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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001349-MR

JEFFREY A. ISHAM APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 99-CI-02600

ABF FREIGHT SYSTEM, INC.
AND SHERYL D. KINGSTON APPELLEES

AND

NO. 2005-CA-000409-MR

JEFFREY A. ISHAM APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 99-CI-02600

DANIEL P. WOLENS APPELLEE

OPINION
AFFIRMING IN PART
AND REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: ABRAMSON, BARBER, AND HENRY, JUDGES.

HENRY, JUDGE: Jeffrey A. Isham appeals from a May 12, 2004 order of the Fayette Circuit Court granting summary judgment as to his claims against ABF Freight System, Inc., Sheryl D. Kingston, and Daniel P. Wolens, M.D. Upon review, we affirm in part, and reverse and remand in part.

Isham was initially employed as a truck driver for ABF, a national freight carrier, in 1991 at the company's Lexington, Kentucky terminal. Appellee, Kingston, was the manager of the terminal during the time relevant to this appeal. Appellee, Wolens, an occupational physician, examined Isham at ABF's request to determine his fitness to return to work. At all times throughout his employment, Isham was a member of the International Brotherhood of Teamsters, Local 651, and his employment was governed by a collective bargaining agreement, otherwise known as the Uniform National Contract, which the Teamsters negotiated every four years with carriers such as ABF.

On June 10, 1994, Isham suffered a hernia and strained back while unloading a rug from a truck on the job and did not work again until September 1994. When he returned, he was placed in his previous position at the same rate of pay. Isham reinjured his back on December 5, 1995 while unloading some tubing and did not return to work until April 1996. When he returned, he was once again placed in his previous position at the same rate of pay.

After returning to work the second time, Isham filed a worker's compensation claim relating to the aforementioned injuries. While his claim was ongoing, he continued to work periodically. However, in October 1997, he was laid off by ABF pursuant to contract seniority rules due to a decline in business. While laid off, Isham gave testimony in his compensation case that he was unable to perform his job duties at ABF due to his injuries. Specifically, he indicated that he had difficulty driving, lifting, walking, standing, and sitting, and that he was unable to lift more than 15 pounds. Isham was also prescribed medication for depression that had resulted from his lay-off.

Subsequently, in June 1998, ABF recalled Isham back to work because of an increase in business. Initially, Isham submitted a doctor's note indicating that he was being treated for depression and was unable to return to work. However, in August 1998, he submitted another doctor's note to ABF stating that he would be able to resume working. Moreover, despite his prior testimony in his workers' compensation case, Isham told ABF that he had fully recovered.

On August 14, 1998, the administrative law judge in Isham's workers' compensation case entered an opinion and order finding that Isham suffered from a 50% permanent partial disability and awarded him $156.00 per week in benefits for 520

weeks. Nevertheless, ABF reinstated Isham to his previous position at the same rate of pay on September 14, 1998. Isham was cleared to return to work by Appellee Wolens in a September 10, 1998 letter to ABF. Of particular interest here, while Wolens recommended that Isham be allowed to return to work in his previous capacity, he also expressed clear skepticism about Isham's workers' compensation award and the decision of the ALJ who had awarded it, stating that "this decision was based on presumed facts that on this date are completely untrue." He also took it upon himself to recommended to ABF a number of "avenues of approach" to consider – including having Isham's claim re-opened and prosecuting him for perjury. However, ABF did not attempt to reopen Isham's claim or otherwise contest the award in his favor.

On January 8, 1999, Isham called ABF's terminal and told the dispatcher, Mike Shepherd, that he could not come to work that day because it had snowed the night before and the roads were bad. Shepherd told Isham, "We need you bad. Going to have to have you," and informed him that road conditions had improved and that he needed to report to work or face disciplinary measures. A disagreement consequently arose between the two men, leading to Isham telling Shepherd:

> Now, Mike, I'm going to tell you ... Ever since I've come back to work over there ... you all have really harassed and anything

> you can do to kind of upset me.... I'm not coming in.... I'm going to tell you what.... You just keep it up. I'm going to get me a lawyer and I'm going to come over there and I'm going to fire on everybody there.

