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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000655-MR

CHARLES V. MULLINS,
individually and d/b/a U.S. AUTO RECOVERY;
DEREK DENNEY; JONATHON C. PAYNE;
and LOUISVILLE REPOSSESSION TASK FORCE
LIMITED LIABILITY COMPANY — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH MCDONALD BURKMAN, JUDGE
ACTION NO. 12-CI-00198

OFFICER RUSSELL CARVER;
SERGEANT JAMES CIRILLO;
OFFICER JOEL PHILLIPS;
OFFICER VICTOR SZYDLOWSKI;
OFFICER SHAWN HOOVER;
and SERGEANT MICHAEL KING — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND D. LAMBERT, JUDGES.

KRAMER, CHIEF JUDGE: The above-captioned appellants are or were involved in the business of effectuating automobile repossessions in and around Louisville, Kentucky. Charles Mullins was a sole proprietor of a business he named "United States Repossession Task Force." He was the managing member of "Louisville Repossession Task Force Limited Liability Company." Derek Denney and Jonathon C. Payne were two of Mullins' employees (or, as Mullins refers to them, his "field agents").

The underlying litigation involved three incidents that occurred between 2009 and 2011. In each incident, discussed in depth below, Mullins and his company attempted to effectuate repossessions in the greater Louisville area. Following each incident, Mullins was arrested by officers from the Louisville Metropolitan Police Department (LMPD) for impersonating a peace officer. Denney and Payne, who assisted Mullins during one of these three incidents, were also charged with that offense. Subsequently, these appellants were either acquitted or their charges were dismissed; and they—along with Mullin's limited liability entity—filed a variety of civil claims in Jefferson Circuit Court against the arresting officers in their individual capacities. They alleged the officers (the above-captioned appellees) were liable for malicious prosecution and had conspired to interfere with Mullins' repossession business. The circuit court summarily dismissed these claims, and this appeal followed. Upon review, we affirm.

Summary judgment serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show 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." Kentucky Rule of Civil Procedure (CR) 56.03. Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Summary judgment "is proper where the movant shows that the adverse party could not prevail under any circumstances." *Id*. at 480 (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)).

On appeal, we must consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). Because summary judgment involves only questions of law and not the resolution of disputed material facts, an appellate court does not defer to the circuit court's decision. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378 (Ky. 1992). Likewise, we review the circuit court's interpretations of law *de novo*. *Cumberland Valley Contrs., Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007).

With this standard in mind, we now proceed to the substance of this appeal. We have divided our analysis into three parts to separately address each of the three aspects of the appellants' lawsuit and appeal.

The Michael Smith Incident: *Mullins v. Cirillo*

The appellants spend approximately one paragraph of their brief describing the first aspect of their lawsuit and appeal. On page 1, they state:

> On November 19, 2009, Michael Smith ("Smith") reported to the Louisville Metro Police Department ("LMPD") that Appellant Charles Mullins ("Mullins"), along with two other employees of Mullins', were "acting like police." At that time, Mullins and his employees were attempting to lawfully repossess Smith's vehicle. No individuals were arrested as a result of this incident, but the report started a string of continuous harassment by LMPD and its officers against Mullins and his employees.

On page 17, the appellants then add Sgt. Cirillo, one of the officers who investigated this incident, ultimately "waited over a year to bring impersonation charges in relation to the initial November 19, 2009 incident." The appellants conclude by stating:

> Viewed in the light most favorable to Appellants, Sgt. Cirillo did not have probable cause to support a claim that Appellants were engaging in any illegal activity. Thus, he had no rightful authorization to institute any process against Appellants and acted with the sole ulterior motive to coerce Appellants out of their lawful business.

This is the extent of the appellants' description of what occurred on November 19, 2009, and their contention regarding why Sgt. Cirillo, in his

individual capacity, is liable to them for abuse of process and tortious interference with business relationships (also known as "intentional interference with prospective advantage").

With this in mind, we would be justified in affirming the circuit court's decision to dismiss both of these claims without further discussion. Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v) states, in part, that an appellant's brief shall contain "[a]n 'ARGUMENT' conforming to the Statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law. . . ." We are not required to review a contention offered in an appellate brief that violates this standard. *Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006).

