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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000306-MR

J. D. DAVIS

APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE, JR., JUDGE
ACTION NO. 97-CI-00365

CITY OF WINCHESTER, KENTUCKY;
SHANNON STONE; HARVEY CRAYCRAFT;
AND GREGORY VAUGHT

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, DIXON AND KELLER, JUDGES.

ACREE, JUDGE: The appellant, J. D. Davis, appeals from the Clark Circuit Court's October 6, 2009 trial order and judgment dismissing, with prejudice, his malicious prosecution claim against the appellees, City of Winchester, Shannon Stone, Harvey Craycraft, and Gregory Vaught, following a jury trial. On appeal, Davis contends that the circuit court erred by denying his request for leave to

amend his complaint, and that the circuit court failed to properly instruct the jury. For the following reasons, we affirm the circuit court's trial order and judgment.

I. Facts and procedure

On October 5, 1996, appellees Harvey Craycraft and Shannon Stone, police officers with the Winchester Police Department, were patrolling downtown Winchester in plainclothes. Following several complaints of public intoxication, fighting, and excessive noise, the Winchester Police Department assigned plainclothes police officers to the downtown area in order to control the reported unruly behavior, which the offenders often ceased when they saw marked police cruisers. Though Officers Craycraft and Stone were in plainclothes, both officers still carried their handcuffs, firearms, and police wallet badges. Officer Craycraft also had a police radio concealed in his jacket pocket.

On the night in question, Davis visited the Fishin' Hole, a bar owned by his wife in downtown Winchester. While at the Fishin' Hole, Davis consumed one and a half cans of beer. After participating in a pool tournament at the Fishin' Hole, Davis walked with his friend, Terry Salyers, to Bam's Bar, another establishment in downtown Winchester. Davis stayed at Bam's Bar for approximately one-and-one-half hours and, during that time, consumed three more beers. At around 8:30 p.m., Davis and Salyers decided to walk back to the Fishin' Hole via Wall Alley. At this time, Officers Craycraft and Stone heard loud, boisterous voices laced with profanity coming from Wall Alley. When they looked

down the alley in the direction of the voices, they observed Davis and Salyers staggering towards them.

When Davis and Salyers emerged from the alley, Officers Craycraft and Stone smelled alcohol about the persons of Davis and Salyers, and observed that both men had glassy, bloodshot eyes. Officer Craycraft asked the men their names. Davis provided his name and claimed he was the owner of the Fishin' Hole. The police officers testified that Davis was slurring his speech and that Officer Stone considered Davis manifestly intoxicated.

While talking with Davis, radio traffic came across the police radio concealed in Officer Craycraft's jacket. Davis asked if they were police officers. The police officers confirmed their identities and showed Davis their police badges. At this point, Salyers smiled and walked into the Fishin' Hole. Davis, however, asked how he was supposed to know if the badges were real. Davis testified that he did not believe they were police officers. Davis also recalled a recent incident in the area in which an individual had been killed in a back alley when someone struck that person in the head with a brick. In response to Davis's question, Officer Craycraft said that he would call for a marked unit to verify the officers' identities. Officer Craycraft then removed the police radio from his jacket and called for a "10-16," which is a code requesting a prisoner transport. The police officers testified that they had decided to arrest Davis because they considered him intoxicated based on their observations of blood shot eyes, conduct

in the alley, and based on his slurred speech and the smell of alcohol coming from his person.

At this point, Davis used profanity to express his view of the circumstances and walked toward the Fishin' Hole's entrance. The police officers testified that, because Davis was not yet under arrest, they decided to simply follow Davis into the bar in order to maintain visual contact until the marked police unit arrived. Davis opened the door and Officer Craycraft, who was immediately behind Davis, reached out to catch the door. The police officers testified that, at that moment, Davis swung his arm around, striking Officer Craycraft in the chest with a closed fist, knocking him off balance. When, as alleged by the officers, Davis drew back his fist to strike Officer Craycraft again, Officer Stone grabbed Davis's wrist. In doing so, all three men fell to the ground. While on the ground, Officer Stone stated, "Buddy, you're under arrest." Davis continued to struggle on the ground as the police officers attempted to secure Davis in handcuffs.

Davis claims, however, that he did not swing at the officer, but that he merely turned and pointed to a sign which required that the police officers provide identification prior to entering the bar, whereupon the police officers threw Davis to the ground, striking his head on the concrete and breaking his thumb.

