

RENDERED: OCTOBER 9, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000796-MR

THOMAS E. CLAY AND
THOMAS E. CLAY, P.S.C.

APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 11-CI-006475

ANNEMARIE GREIPEL;
KENNETH J. HENRY d/b/a
HENRY & ASSOCIATES, PLLC;
SIMONE R. GREEN; AND
CHRISTINA R.L. NORRIS d/b/a
CHRISTINA NORRIS LAW OFFICES

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, KRAMER, AND VANMETER, JUDGES.

VANMETER, JUDGE: In an action for malicious prosecution, one element the plaintiff must prove is that the defendant lacked probable cause for filing an action against the plaintiff. Here, the issue we must decide is whether the Jefferson

Circuit Court erred by granting summary judgment in favor of Annemarie Greipel, Kenneth J. Henry d/b/a Henry & Associates, PLLC (“Henry”), Simone R. Green,¹ and Christina R.L. Norris d/b/a Christina Norris Law Offices (“Norris”) on Thomas E. Clay and Thomas E. Clay, P.S.C.’s (“Clay”) claims of malicious prosecution, abuse of process, and intentional interference with prospective business or contractual relations. For the following reasons, we affirm.

Clay previously represented Greipel’s daughter, Green, in a dissolution action. At that time, Clay was aware that Green was eight months pregnant, only worked part-time, and had suffered physical abuse from her husband (“Zaring”). Clay scheduled a mediation to resolve marital property issues; yet, he did not arrange for Green to be in a separate room from Zaring, nor did he seek maintenance or attorney fees on Green’s behalf. Clay knew that Greipel was prepared to pay up to \$130,000 to assist Green in resolving the marriage, and he made at least one phone call to her during the mediation. Zaring ultimately accepted \$120,000 for his interest in the couple’s home, and in addition, Green was to assume the mortgage of approximately \$134,000. After the settlement agreement was signed, Greipel and Green informed Clay that they were dissatisfied with the agreement, and Clay referred them to an estate planning attorney. That attorney referred them to Norris, a family law attorney.

¹ Some confusion exists as to whether Green’s name is spelled “Green” or “Greene.” We will refer to her throughout this opinion as “Green” as that is how her name is spelled in the brief she submitted to this court.

Norris informed Greipel and Green of the difficulties of having the settlement agreement set aside given the fact that Green had been represented by counsel during the mediation. Norris informed Greipel and Green that she believed Clay's representation had been deficient, and she contacted Zaring's attorney to discuss renegotiating the settlement agreement. Zaring's attorney indicated that he might be willing to renegotiate the settlement. Norris was then substituted for Clay as Green's counsel.

Zaring subsequently ended negotiations, and Norris was forced to attempt to convince the court that the settlement agreement was unconscionable in order to have it set aside. She requested Clay's file and contacted Mark Mulloy to review the documents as a legal malfeasance expert. Mulloy advised Norris of his opinion that Clay had committed malfeasance in his representation of Green at the mediation.

Norris contacted Henry in January 2009 about a possible malfeasance claim against Clay. Henry initially drafted a complaint for Greipel and Green to file *pro se*; however, he did not yet engage Greipel or Green as clients. At this time, Green was suffering severe depression. Due to Green's health and the possibility of needing Clay to testify in the pending divorce action,² Greipel, Green and Henry discussed filing the complaint to satisfy the statute of limitations but not having the summons issued immediately. Greipel and Green filed the Complaint on January 30, 2009, alleging malfeasance against Clay. Henry ultimately agreed

² The dissolution action was ultimately settled out of court.

to represent Greibel and Green and executed an engagement agreement in May 2009. Clay was served with the malfeasance summons on June 29, 2009.

The malfeasance action proceeded to trial, and a jury returned a verdict in Clay's favor on August 30, 2011. Clay then filed this action in October 2011, asserting claims for malicious prosecution, abuse of process, intentional interference with prospective business or contractual relations, and intentional infliction of emotional distress. On April 22, 2014, the trial court entered an order granting summary judgment in favor of the defendants and dismissing all of Clay's claims with prejudice.³ From that order, Clay appeals.

On appeal, Clay argues that the trial court inappropriately drew inferences in a light most favorable to the moving parties: Greipel, Green, Henry, and Norris. Further, he claims the trial court erred by finding that no disputed issues of material fact existed. He asserts that these errors warrant reversal of the trial court's decision with respect to his malicious prosecution, abuse of process, and intentional interference with prospective business or contractual relations claims.