Shepherd relayed this statement to Sheryl Kingston, the terminal manager, and the conclusion was reached that it constituted a threat of physical violence. In addition to the fact that ABF had a violence prevention policy prohibiting statements that included physical threats, threatening physical harm was a "cardinal offense" under the labor contract meriting termination. Isham was subsequently told by letter that he was being terminated for the foregoing statement and not to return to the terminal. Specifically, the letter stated that Isham "manifested the Postal Worker's Syndrome in that you called the terminal to say you were not coming in to work and during that conversation stated that you 'would fire on everyone here' to Mike Shepherd. You made the same statement to union stewar[d] Sam Adkins. Therefore, this action on your part is deemed by the company to be a cause for discharge."

Pursuant to the labor contract, Isham filed a grievance contesting his termination on January 15, 1999. A Grievance Committee composed of an equal number of management and union members conducted a hearing on the matter on February 2, 1999 and heard from a number of witnesses, including Wolens and Dr. Robert Wooley. Isham explained that his remarks to

Shepherd were intended to convey his willingness to take legal action, not to cause bodily harm. The Committee ultimately ruled that he needed to be seen by a psychologist chosen by both Wolens and Wooley. The Committee further ordered that once Isham obtained a report from the chosen psychologist, he was to return before the Committee for a final ruling. However, Isham never went to see the doctor ultimately chosen, even though he was given over one year to comply with the Committee's order. Consequently, on May 3, 2000, Isham's grievance was dismissed and his termination was upheld.

On the same day that Isham was terminated, ABF filed a criminal complaint against him, and he was subsequently charged with terroristic threatening. Isham moved to dismiss the charge in district court, arguing that his words were merely intended as a threat of legal action, and that no reasonable person could interpret them as threatening physical violence. The district court agreed and dismissed the charge. However, the matter proceeded through the appellate process and ultimately ended up before the Kentucky Supreme Court, who ordered the case to be tried for reasons set forth below. Ultimately, Isham was tried before a Fayette County jury and acquitted on July 27, 2003.

In the meantime, Isham filed complaints in the Fayette Circuit Court on July 22, 1999 against ABF, Kingston, and Wolens. Isham's complaints alleged the following counts: (I)

retaliatory discharge by ABF – in violation of KRS[1] Chapter 342 - in response to his threat to take legal action due to ABF's acts of discrimination and harassment against him; (II) retaliatory discharge by ABF – in violation of KRS Chapter 344 - in response to his threat to take legal action due to ABF's acts of discrimination and harassment against him; (III) that ABF, Kingston, and Wolens conspired to unlawfully terminate his employment with ABF and to wrongfully initiate criminal proceedings against him; (IV) that Kingston and Wolens conspired to unlawfully terminate his employment with ABF, in violation of KRS 344.280; (V) malicious prosecution by ABF and Kingston; and (VI) abuse of process by ABF and Kingston. As a result of these alleged actions, Isham claimed that he was entitled to "lost wages, income and benefits, compensatory and punitive damages, reinstatement to employment or front pay in lieu thereof, lost future earning capacity, costs and attorney's fees for defendants' wrongful and unlawful actions."

On March 16, 2004, ABF and Kingston moved the trial court for summary judgment. After lengthy briefing and an oral argument, the court granted the motion as to all claims. Specifically, Counts I, III, and IV were dismissed as claims preempted under federal law and for a lack of sufficient evidence. Count II was dismissed because Isham was not part of

[1] Kentucky Revised Statutes.

the class of persons covered by the statute. Count V was dismissed due to the court's finding that probable cause existed for ABF to bring the terroristic threatening charge. Finally, Count VI was dismissed due to Isham's purported failure to allege proper damages for abuse of process. Isham subsequently moved to alter, amend, or vacate this judgment, but the motion was denied by the trial court. On December 17, 2004, Wolens filed his own motion for summary judgment as to Counts III and IV of Isham's complaint. On February 1, 2005, the trial court entered summary judgment against Isham for the same reasons set forth in its previous order. The matters were ultimately consolidated and this appeal followed.