Because of the confrontation between Davis and the police officers, patrons of the Fishin' Hole began coming out of the bar. Officers Stone and Craycraft shouted multiple times that they were police officers, and called for immediate assistance on the police radio to ensure the crowd did not get out of hand. Multiple

police cars arrived moments later. Winchester Police Officer Gregory Vaught was among the responding officers. Davis was arrested and placed in Officer Vaught's police cruiser. The police ordered the Fishin' Hole bar to be shut down for the evening.

Officer Vaught transported Davis to the Clark County jail. While at the jail, Officer Vaught heard Davis complaining to jail employees about his injured thumb, and threatening to kill the police officers who arrested and injured him. Davis claims that, when he arrived at the jail, jail employees refused to treat his injured thumb, and would not contact his doctor.

Davis was charged with alcohol intoxication, disorderly contact, resisting arrest, and terroristic threatening. Subsequently, Davis was also charged with third-degree assault and, as recommended by the Kentucky State Alcoholic Beverage Commission, operating a disorderly retail establishment.

Ultimately, the Clark District Court dismissed all the charges against Davis. Davis then filed this action against the defendants claiming malicious prosecution, excessive force, and unlawful arrest. Davis's case proceeded to a jury trial on January 13, 2003. The jury found in favor of the defendants. Davis appealed the jury's verdict to this Court, which affirmed the circuit court's ruling. Davis then sought discretionary review by the Kentucky Supreme Court,¹ which reversed this

¹ On discretionary review, the Supreme Court held that the circuit court committed reversible error when it refused to allow Davis to submit evidence that the charges against him had been resolved in his favor by the district court because this was an essential element of his malicious prosecution claim. *Davis v. City of Winchester*, 206 S.W.3d 917 (Ky. 2006)

Court and remanded Davis's case back to the circuit court for a new trial on the malicious prosecution claim.

On remand, the Clark Circuit Court entered a pre-trial order on November 13, 2008, establishing deadlines for discovery and other dispositive motions. The pre-trial order required that any proposed pleading amendment be filed on or before 60 days before trial. On August 6, 2009, Davis filed a motion for leave to amend his complaint to add a new cause of action against the defendants. The circuit court denied Davis's motion, finding that the motion would unfairly prejudice the defendants, unduly complicate the issues presented to the jury panel, and that the motion was untimely.

The circuit court conducted a second jury trial beginning on October 5, 2009, and lasting three days. The jury returned a unanimous verdict for the defendants. Based upon the jury's verdict, a trial order and judgment was entered on November 16, 2009, by which Davis's complaint was dismissed with prejudice. The circuit court denied Davis's post-trial motion for relief. This appeal followed.

II. Analysis

On appeal, Davis presents two arguments. First, he asserts the circuit court abused its discretion when it denied Davis's motion for leave to amend his complaint to add a new cause of action. Second, he argues that a jury instruction erroneously allowed the jury to find for the City and the police officers if probable cause existed as to any of the criminal charges against him, rather than requiring

that all such charges be based on probable cause. We are not persuaded by either argument.

A. Denial of motion to amend complaint not abuse of discretion

The decision whether to allow a party to amend his pleading is vested within the trial court's discretion, and we will not disturb its ruling unless the court abused that discretion. *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 779 (Ky. App. 2000). "An abuse of discretion occurs when a trial judge's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 684 (Ky. 2005) (quotation omitted).

Kentucky Rules of Civil Procedure 15.01 permits a party to "amend its pleading, following the twenty-day period after it is served, 'only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.'" *M.A. Walker, Co. v. PBK Bank, Inc.*, 95 S.W.3d 70, 74 (Ky. App. 2002) (citing Kentucky Rules of Civil Procedure (CR) 15.01). While the trial court shall freely authorize leave to amend when justice so requires, "this does not mean that leave should be granted without limit or restraint." *Laneve v. Standard Oil Co.*, 479 S.W.2d 6, 8 (Ky. 1972). Thus, the trial court may deny a party's motion for leave to amend if "the amendment will result in undue prejudice to the other party, is unduly delayed, is not offered in good faith, or [if] the party has had sufficient opportunity to state a claim." *Stout v. City of Martin*, 395 S.W.2d 591, 593 (Ky. 1965).