The appellants have not met this standard with respect to their abuse of process claim. Abuse of process consists of "the employment of legal process for some other purpose than that which it was intended by law to effect." *Raine v. Drasin*, 621 S.W.2d 895, 902 (Ky. 1981); *Flynn v. Songer*, 399 S.W.2d 491, 494 (Ky. 1966); *Simpson v. Laytart*, 962 S.W.2d 392, 394 (Ky. 1998). The essential elements for the tort of 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. *Bonnie Braes Farms, Inc. v. Robinson*, 598 S.W.2d 765, 766 (Ky. App. 1980). Examples of an abuse of process include an improper threat to continue the prosecution of an ongoing claim unless a concession is made on a collateral matter; or the initiation of a legal action for an improper purpose

(demanding a result not authorized by applicable law) after threatening to do so unless the unauthorized result is granted. *Sprint Communications Co. v. Leggett*, 307 S.W.3d 109, 119 (Ky. 2010). Conversely, even though a party acts with malevolent intentions, if he has done nothing more than carry out the legal process to its authorized conclusion an abuse of process claim will not lie. *Simpson*, 962 S.W.2d at 394–95.

Here, the appellants' brief makes no attempt to: (1) describe, or cite any evidence describing, the "incident" that occurred on November 19, 2009; (2) indicate who among the above-captioned appellants was involved and criminally charged with impersonating a peace officer in relation to the "incident;" or (3) cite any evidence of record supporting that Sgt. Cirillo, in bringing those charges, did anything more than endeavor to carry a legal process to an authorized conclusion. The appellants' prominent contention that "Sgt. Cirillo did not have probable cause to support a claim that Appellants were engaging in any illegal activity" also reflects that they do not understand the nature of abuse of process; "probable cause" is not an element of this tort.[1]

[1] In *Leggett*, 307 S.W.3d at 113, the Kentucky Supreme Court indicated that abuse of process in Kentucky generally conforms to the Restatement (Second) of Torts § 682. Comment "a" of that section of the Restatement further explains why probable cause is not an element of abuse of process:

> The gravamen of the misconduct for which the liability stated in this Section is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is

The appellants' brief is similarly deficient regarding their claim of intentional interference with prospective advantage. In *National Coll. Athletic Ass'n v. Hornung*, 754 S.W.2d 855 (Ky. 1988), the Supreme Court of Kentucky set forth the principles governing the tort of intentional interference with prospective advantage. It held that Sections 766B, 767 and 773 of the Restatement (Second) of Torts reflect the prevailing law in Kentucky. To recover under this cause of action, a claimant must plead and prove the following elements: (1) the existence of a valid business relationship or its expectancy; (2) a defendant's knowledge thereof; (3) an intentional act of interference; (4) an improper motive; (5) causation; and (6) special damages. In deciding whether the actor's actions were improper, a court must consider the factors set forth in Section 767 of the Restatement (Second) of Torts; *Hornung*, 754 S.W.2d at 858. Those factors are (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties. Though a defendant's actions may be "improper," he may nevertheless not be liable, if he acted in good faith in asserting a legally protected interest. *Hornung*, 757 S.W.2d at 858.

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imposed[.]

Here, the appellants' brief merely contains a bald assertion that Sgt. Cirillo had no justification for pressing charges against the appellants, and a conclusion that he is therefore liable.

Nevertheless, rather than affirming the circuit court's decision based upon these clear procedural deficiencies, we do so on the merits.

The evidence of record regarding what occurred on November 19, 2009, consists of Sgt. Cirillo's videotaped deposition; a voluntary statement taken from Mullins shortly after the incident; an investigative letter Sgt. Cirillo composed regarding his investigation; a series of post-investigative emails he circulated to other officers within LMPD; and Sgt. Cirillo's testimony before the grand jury. The appellants do not dispute this evidence, and the statement of facts offered in Sgt. Cirillo's appellate brief accurately reflects its substance. We therefore adopt that portion of Sgt. Cirillo's brief as follows:

> On the evening of November 19, 2009, Michael Smith called LMPD and reported that men posing as police were trying to repossess his vehicle. Appellant Mullins and several employees of his repossession business[2] had "set up" Mr. Smith to come to one of their private residences on the pretext of fixing a door. Smith claimed[3] that when he pulled into the driveway, Appellant Mullins and his employees pulled up behind

[2] The individuals ultimately charged in this matter were Mullins and two men he describes as his "agents," Stephen Beck and Joseph Lanham. According to Mullins, Beck and Lanham lured Smith, a handyman, to Beck's residence under the false pretense of getting an estimate on a home repair project.