Our standard of review as to cases where a summary judgment has been granted 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, 916 S.W.2d 779, 781 (Ky.App. 1996); CR[2] 56.03. Summary judgment "is only proper where the movant shows that the adverse party could not prevail under any circumstances." Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991). The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." Id. Indeed, "trial judges

[2] Kentucky Rules of Civil Procedure.

are to refrain from weighing evidence at the summary judgment stage." Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999). Accordingly, "[e]ven though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." Steelvest, 807 S.W.2d at 480. "The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the nonmoving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." Welch, 3 S.W.3d at 730. Consequently, a party opposing a properly supported summary judgment motion "cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Steelvest, 807 S.W.2d at 482; see also Wymer v. J.H. Properties, Inc., 50 S.W.3d 195, 199 (Ky. 2001). "Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we owe no deference to the conclusions of the trial court." Blevins v. Moran, 12 S.W.3d 698, 700 (Ky.App. 2000).

Due to the numerous issues involved in this appeal, we will examine each of Isham's allegations separately and in numerical order by the way in which they were presented in his complaint.

Count I: Illegal discharge under KRS 342.197.

As to Isham's claim in Count I of his complaint that he was illegally discharged in retaliation for filing a workers' compensation claim - which is prohibited by KRS 342.197 - the trial court concluded that it did not have jurisdiction over the claim "because it requires interpretation of the contract. Any state law claims which require consideration of a collective bargaining agreement are preempted by federal law." The court further held: "[E]ven if this Court did have jurisdiction, Isham's claim fails as a matter of law. The Court holds that no reasonable jury could find a causal connection between Isham's worker's compensation claim and his discharge." In this same context, the court finally added: "Isham's evidence is insufficient to rebut ABF's non-discriminatory reason for his discharge – that being his January 8, 1999 statement." Upon careful review, we believe that the trial court's entry of summary judgment as to this claim was erroneous.

We first address the trial court's conclusion that Isham's KRS 342.197 claim is preempted by federal law – specifically § 301 of the Labor Management Relations Act of 1947 – because considering the claim would require interpreting the terms of the labor contract between ABF and Isham's labor union. In Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985), the United States Supreme Court

reiterated that the "dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute [so that] issues raised in suits of a kind covered by § 301 [are] to be decided according to the precepts of federal labor policy." Id. at 209, 105 S.Ct. at 1910. As a result, the Court concluded that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim ... or dismissed as pre-empted by federal labor contract law." Id. at 220, 105 S.Ct. at 1916. Put another way, § 301 preemption occurs where a state claim "is inextricably intertwined with consideration of the terms of the labor contract," Id. at 213, 105 S.Ct. at 1912, and application of state law "requires the interpretation of a collective-bargaining agreement." Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 413, 108 S.Ct. 1877, 1885, 100 L.Ed.2d 410 (1988). However, if a state-law claim may be resolved without interpretation of the collective bargaining agreement, it is "independent" of the agreement and not preempted by § 301. Id. at 410, 108 S.Ct. at 1883.

In Firestone Textile Co. Division v. Meadows, 666 S.W.2d 730 (Ky. 1983), the Kentucky Supreme Court held that an employee who pursues a workers' compensation claim and is

subsequently terminated has a claim for retaliatory discharge against his employer "when the discharge is motivated by the desire to punish the employee for seeking the benefits to which he is entitled by law." Id. at 734. The General Assembly codified the Firestone holding in KRS 342.197(1). Noel v. Elk Brand Mfg. Co., 53 S.W.3d 95, 100 (Ky.App. 2000). In Willoughby v. GenCorp, Inc., 809 S.W.2d 858 (Ky.App. 1990), we explained that in order to establish a cause of action for retaliatory discharge, "it is incumbent on the employee to show at a minimum that he was engaged in a statutorily protected activity, that he was discharged, and that there was a connection between the 'protected activity' and the discharge." Id. at 861. As to the last prong of the Willoughby test, the employee must prove that "the workers' compensation claim was 'a substantial and motivating factor but for which the employee would not have been discharged.'" First Property Management Corp. v. Zarebidaki, 867 S.W.2d 185, 188 (Ky. 1993).

