have determined, as set forth below, that the summary judgment of the trial court should be affirmed for other reasons, we decline to address this issue. We now turn to the Borsts' state law claims.

The Borsts' complaint alleges a cause of action for malicious prosecution. The six elements that must be proved to sustain an action for malicious prosecution in Kentucky are 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, (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, Ky., 621 S.W.2d 895, 899 (1981). There must be strict compliance with these elements, id., as malicious prosecution actions are "not generally favored." Kirk v. Marcum,

Ky. App., 713 S.W.2d 481, 483 (1986). The Borsts' claim does not meet all of these elements.

The Borsts cannot meet the element of want or lack of probable cause for the proceeding. Officer Leadingham sought a warrant against Mrs. Borst based on her admission that she sometimes fed a dog matching the description of the vicious dog in question and based on three eyewitnesses' identifications of the dog in the Borsts' enclosed backyard as being the dog in question. The trial court properly determined that probable cause existed as a matter of law.⁵ The malicious prosecution must fail for this reason alone.⁶

The malicious prosecution claim should also fail due to the fact that the charges were filed against Mrs. Borst based upon the advice of counsel--County Attorney Vincent. Advice of counsel is a "complete" defense to a malicious prosecution claim.⁷ Mayes v. Watt, Ky., 387 S.W.2d 872, 873 (1964).

⁵ Probable cause is generally an issue to be decided by the court, Prewitt v. Sexton, Ky., 777 S.W.2d 891, 894 (1989), if the facts are not greatly disputed.

⁶ The fact that Officer Leadingham gave Vincent a superseded ordinance without the penalty section would not diminish the fact that he had probable cause to prosecute Mrs. Borst for harboring a vicious animal. The prosecution itself was based upon probable cause, although the manner in which the prosecution was undertaken (i.e., the arrest warrant) was improper.

⁷ Advice of counsel is a defense to a malicious prosecution claim because advice of counsel is the equivalent of a "form of probable cause," Flynn v. Songer, Ky., 399 S.W.2d 491, 495 (1966), thereby negating one of the elements required to prove malicious prosecution--the absence of probable cause.

The advice of counsel defense is available, however, only "upon a full and fair disclosure of all material facts to the attorney advising prosecution." Reid v. True, Ky., 302 S.W.2d 846, 847 (1957). It is uncontroverted that Officer Leadingham sought the arrest warrant based upon an expired ordinance for which an arrest was improper. However, that is not an issue of material fact. Rather, Vincent was not advised of the relevant law. In short, the advice of counsel defense is applicable to the Borsts' malicious prosecution claim herein, and it fails for this additional reason.

The Borsts' complaint also alleges false imprisonment.⁸ In order to succeed on a false imprisonment claim, the arrest or imprisonment must be conducted without legal authority. See Wal-Mart Stores, Inc. v. Mitchell, Ky. App., 877 S.W.2d 616, 617 (1994) (holding that in order to recover on a false imprisonment claim, a plaintiff must "establish that he was detained and that the detention was unlawful"). In the case sub judice, Mrs. Borst's arrest and imprisonment were based upon a facially valid arrest warrant. In such a case, no action for false imprisonment lies. See Roberts v. Thomas, 135 Ky. 63, 65, 121 S.W. 961 (1909).

The Borsts' complaint also alleges a cause of action for abuse of process. Abuse of process is defined as "the

⁸ There is no distinction between false arrest and false imprisonment in cases involving police officers. Lexington-Fayette Urban County Government v. Middleton, Ky. App., 555 S.W.2d 613, 619 (1977).

irregular or wrongful employment of a judicial proceeding.” Bonnie Braes Farms, Inc. v. Robinson, Ky. App., 598 S.W.2d 765, 766 (1980). The “essential elements” of an abuse of process claim are “(1) an ulterior purpose and (2) a wilful act in the use of the process not proper in the regular conduct of the proceeding.” Id. Stated differently, “[s]ome 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.” Simpson v. Laytart, Ky., 962 S.W.2d 392, 394-95 (1998). Abuse of process is generally a type of extortion. Id. at 395, quoting W. Prosser, Torts § 121 (4th ed. 1971) at 856.