[3] Although Mullins gave a different version of his and the appellants' initial interactions with Smith, he and the remaining appellants do not dispute that this was the version of events Smith related to LMPD; nor do the appellants dispute any other portion of this narrative regarding what Sgt. Cirillo or any of the other LMPD officers personally witnessed when they became involved.

him in two vehicles. Mullins was driving a Crown Victoria, with red/blue lights and a spotlight,[4] and his two employees were driving a pick-up truck.

When Mullins and his employees got out of their respective vehicles, Smith saw that they wore black shirts with silver badges.[5] They yelled at him "Do you have a gun?", told him to get out of his truck, and ordered him to lift his shirt to show that he had no weapons.[6] They repeatedly told him that he would be arrested if he did not give up his vehicle and asked if he had any warrants.[7] When Mr. Smith walked towards them, they ordered him to return to his vehicle and would not let him use his cell phone or call anyone.

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[4] During his voluntary statement, Mullins acknowledged that his blue Crown Victoria was a decommissioned police car that he had purchased in Indiana. He also stated that when he pulled up at the scene, he was flashing white and amber hazard sirens. Lanham, a volunteer firefighter, also had his volunteer firefighter sirens in his truck; Mullins stated he was unsure whether Beck and Lanham turned them on when Smith arrived where they had lured him.

[5] Mullins described the full array of his, and his employees' (or "agents" as he has continuously referred to them throughout this litigation) apparel during his voluntary statement. Mullins said that he typically wears a bulletproof vest; a black hoodie with a silver badge printed on the upper-left of the front featuring a center insignia of "the Commonwealth seal of two people holding hands," "AGENT MULLINS" printed elsewhere on the front, and "UNITED STATES RECOVERY AGENT" printed in large, bold, white lettering on the back; and a utility belt holding, among other things, a can of mace and an asp (a tactical baton commonly used by police). Mullins stated he keeps a pair of handcuffs in his car or in his pocket "just in case, you know, someone assaults me." As for "Agent Denney," "Agent Beck," and "Agent Lanham," Mullins stated each of these men wore the same type of hoodie, but their hoodies did not list their "agent" names; each wore the same type of utility belt with items such as pepper spray and asps; he also added "all the agents that are allowed to have a gun most of the time carry a firearm, whether visibly on their side or concealed in their vehicle, in the glove box or something."

[6] Mullins stated that before this incident he had checked an internet website which indicated Smith had a permit to carry a concealed weapon. He also stated Smith voluntarily, and without being prompted to do so, lifted up his own shirt to demonstrate he was unarmed.

[7] According to Mullins, Smith initially told them if they went to his home to repossess the Ford F-150, he would let his dogs attack them. Thereupon, Beck explained to him that "withholding property is a class "D" felony, which is the KRS 517.060." Mullins also explained that his usual practice during a repossession is to ask "You're not wanted for anything?" because he does not "want to be in a situation where [he's] harboring a fugitive or anything like that." He will also typically call the sheriff's department before the repossession and ask if they can check if the person whose vehicle is the subject of the repossession "has a court order" or a warrant.

Mullins and his employees eventually realized that Smith was driving a red Dodge truck and not the red Ford truck that they were trying to repossess. The Ford was at Smith's home, and they agreed to follow Smith there to retrieve the truck. Only then did they move their vehicles and allow him to exit the driveway.

Smith made his first call to LMPD as he was driving, and the dispatcher told him to pull over and wait for uniformed officers to arrive. Mullins, driving the Crown Vic, pulled over behind Smith, got out, and asked him why he had stopped. Smith advised he was waiting for the police, and Mullins got back into his own car and drove away. Mr. Smith then resumed his drive home.

A tow truck driven by Appellant Denney, one of Mullins' employees, was at Smith's house when Smith arrived. Mr. Smith then made a second call to LMPD and asked that they come to his house. Upon learning that police had been called, Denney left. He drove to a nearby gas station and called the police himself. While uniformed officers went to Smith's home, Sgt. Cirillo and another officer met Denney at the gas station. Denney was dressed in a black hooded sweatshirt with a silver badge printed on the front. The printed badge had the words "United States Recovery Task Force, USA." The words "UNITED STATES RECOVERY AGENT" were printed on the back of the sweatshirt. He also had a gun and handcuffs in his tow truck, all of which were photographed with Denney's consent. Denney complained that Smith would not agree to give up the vehicle for repossession and that Smith threatened him. He identified Mullins and the other employees who had the earlier interaction with Smith and advised that he had not been at that residence. Denney provided Mullins' telephone number to Sgt. Cirillo.