In Lingle v. Norge Division of Magic Chef, Inc., supra, the U.S. Supreme Court specifically addressed the question of whether a claim of retaliatory discharge for filing a workers' compensation claim under Illinois law was preempted by § 301 of the LMRA. The Court concluded that it was not,

finding that each of the facts required to establish the tort[3] "pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement." Lingle, 486 U.S. at 407, 108 S.Ct. at 1882. The Court continued: "To defend against a retaliatory discharge claim, an employer must show that it had a nonretaliatory reason for the discharge ... this purely factual inquiry likewise does not turn on the meaning of any provision of a collective-bargaining agreement." Id. Accordingly, the Court concluded that "the state-law remedy in this case is 'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." Id.

In Bednarek v. United Food and Commercial Workers Intern. Union, Local Union 227, 780 S.W.2d 630 (Ky.App. 1989), we considered a similar situation, only involving a retaliatory discharge claim under Kentucky law. Following the lead of the U.S. Supreme Court in Lingle, we concluded that the plaintiff's claim of retaliation for filing a workers' compensation claim

[3] As set forth in Lingle, "to show retaliatory discharge [under Illinois law], the plaintiff must set forth sufficient facts from which it can be inferred that (1) he was discharged or threatened with discharge and (2) the employer's motive in discharging or threatening to discharge him was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights." Lingle, 486 U.S. at 407, 108 S.Ct. at 1882.

did not turn on an interpretation of her collective bargaining agreement. Id. at 632. Once again, we are compelled to reach the same conclusion here. As the U.S. Supreme Court concluded in Lingle, the questions involved in considering a retaliatory discharge claim under KRS 342.197 - that the employee was engaged in a statutorily-protected activity (here, filing a workers' compensation claim), that the employee was discharged, and that there was a connection between the "protected activity" and the discharge – are purely factual ones pertaining to the conduct of the employee and the conduct and motivation of the employer. Lingle, 486 U.S. at 407, 108 S.Ct. at 1882. Resolving such questions does not require any interpretation of a collective-bargaining agreement and is not "inextricably intertwined with consideration of the terms of the labor contract." Allis-Chalmers Corp., 471 U.S. at 213, 105 S.Ct. at 1912. Consequently, the trial court's conclusion that § 301 preemption is applicable here was erroneous.

With this said, the trial court also concluded that summary judgment as to Isham's KRS 342.197 claim was proper because "no reasonable jury could find a causal connection between Isham's worker's compensation claim and his discharge." We disagree. While the evidence in favor of Isham's claim is by no means overwhelming, we believe it is sufficient to overcome the threshold for summary judgment. The record indicates that,

although Isham was cleared to return to work by Wolens in September 1998, Wolens also expressed clear skepticism about the injuries leading to Isham's workers' compensation award – even going so far as to advise ABF of a number of "avenues of approach," including having Isham's case re-opened or contemplating a perjury complaint. According to Isham, during the four-month period after he returned to work following Wolens' clearance and before he was fired, he was subjected to arguably disparate treatment compared to other employees and was told by union steward Sam Adkins that Kingston was out to get him and wanted him "out the door." Isham was also told that Kingston didn't like his "attitude." Shively Pierce, Isham's representative during the grievance process, also gave his opinion that ABF intentionally misrepresented the statement made by Isham to Shepherd in order to fire him, noting that Isham "wasn't their favorite person." Sam Adkins further testified to his belief that the statement in question was not the actual reason for his firing. Moreover, Wolens himself indicated that Kingston believed that "there was something up" with Isham's workers' compensation claim, and gave his opinion that Isham's back injury was the basis for a "poor" relationship between ABF, Kingston, and Isham. While this evidence is debated in some respects by ABF and is arguably not an overwhelming indication

that Isham was fired because of his workers' compensation claim, we believe that it is enough to survive summary judgment.