While the Borsts contend that the appellees were motivated in prosecuting Mrs. Borst by their intention to force a financial settlement from the Borsts for damages done to Officer Adams’ car, there is no evidence in the record that any of the appellees used the criminal proceedings against Mrs. Borst in an attempt to gain an improper advantage or benefit from her. The Borsts are unable to cite evidence of any specific actions taken by the appellees during the course of the judicial proceedings against Mrs. Borst that were “not proper in the regular conduct of the proceeding.” Robinson, supra at 766. A party opposing a summary judgment motion must present “at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial.” Hubble, supra at 171.

The Borsts' complaint also alleges a cause of action for conspiracy. It is difficult to glean from the record the underlying basis for this claim. As the Borsts point out in their brief, no evidence was adduced via discovery on this issue prior to the trial court's summary judgment order.

In order to defeat a summary judgment motion, the Borsts were required to present some affirmative proof that a genuine issue of material fact existed. See Hubble, supra. The fact that no discovery has occurred on this issue in state court is not dispositive, as extensive discovery was taken in the federal action and as the Borsts have not informed this court of what evidence they could adduce in discovery which would further their claim.

In response to the appellees' summary judgment motion before the trial court, the Borsts merely stated that "there are sufficient facts involving the claim of Mrs. Borst to submit to a jury." It is unclear, however, what facts the Borsts are relying upon to support their conspiracy claim. The Borsts believe that they are victims of a conspiracy to harass them due to their failure to voluntarily pay for the damage to Officer Adams' car. However, there is nothing in the record to support that belief, and a mere "belief" is not evidence and does not create a material fact issue sufficient to withstand a summary judgment motion. Humana of Kentucky, Inc. v. Seitz, Ky., 796 S.W.2d 1, 3 (1990).

The Borsts' complaint alleges a cause of action for intentional infliction of emotional distress. This claim is not discussed to any extent in the parties' briefs. The elements necessary to sustain a cause of action for this tort are:

- (1) the wrongdoer's conduct must be intentional or reckless;
- (2) the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality;
- (3) there must be a causal connection between the wrongdoer's conduct and the emotional distress; and
- (4) the emotional distress must be severe.

Seitz, supra at 2-3.

The Borsts assert that they suffered emotional distress due to Mrs. Borst's arrest and prosecution and the subsequent "harassment" which they received from the appellees. However, they have not specified any acts by the appellees which are "so extreme in degree . . . as to go beyond all possible bonds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Seitz, supra at 3, quoting Restatement (Second) of Torts § 46, Comment d (1965). Thus, both Mr. and Mrs. Borst's emotional distress claims must fail.

Finally, the Borsts' complaint alleges arbitrary conduct. Arbitrary conduct is defined as "[w]hatever is contrary to democratic ideals, customs and maxims" or "whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people." Kentucky Milk Mktg. v.

Kroger Co., Ky., 691 S.W.2d 893, 899 (1985). While the Borsts have claimed that the appellees acted in an arbitrary manner, they have not specified the alleged arbitrary acts. Presumably, they are arguing some type of selective or unequal enforcement of the law against them based upon the traffic citations, etc., which they have been issued. Unequal enforcement of the law is prohibited by § 2 of the Kentucky Constitution. Id. However, there is nothing in the record to indicate that the officers acted with any conscious malice or intent to harass when issuing the citations in question. The Borsts may believe that the officers had such a motive, but mere belief does not constitute affirmative evidence sufficient to defeat a summary judgment motion. Seitz, supra at 3.

The summary judgment of the Boyd Circuit Court in favor of the appellees is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Gordon J. Dill
Ashland, KY

BRIEF FOR APPELLEES:

John I. Hanbury
Ashland, KY

Richard W. Martin, III
Ashland, KY