Sgt. Cirillo called Mullins and asked him to meet them at the gas station, but he refused. Sgt. Cirillo later learned that Mullins had an outstanding warrant for speeding. Sgt. Cirillo instructed his officer to obtain additional information from Smith in order to complete the incident report, and Denney was allowed to leave.

> Sgt. Cirillo then spoke with Smith regarding the details of the incident, which he summarized in an Investigative Letter, and he performed internet research regarding Mullins and his company. On November 26, 2009, Sgt. Cirillo sent an internal LMPD email regarding Mullins' company, United States Recovery Task Force. The email informed other LMPD employees of the identities of Mullins and his company, provided photos of the company uniforms which closely resembled those of police, and briefly described Smith's incident as well as an earlier incident in which some of Mullins' employees demanded police discounts at Mark's Feed Store.[8] Sgt. Cirillo also wrote that LMPD had several past run-ins with the company but did not have enough to charge them with anything and that the company operated all over the Louisville Metro area. Appellants have never disputed the factual accuracy of any of the information contained in Sgt. Cirillo's email.
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> Continuing his investigation of the November 19, 2009 incident, Sgt. Cirillo asked Mullins and his employee, Joseph Lanham, to provide voluntary statements. Both did so on December 12, 2009. They confirmed their involvement in the November events at the St. Matthew's residence, although Mullins denied blocking Smith's vehicle[9] and claimed that he only briefly used the spotlight in order to identify Smith's vehicle. Mullins also stated that, in his opinion, Mr. Smith could be

[8] During his voluntary statement, Mullins related that on an occasion during the summer before the November 19, 2009 incident he, Denney, and Denney's 18-year-old brother were eating at Mark's Feed Store in their company attire (which at the time consisted of black shirts with badges, camouflage pants, and Mullins' use of a necklace with a "fugitive recovery" badge attached to it) when "as a joke" Denney's brother submitted a "suggestion" card asking for "better discounts for officers." A restaurant employee later told law enforcement that Mullins and his employees were, as a result of the "suggestion," given a law enforcement discount on their meal. Mullins stated he was not aware they had been given the discount when he paid the bill.

[9] Mullins stated that if Smith had been driving the Ford F-150, he and his "agents" would have blocked him in; this is a tactic they normally use; and, in his words, "that's just to make sure that they don't take off on us with the repo and we don't have to, you know, go through all kinds of crap to try to find them. At that point we do block them in and explain to them it's a repo."

charged with failure to make his vehicle payments pursuant to Kentucky law.[10]

Based on the statements and other evidence he gathered, Sgt. Cirillo felt that probable cause existed to arrest Mullins. Not only did Mullins' uniforms, vehicle, and other paraphernalia resemble those of police, but also, when Mullins pulled in behind Smith at the St. Matthew's residence and ordered Smith to exit his vehicle and show his hands, that resembled a high-risk traffic stop by police. While Sgt. Cirillo felt that with Mullins' statement he had enough to charge Mullins with impersonating a peace officer and unlawful imprisonment, he did not at that point feel that he had a sufficiently strong case to be successful in court. He therefore retained his case file and waited to see if any new information surfaced regarding that incident or any future incidents. Sgt. Cirillo felt that, if Mullins were to engage in future incidents of impersonating a peace officer, it would show a pattern of behavior that would bolster the potential success of a prosecution based on the Smith incident.

Sgt. Cirillo had no further active involvement with Mullins until October 2010. On October 15, 2010, a County Attorney advised Sgt. Cirillo that Smith had contacted her about the status of his own case in light of Mullins' and Denney's recent arrests by Sgt. Carver for impersonating peace officers.[11] Sgt. Cirillo contacted Smith, corroborated his earlier statement to LMPD, and ascertained that Smith would like to cooperate going forward.

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[10] To this effect, Mullins referenced KRS 517.060(1), which provides in relevant part "A person is guilty of defrauding secured creditors when he destroys, damages, removes, conceals, encumbers, transfers, or otherwise deals with property subject to a security interest with intent either to lower the value of the secured interest or unlawfully to hinder enforcement of that interest."