Moreover, while ABF has offered a non-workers' compensation-related reason for its termination of Isham – that he made a threat of physical harm - our Supreme Court has held that an "employer is not free from liability simply because he offers proof he would have discharged the employee anyway, even absent the lawfully impermissible reason, so long as the jury believes the impermissible reason did in fact contribute to the discharge as one of the substantial motivating factors." Zarebidaki, 867 S.W.2d at 188. Consequently, we believe that the trial court was premature in finding as a matter of law that Isham failed to rebut ABF's justification for his dismissal. We therefore are compelled to reverse the trial court's entry of summary judgment as to this claim and remand for further proceedings.

Count II: Retaliatory discharge in response to a protected activity under KRS Chapter 344.

In Count II of his complaint, Isham claims that he was subjected to unlawful discrimination, in violation of KRS 344.280. That provision makes it unlawful for one or more persons "[t]o retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a

complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing under this chapter." The trial court concluded that "Kentucky law does not support a wrongful termination claim in violation of KRS Chapter 344 for individuals who do not fall into a protected class," justifying entry of summary judgment as to this claim.

Isham argues that the trial court's decision was erroneous because KRS 344.280 only requires that someone be "a person" in order to plead a retaliatory discharge claim under that provision.[4] Accordingly, as he is "a person," the argument goes, he had standing to bring a suit under KRS Chapter 344. We disagree.

KRS 344.020 provides, in relevant part, that the purpose of KRS Chapter 344 is "[t]o safeguard all individuals within the state from discrimination **because of familial status, race, color, religion, national origin, sex, age forty (40) and over, or because of the person's status as a qualified individual with a disability as defined in KRS 344.010 and KRS 344.030**[.]." KRS 344.020(1)(b) (Emphasis added). Moreover, KRS 344.040 provides, in relevant part, that it is an unlawful practice for an employer:

[4] KRS 344.010(1) defines "person" as including: "one (1) or more individuals, labor organizations, joint apprenticeship committees, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, fiduciaries, receivers, or other legal or commercial entity; the state, any of its political or civil subdivisions or agencies."

> To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, **because of the individual's race, color, religion, national origin, sex, age forty (40) and over, because the person is a qualified individual with a disability, or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking**[.]

KRS 344.040(1) (Emphasis added).

Accordingly, in order for an individual to be entitled to relief under Chapter 344, he must establish that his claim of discrimination or retaliation is based upon one of the criteria set forth therein. In other words, the question becomes (1) whether he was discriminated against because of his race, color, religion, national origin, sex, age, disability, or status as a smoker, or (2) for purposes of KRS 344.280, whether he was retaliated or discriminated against "because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing under this chapter." Here, Isham has failed to plead or provide anything to indicate that he was terminated due to any of these factors or for opposing a practice prohibited by KRS Chapter 344. Accordingly, we find that the trial court was

correct in granting summary judgment to ABF and Kingston as to this claim.

III. Conspiracy by ABF, Kingston, and Wolens to unlawfully terminate Isham's employment and to wrongfully initiate criminal proceedings against him.

We next consider the trial court's dismissal of Count III of Isham's complaint – a common-law conspiracy claim against ABF, Kingston, and Wolens contending that they conspired to terminate his employment and to initiate criminal proceedings against him. The trial court concluded that this claim was preempted by federal law and that Isham "presented no evidence upon which a reasonable jury could find that there was any conspiracy to either terminate or file criminal charges against Isham."

We disagree with the trial court's conclusion that Isham's common-law conspiracy claim is preempted for the same reasons set forth in Part I of our opinion. Accordingly, we turn to the question of whether the claim was properly disposed by summary judgment for lack of evidence.