In the case *sub judice*, the circuit court denied Davis's motion for leave to amend his complaint because the court determined that Davis's motion would unfairly prejudice the defendants, would unduly complicate the issues at trial regarding malicious prosecution, and was not timely. The circuit court's reasoning is sound.

The incident giving rise to Davis's malicious prosecution complaint occurred in October of 1996. Davis filed this action against the appellees shortly thereafter. Davis's case originally came on for trial in January of 2003. Additionally, the Kentucky Supreme Court remanded Davis's case back to the circuit court for a new trial on September 26, 2006, and the circuit court notified the parties of the new trial date on November 11, 2008.

Despite the fact that Davis's case had been pending in the courts for over a decade, Davis waited until August of 2009, two months before his second trial, to assert a new cause of action against the defendants. Davis had ample time, even after the Kentucky Supreme Court remanded his case back to the circuit court, to file a motion for leave to amend his complaint to include a new cause of action. *See Laneve*, 479 S.W.2d at 8-9.

Additionally, Davis relies on testimony from the 2003 trial to support his new cause of action. Thus, Davis knew or should have known about this new potential avenue for relief at least since 2003, some six-and-one-half years before he filed his motion for leave to amend his complaint. Davis has failed to offer any persuasive explanation for his delay in asserting his new cause of action. Further,

by the time Davis filed his motion, the deadline for discovery and dispositive motions had passed, and the circuit court had already entertained two motions for summary judgment. Thus, we are unable to conclude that the circuit judge abused his discretion in denying Davis's motion for leave to amend.

Davis argues that, because he filed his motion for leave on or before 60 days prior to trial, as required by the circuit court's pre-trial order, his motion was timely. Without determining whether Davis's motion for leave actually falls within the 60 day window established by the circuit court, we are unable to conclude that simply complying with a trial court's pre-trial or scheduling order automatically deems a motion for leave timely. Of course, a litigant must comply with the trial court's pre-trial or scheduling order if the trial judge is going to consider the motion, but the trial judge still retains the discretion to deny the motion if he or she deems that the pleading amendment would impair justice. Accordingly, we are not persuaded by Davis's argument.

B. Jury finding of no malice moots argument of error in instruction

Davis contends the circuit court committed reversible error when it issued a jury instruction allowing him to prevail only if the officers "did not have reasonable grounds to believe that Plaintiff committed *any* one of the crimes" with which Davis was charged. Davis sought an instruction that would have allowed him to prevail if reasonable grounds did not support each and every charge against him. However, we need not address the merits of that argument because the jury

found that the officers did not act with malice – a necessary element of the cause of action.

In order to succeed on a claim of malicious prosecution, the plaintiff must prove, by a preponderance of the evidence, six basic elements: “(1) the institution or continuation of original judicial proceedings . . . (2) by, or at the insistence of, the plaintiff [in the underlying action], (3) the termination of such proceedings in the defendant’s favor, (4) malice in the institution of such proceedings, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damages as a result of the proceeding.” *Raine v. Drasin*, 621 S.W.2d 895, 899 (Ky. 1981). Because malicious prosecution actions are not favored in the law, the plaintiff “must strictly comply with the prerequisites of maintaining an action for malicious prosecution.” *Id.* Thus, it reasonably follows that if the plaintiff fails to prove each and every element, plaintiff’s malicious prosecution claim fails as a matter of law. *See id.*

At trial, the court instructed the jury separately on the fourth element of Davis’s cause of action – whether the officers instituted the proceedings with malice. Although Davis argues erroneous jury instruction related to the fifth element – the probable-cause element – he raised no objection to the instruction regarding malice and, before this Court, ignores the jury’s finding of no malice. While we know of none, any such argument that might have been available, therefore, is waived. *Personnel Bd. v. Heck*, 725 S.W.2d 13, 18 (Ky. App. 1986).

The jury was asked, in three questions separately applicable to the three officers, whether Davis had demonstrated that the officers had “improperly brought the criminal charges against [Davis] to injure, harass, or annoy him and not in a good faith effort to promote justice” The unanimous answer was “No.”

It is self-evident that malice is a necessary element of the offense of malicious prosecution. The jury’s finding of no malice was fatal to Davis’s claim before the circuit court; the same finding is fatal to any argument on appeal that disregards it, such as the argument Davis urges regarding probable cause. Therefore, we see no need to address that argument.

III. Conclusion

For the foregoing reasons, the trial judgment and order of the Clark Circuit Court is affirmed.

ALL CONCUR.

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