[11] Mullins, Beck, and Lanham were indicted on February 11, 2011, for violating KRS 519.055 for what occurred during the Michael Smith incident, two days after Mullins and two of his other "agents"—Denney and Payne—were indicted for what occurred in the Ashley Meredith incident (discussed in greater depth below).

> Sgt. Cirillo then turned his entire case file over to the Commonwealth Attorney's office so that a grand jury could determine whether it merited an indictment. Sgt. Cirillo testified before the grand jury regarding the November 19, 2009 incident, and the grand jury returned a true bill against Mullins and his two employees for impersonating a police officer in connection with that incident. Sgt. Cirillo was subpoenaed to provide testimony at the trial, but the charges were ultimately dismissed on January 12, 2012. Sgt. Cirillo was not involved in any decisions regarding the prosecution of the criminal case, including the decision to dismiss.

(Internal citations to evidence of record omitted.)

Returning to the specifics of what is contended on appeal, "the appellants" assert that the circuit court erred in dismissing "their claims" against Sgt. Cirillo for abuse of process and intentional interference with prospective advantage.

But, "the appellants" did *not* file suit against Sgt. Cirillo. Beck and Lanham, two of the three men criminally charged with violating KRS 519.055 in relation to the November 19, 2009 incident, are not and have never been parties in this action. "U.S. Auto Recovery" was a sole proprietorship operated by Mullins, and thus had no legal identity separate from Mullins. Moreover, the remaining appellants each admitted in their respective answers to interrogatories, below, that no one other than Mullins has ever filed suit against Sgt. Cirillo. The claims asserted against Sgt. Cirillo were asserted by Mullins alone.

With respect to the abuse of process claim Mullins asserted against Sgt. Cirillo, the fact that Sgt. Cirillo delayed filing charges[12] is irrelevant:

> Courts are in no position to say as a matter of law that an officer must break off an investigation at any particular point in time or that he must move in and effect an arrest at any particular time. These are matters that do and must remain in the reasonable discretion of the officer in the field conducting the investigation.

Phillips v. Commonwealth, 473 S.W.2d 135, 137 (Ky. 1971).

Rather, the dispositive question is whether legal process was employed for some other purpose than that which it was intended by law to effect. *Raine*, 621 S.W.2d at 902.

The objective of the process initiated against Mullins was to punish and further prohibit him from *effectuating repossessions in a specific manner*—namely, by dressing and acting, and encouraging his employees to dress and act, like peace officers in violation of KRS 519.055. If the prosecution had gone forward—and it was ultimately determined that the manner in which Mullins and his employees had dressed and acted constituted a violation of KRS 519.055—Mullins and his employees would have been punished and further prohibited from effectuating repossessions *in that specific manner*; that would have been the result

[12] As noted, Smith's version of the events of November 19, 2009, was disputed by Mullins and his employees. Sgt. Cirillo stated during his deposition that he believed Smith's version was enough of a basis for charging Mullins and his employees with impersonating peace officers, but he was aware that a trial regarding those charges would have depended, at least in part, upon a jury's assessment of Smith's credibility versus the credibility of Mullins, Lanham, Beck, and Denney. Sgt. Cirillo testified during his deposition that this was the primary reason he delayed filing charges and waited for additional evidence indicating that Mullins and his employees were engaged in a common scheme or plan to impersonate peace officers to further their repossession business.

authorized by the applicable law. *See Leggett*, 307 S.W.3d at 119 (explaining abuse of process occurs where a result is demanded that is *not* authorized by the applicable law). The record does not support that Sgt. Cirillo threatened Mullins with judicial process or initiated judicial process for any reason collateral to that purpose, much less to coerce Mullins into abandoning the business of effectuating repossessions in any *other* manner. *Id*. (Explaining abuse of process occurs where prosecution of an ongoing claim is threatened unless a concession is made on a *collateral* matter). Accordingly, Mullins failed to support the elements of this claim, and the circuit court properly dismissed it.

Mullins' intentional interference with prospective advantage claim also fails for at least three reasons. First, for purposes of this tort, Mullins was required to allege and prove special damages. *See CMI, Inc. v. Intoximeters, Inc.*, 918 F.Supp. 1068, 1080-81 (W.D. Ky. 1995) (citing *Henkin, Inc. v. Berea Bank & Trust Co.*, 566 S.W.2d 420, 425 (Ky. App. 1978)). He failed to do so and instead merely offered a general, unsupported assertion that he "lost business."