"A conspiracy is a corrupt or unlawful combination or agreement between two or more persons to do by concerted action an unlawful act, or to do a lawful act by unlawful means." McDonald v. Goodman, 239 S.W.2d 97, 100 (Ky. 1951). A conspiracy is inherently difficult to prove; nevertheless, the

burden of proof is upon the party charging it. Krauss Wills Co. v. Publishers Printing Co., 390 S.W.2d 132, 134 (Ky. 1965). After reviewing the record, we do not believe that Isham has produced any significant evidence indicating that there was a conspiratorial agreement between ABF/Kingston and Wolens aimed towards terminating his employment or trying to initiate criminal charges against him. For example, there is nothing to support the contention that Wolens had anything to do with the initiation of terroristic threatening charges against Isham; indeed, the record instead reflects that Wolens had no contact with ABF between the submission of his return-to-work letter and the request to submit a letter for Isham's grievance procedure. While it is true that a conspiracy can be shown by circumstantial evidence, see Addison v. Wilson, 238 Ky. 143, 37 S.W.2d 7, 11 (1931), we find that the evidence tendered by Isham fails to rise to even this level. As we noted above, a party cannot defeat a properly supported motion for summary judgment without presenting at least some affirmative evidence indicating that there is a genuine issue of material fact. Steelvest, 807 S.W.2d at 482; see also Wymer, 50 S.W.3d at 199 ("The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment.") We simply do not believe that Isham has met this burden here. Accordingly, the trial court was correct in

ordering summary judgment as to this ground and its decision in this respect is affirmed.

IV. Conspiracy by Kingston and Wolens to unlawfully terminate Isham’s employment, in violation of KRS 344.280.

In Count IV of his complaint, Isham argued that Kingston and Wolens conspired to unlawfully terminate him in violation of KRS 344.280. The trial court rejected this argument, finding that this count was preempted by federal law and that Isham presented no evidence upon which a reasonable jury could find in his favor. However, for reasons set forth in Part II of this opinion, we believe that this claim must fail because Isham has failed to establish that he was opposing or complaining about a practice prohibited by KRS Chapter 344. Accordingly, summary judgment as to this claim was appropriate, but for different reasons than those set forth by the trial court.

Count V: Malicious prosecution.

As to Isham’s claim of malicious prosecution, the trial court found that he “cannot maintain his claim for malicious prosecution as a matter of law because he cannot prove that there was a ‘want or lack of probable cause’ for the criminal charge filed against him.” Specifically, the court noted that “[a]s a result of the decision of Kentucky’s Supreme Court in Isham’s criminal case, it has been established as a

matter of law that probable cause did exist for the filing of a criminal charge." Accordingly, the court found that summary judgment was appropriate as to this count.

"[T]here are six basic elements necessary to the maintenance of an action for malicious prosecution, in response to both criminal prosecutions and civil action." Raine v. Drasin, 621 S.W.2d 895, 899 (Ky. 1981). They include: "(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." Id. 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.

It is well-established that the plaintiff has the burden in a malicious prosecution action of establishing a lack of probable cause. Collins v. Williams, 10 S.W.3d 493, 496 (Ky.App. 1999). Whether or not probable cause exists is

generally a question of law for the court to decide. Id. Of particular importance here, we have also held that "it is axiomatic that where there is a specific finding of probable cause in the underlying criminal action, or where such a finding is made unnecessary by the defendant's agreement or acquiescence, a malicious prosecution action cannot be maintained." Broaddus v. Campbell, 911 S.W.2d 281, 283 (Ky.App. 1995).

ABF and Kingston contend that summary judgment was appropriate as to this claim because Isham cannot establish a "want or lack of probable cause" for the criminal proceeding instituted against him. They specifically point to the Kentucky Supreme Court's conclusion in Commonwealth v. Isham, 98 S.W.3d 59 (Ky. 2003), that the question of whether or not Isham's statement constituted terroristic threatening was an issue for the jury. However, after reviewing Isham, we find that the Supreme Court's holding revolved entirely upon the question of whether trial courts have the ability or authority to dismiss or amend a criminal complaint on their own initiative on such grounds as a lack of probable cause. See id. at 61-62. The Court concluded that they do not, and that only the Commonwealth may dismiss a complaint, with the trial court's permission. Id. at 62. The Court refused to specifically address the question of whether or not the terroristic threatening claim against

Isham was supported by the evidence or even if probable cause existed for it in the first place. See id. Consequently, we do not believe that the Supreme Court's opinion can be viewed as definitively establishing the existence of probable cause for the criminal complaint filed against Isham.