CR⁴ 56.03 provides that summary judgment is appropriate when no genuine issue of material fact exists and the moving party is therefore entitled to judgment as a matter of law. Summary judgment may be granted when "as a matter of law, it appears that it would be impossible for the respondent to produce

³ Clay conceded prior to the trial court's order granting summary judgment that his claims for intentional infliction of emotional distress should be dismissed as to each defendant.

⁴ Kentucky Rules of Civil Procedure.

evidence at the trial warranting a judgment in his favor and against the movant.”

Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 483 (Ky. 1991)

(internal quotations omitted). Whether summary judgment is appropriate is a legal question involving no factual findings, so a trial court’s grant of summary judgment is reviewed *de novo*. *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 370-71 (Ky. 2010).

First, Clay asserts that summary judgment should not have been granted in favor of the defendants on his malicious prosecution claim. Six basic elements are necessary to maintain an action for malicious prosecution:

(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, 621 S.W.2d 895, 899 (Ky. 1981). The issue here, whether the defendant had probable cause for filing the action, is a legal question for the court.

Prewitt v. Sexton, 777 S.W.2d 891, 895 (Ky. 1989) (citing Restatement (Second) of Torts, § 681B). Probable cause is “a suspicion founded upon circumstances sufficiently strong to warrant a reasonable person in the belief that the charge is true.” *Prewitt*, 777 S.W.2d at 894.

The trial court found against Clay on the probable cause element since Clay failed to proffer any evidence, other than his own claims, that the defendants

initiated the malpractice suit based on inaccurate or incomplete information regarding Clay's representation of Green. After a thorough review of the record, we agree with the trial court that given the circumstances surrounding the settlement Clay negotiated for Green, a reasonable person would believe that a cause of action for malpractice was warranted. For a pregnant woman working only part-time, a settlement in which she agreed to pay \$120,000 on top of assuming a \$134,000 mortgage is highly questionable. Thus, we find no error in the trial court's grant of summary judgment in favor of the defendants on this claim.

Next, Clay argues that the trial court erred by granting the defendants summary judgment on his claim of abuse of process. "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.'" *Simpson v. Laytart*, 962 S.W.2d 392, 394 (Ky. 1998) (internal citations omitted). The elements of an abuse of process claim "include (1) an ulterior purpose and (2) a [willful] act in the use of the process not proper in the regular conduct of the proceeding." *Bonnie Braes Farms, Inc. v. Robinson*, 598 S.W.2d 765, 766 (Ky. 1980).

Clay alleges that the delay in issuing the summons in the malpractice action is an abuse of process since the summons was delayed in order to secure his favorable testimony in Green's attempt to have her dissolution settlement

agreement set aside. While this may be true, we agree with the trial court that since Clay had no knowledge of the filing of the malpractice complaint until he was served with the summons, no threat was made or tactical advantage gained by delaying the summons. Abuse of process

usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort.

Simpson, 962 S.W.2d at 395. No liability exists when the defendant has done nothing more than carry out the process to its authorized conclusion even if we assume bad intentions. *Id.* The defendants here never made filing of the malpractice action contingent on Clay's favorable testimony nor did they threaten Clay in any way. Thus, summary judgment on this count was appropriate.

Lastly, Clay argues that the defendants intentionally interfered with his prospective business or contractual relations by filing the malpractice action. On this claim, the trial court granted summary judgment in favor of the defendants because Clay failed to show any damages he suffered as a result of the actions of the defendants in this case. "[I]n order to recover under this cause of action, [a plaintiff] must plead and prove the following elements: (1) the existence of a valid business relationship or its expectancy; (2) defendant's knowledge thereof, (3) an intentional act of interference; (4) an improper motive; (5) causation; and (6)

special damages.” *Monumental Life Ins. Co. v. Nationwide Retirement Sols, Inc.*, 242 F.Supp.2d 438, 450 (W.D.Ky. 2003) (applying Kentucky law). We agree that since Clay failed to show that he lost any business or is inhibited from gaining new business as a result of the legal malfeasance lawsuit, he has failed to show that he suffered any damages resulting from the alleged interference. Hence, his claim fails.

For the reasons discussed above, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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