Second, Mullins has failed to adduce any evidence indicating his "lost business" was in any way attributable to or caused by Sgt. Cirillo.

Third, the evidence regarding what Sgt. Cirillo knew or reasonably believed at all relevant times is undisputed and demonstrates he acted in good faith in asserting a legally protected interest—namely, his mandated duty of law enforcement. *Hornung*, 757 S.W.2d at 858.

As an aside, individuals who work in the repossession business act illegally and expose themselves to civil liability if, in effectuating a repossession outside of judicial process, they commit a "breach of the peace." *See* KRS 355.9-609(2)(b). The use of force or intimidation to effectuate a repossession constitutes a breach of the peace. *First and Farmers Bank of Somerset, Inc. v. Henderson*, 763 S.W.2d 137, 140 (Ky. App. 1998). It is also a breach of the peace to employ the unofficial use of the power of the State to essentially override or squelch a debtor's right to object to a repossession; this includes the instance of recruiting a uniformed, but off-duty law enforcement officer to stand by, in view of the debtor, while a repossession is effectuated. *Id*. at 141.

Here, Sgt. Cirillo had probable cause to believe Mullins and Mullins' "agents" attempted to employ *pretended* State power to force or intimidate Smith into cooperating with their repossession of his vehicle; and that in doing so, Mullins and Mullins' "agents" breached the peace by engaging in felony conduct. KRS 519.055 provides:

> (1) A person is guilty of impersonating a peace officer if he pretends to be a peace officer, or to represent a law enforcement agency or act with the authority or approval of law enforcement agency, with intent to induce another to submit to the pretended official authority or otherwise to act in reliance upon the pretense to his prejudice.
>
> (2) Impersonating a peace officer is a Class D felony.

(3) As used in this section, the phrase "peace officer" means a peace officer as defined in KRS 446.010.[13]

To review, Sgt. Cirillo noted that the uniforms and paraphernalia worn by Mullins resembled what is typically worn by law enforcement. Mullins does not disagree with this point.

Sgt. Cirillo noted the vehicle used by Mullins resembled what was typically used by law enforcement. Mullins acknowledged that his Crown Victoria was formerly used as a police car and that he used sirens.

Sgt. Cirillo noted Smith's description of how Mullins used sirens, pulled in behind Smith at Beck's residence, and ordered Smith to exit his vehicle and show that he was unarmed, resembled a traffic stop by police. While Mullins has a different version of events, he does not disagree that what Smith related to Sgt. Cirillo resembles the conduct of police in effectuating a traffic stop; nor does he disagree that it resembles the conduct of police in securing an individual's compliance under the pretense of official authority.

According to Smith's version of events, Mullins and his "agents" asked Smith whether he had "warrants" and threatened him with arrest if he did not comply with their demand that he turn over the Ford F-150. Again, while Mullins has a different version of events, he does not disagree this is what Smith told and months later reaffirmed to Sgt. Cirillo. Nor could it be reasonably argued that a person who asks about warrants and threatens arrest while demanding compliance

[13] KRS 446.010(31) defines a "peace officer" to include "sheriffs, constables, coroners, jailers, metropolitan and urban-county government correctional officers, marshals, policemen, and other persons with similar authority to make arrests[.]"

is behaving like a repo man, as opposed to a peace officer. In sum, the circuit court did not err in summarily dismissing Mullins' claims against Sgt. Cirillo.

The Ashley Meredith Incident: *Denney, Mullins and Payne v. Carver*

To the extent that the word "appellants" is used in the context of our discussion of this second aspect of the appeal, it references only Mullins, Denney, and Payne. This aspect of this appeal relates to the following allegations in the appellants' amended complaint:

> 51. From September 7, 2010, through September 23, 2011, Officer Carver was acting within the scope of his employment as a police officer for the LMPD.
>
> 52. Under the color of law and under color of Officer Carver's authority as a police officer for the LMPD, Officer Carver investigated and prosecuted the [appellants] for the offense of impersonating a peace officer, without probable cause or justification.
>
> 53. In the course of Officer Carver's investigation and prosecution, the [appellants] were subjected to an indictment and a jury trial.
>
> 54. On September 23, 2011, a jury was empaneled in Jefferson Circuit Court to try the case of the *Commonwealth of Kentucky v. Derek Denney, Charles Mullins, and Jonathon Payne* on charges of impersonating a peace officer. After hearing evidence for four days the jury returned a verdict of "not guilty," thereby terminating the prosecution favorably for the [appellants].
>
> 55. When Officer Carver instituted and continued the prosecution of the Plaintiffs, he did so without probable cause.
>
> 56. The aforementioned conduct of Officer Carver was done intentionally, recklessly, maliciously, wantonly,

> oppressively, and/or with a flagrant indifference to the rights of the [appellants].