Moreover, while we acknowledge the Supreme Court's statement in Isham that "[t]he proper time to determine whether Isham's alleged statements constitute terroristic threatening is only after a trial on the merits has been held," Id., we must also point out that our courts have held that even a denial of a directed verdict does not establish that a party had probable cause to bring an action against someone claiming malicious prosecution because of the minimal showing required for such prejudgment motions. See Kirk v. Marcum, 713 S.W.2d 481, 485 (Ky.App. 1986). Accordingly, the fact that a claim was allowed to go to a jury does not necessarily establish probable cause for that claim as a matter of law, particularly in a criminal context, where power over the claim is so heavily vested in the Commonwealth. Consequently, we find that summary judgment as to Isham's malicious prosecution claim was not appropriate on the grounds set forth by the trial court, and we reverse and remand as to this issue.

Count VI: Abuse of process.

The trial court disposed of Isham's abuse of process claim on two grounds: (1) that "there is no evidence that ABF or Kingston improperly used the criminal process," as the Supreme Court found as a matter of law that the criminal proceeding against Isham was proper; and (2) that Isham only alleged injury of reputation as to this claim, which "is insufficient to maintain a claim for abuse of process." We do not believe that either ground merited summary judgment.

"An action for abuse of process is the irregular or wrongful employment of a judicial proceeding." Simpson v. Laytart, 962 S.W.2d 392, 394 (Ky. 1998) (Internal quotations omitted). "Abuse of process differs from malicious prosecution in that malicious prosecution consists of commencing an action or causing process to issue maliciously or without justification. Abuse of process, however, consists of 'the employment of legal process for some other purpose 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. "The crux of an abuse of process action, for the plaintiff, lies in establishing the improper purpose: The purpose for which the process is used, once it is issued, is the only thing of importance." Bourbon County Joint Planning Com'n v. Simpson, 799 S.W.2d 42, 45 (Ky.App. 1990) (Internal quotations omitted).

The first ground given by the trial court for summary judgment as to Isham's abuse of process claim was clearly improper – for reasons set forth above – as the Supreme Court did not make a specific finding in Isham, supra, that the terroristic threatening claim against Isham was proper as a matter of law. Accordingly, we turn our attention to the court's second ground - that Isham only alleged injury of reputation.

However, before doing so, we note that the question of whether the claim was legitimate on its face has little to do with the tort of abuse of process, which – as noted above – is instead focused on an "ulterior purpose" for the claim. Isham argues in his brief, and sets forth in his deposition, that he was told by Shively Pierce, his representative during the grievance process: "If you'll resign, all charges will be dropped on you.... I've got that from the labor man." Pierce's deposition appears to offer support for Isham's contention, even

though ABF and Kingston deny that such an offer was made. We have long held that abuse of process can be found when a criminal charge is used "as a means to secure a collateral advantage." Flynn v. Songer, 399 S.W.2d 491, 495 (Ky. 1966); see also Simpson, 962 S.W.2d 392 at 395; Mullins v. Richards, 705 S.W.2d 951, 952 (Ky.App. 1986). Accordingly, it appears that the trial court's general conclusion that "there is no evidence that ABF or Kingston improperly used the criminal process" is incorrect, at least to the extent required to survive summary judgment.

As to the issue of alleged damages, "an action for abuse of process will not lie unless there has been an injury to the person or his property. Injury to name or reputation is not sufficient." Raine, 621 S.W.2d at 902. The complaint and jury demand filed by Isham on July 22, 1999 clearly provides - within Count VI - that "ABF and Kingston wrongfully and unlawfully utilized and abused the criminal prosecution process for the wrongful and ulterior purpose of securing the termination of Isham's employment with ABF **and in so doing have caused damage to Isham's person and property as above-described.**" (Emphasis added). Accordingly, the trial court's conclusion that Isham only alleged injury of reputation as to this claim was clearly in error. Consequently, we must reverse and remand the court's order as to this claim.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed in part and reversed in part, and we remand for further proceedings consistent with this opinion.

ALL CONCUR.

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