Before proceeding, one point bears emphasis in light of what the appellants set forth in their complaint, versus what they have represented in their appellate brief. In their brief, the appellants argue the circuit court erred in summarily dismissing *two* categories of claims of malicious prosecution they asserted against Carver: the first based upon Carver's role in charging them with the offense of impersonating a peace officer; the second based upon Carver's role in charging them with another offense stemming from the events of that night, intimidating a witness. The former category of claims was clearly set forth in paragraph 54 of the appellants' amended complaint. The latter category, however, was set forth for the first and only time in one paragraph on page 12 of a 28-page memorandum the appellants filed before the circuit court in response to the appellees' motions for summary judgment.

A plaintiff may not assert new causes of action during the pendency of the proceeding which were not set out in the complaint, unless they are tried by the express or implied consent of the opposing party. *See generally*, Kentucky Rule of Civil Procedure (CR) 15.02; *Traylor Bros., Inc. v. Pound*, 338 S.W.2d 687 (Ky. 1960). The claims of malicious prosecution that the appellants asserted against Carver, as set out in their complaint, were founded upon Carver's role in charging them with the offense of impersonating peace officers. Nothing of record indicates what the appellants contend was their second malicious prosecution action

(regarding their charges of intimidating a witness) was effectively raised or otherwise tried by consent. None of the discovery of record was directed to it; Carver did not address it in his sur-reply to the appellants' memoranda responding to his motion for summary judgment; and the circuit court never mentioned this claim in its exhaustive order of summary judgment or otherwise gave the appellants leave to assert it.

As such, the only claims of malicious prosecution properly before us relative to Carver are claims asserted by Mullins, Denney, and Payne based upon Carver's role in charging them with impersonating peace officers.

Having said that, the circuit court dismissed this category of claims after determining the record showed no conflict as to the investigation made by Carver before he charged the appellants with impersonating peace officers; and, that in light of what Carver knew or reasonably believed at all relevant times, he acted with probable cause in doing so. The appellants now argue the circuit court erred. We disagree.

The relevant details of Carver's investigation into what transpired on September 7, 2010, are undisputed and consistent between the citation Carver issued that night; his grand jury testimony; the testimony he provided during the appellants' ensuing criminal trial; the criminal trial and probable cause hearing testimony of Officer Mark Braden (Carver's beat partner who arrived about five minutes prior to Carver); and Ashley Meredith's testimony regarding what she told

Braden and Carver had occurred prior to the appellants' arrival at her father's residence.

At 11 p.m., LMPD officers were dispatched to 1203 Wolfe Avenue in Jefferson County to execute an arrest warrant. The first patrol officer to arrive was Mark Braden. When he arrived, he noticed Ashley Meredith standing further up the driveway, appearing shaky, wide-eyed, and in tears; and three men further down the driveway, standing with their arms crossed and their backs to a parked 1999 Chevy Tahoe. According to Braden (and Carver, who arrived shortly thereafter), the three men appeared to be "flex detectives" from another division. The three men were Mullins, Denney, and Payne.

"Flex detectives," as explained by Carver and virtually every other officer who testified in these proceedings, are a multi-purpose unit in each division of the LMPD. The commanding officer of the division can delegate them to be used for many different purposes, but their function is usually narcotics. They typically use unmarked cars. They may operate in task forces with specific missions. The way they dress depends upon what their mission is on any particular day. When they act as a unit, they typically dress alike. When Carver later testified at the appellants' criminal trial that arose from the events of this evening, Carver did so dressed in a way flex detectives, acting in a task force unit, would dress: wearing a metal badge around his neck on a chain necklace; a short-sleeved, black T-shirt with a badge printed on the upper-left breast and large, white, block-letter writing printed on the back indicating "Louisville Metro Police;" khaki cargo

shorts; and a utility belt holding a handgun, clips of ammunition, pepper spray, a flashlight, and handcuffs.

Carver testified he also assumed the three men standing in the driveway were flex detectives who had already made contact with the subject of the dispatch, and all he would need to do at that point was take her to jail. He testified he made this assumption because the three men were standing in the driveway in a manner that indicated to him that they had a right to be there and because they were dressed like flex detectives: they wore metal badges on chain necklaces; short-sleeved, black T-shirts with badges printed on the upper-left breast; khaki cargo shorts; and utility belts holding handguns,[14] clips of ammunition, pepper spray, flashlights, and handcuffs. Braden and Carver testified the writing on the necklace and print badges ("United States Recovery Task Force, USA") was indecipherable at night and absent close scrutiny. Photographs of how Mullins, Denney, and Payne were dressed that night, which were attached to the appellees' motions for summary judgment, also demonstrate what they were wearing bore a striking resemblance to Carver's flex detective uniform. Appellant Payne further admitted during the criminal trial that he agreed his, Mullins', and Denney's repossession "uniforms" could be interpreted as police uniforms.[15]

[14] Mullins and Payne were wearing bee-bee guns; Denney was wearing a Glock .23 handgun loaded with hollow point rounds.

[15] Mullins disagrees with this point because the backs of their "uniforms" stated in bold white lettering "UNITED STATES RECOVERY AGENT;" and according to him, everyone understands the word "recovery" is associated with the private business of vehicle recovery, not some function of law enforcement. However, Meredith testified at trial that she overheard Mullins, while he was being arrested, ask the officers on the scene if he could change the way he was dressed before they took him to jail.

Carver further testified that because he assumed Mullins, Payne, and Denney were flex detectives, he walked by without questioning them in order to approach where Braden had begun to speak with Meredith further up the driveway; and in doing so effectively turned his back to three armed men that he did not know, which he regarded as a critical error on his part.

Braden and Carver testified when they told Meredith why they were there, she seemed more confused that "other cops" were now showing up to talk to her about a warrant. She told them one of the three men standing in front of her vehicle had telephoned earlier that evening to inform her he was "Detective Mullins;" he had a warrant for her arrest; and that it was important for her to speak with him. Thereafter, she explained to "Detective Mullins" she knew she had two outstanding warrants due to traffic offenses; thought that she had resolved the situation by paying the fines associated with the warrants earlier that day; and she agreed to meet with "Detective Mullins" to explain herself because she was worried this was a new situation involving something illegal her cousin might have done while borrowing her vehicle at an earlier point in time, and she did not want to be blamed for it. "Detective Mullins" then put her on the telephone with another man he referred to as his "sergeant." During the probable cause hearing that later took place regarding this incident, Meredith testified regarding what happened next:

> So then another man gets on the phone. So I talk to him, and he's like, "Well, um, actually we're repossessing

> your vehicle." I said, "Well why didn't you just tell me that from the jump start?" I said "I have the money to give it to you right now." He was like, "No, we don't do payments. You can just deal with that, um, we'll be there in 30 minutes. We can do it the easy way or the hard way." So I, I mean I cooperated to the "T," I gave them the keys, I gave them all the information, they stayed and waited and then the police pulled up. So I thought everything was connected, I'm like, well, why's the police here? They got the keys, they got everything they wanted. So I walked up to the police officer and I was like, um, "I took care of my warrants, I don't understand why this is going on." And he[16] was like, he looked at me like, so I showed him proof that I took care of my warrants[17] and everything and he was like, "Okay." And he's like, "Well why am I here?" I said "Well I don't know, sir." He said, "Well who called me?" and I was like, "I don't know, sir." And he immediately looked at the repo men, who did look like they was undercover police officers, narcs, whatever you want to say, he looked at them and he was like "Oh, you like impersonating?" And then it went from me, I'm thinking I'm going to jail, to them getting impersonating and harassment charges.

Over the course of the probable cause hearing testimony and the testimony she later gave during the appellants' criminal trial, Meredith repeated that she told Braden and Carver that the "detective" and "sergeant" who had called her prior to when Mullins, Denney, and Payne arrived told her that if she cooperated with the repossession of her vehicle she would not be arrested; she would not have spoken to or met and cooperated with "Detective Mullins" or his "sergeant" (or informed them of the location of her vehicle) if she had known they

[16] By "he," Meredith was referring to Carver.

[17] The "proof" Meredith was referring to consisted of a printout from the online docket of the Jefferson District Court.

were repo men rather than law enforcement agents; and she continued to believe Mullins, Denney and Payne were law enforcement agents, that all of what was happening was law-enforcement-related, and that she was scared of what was happening and feared she was going to jail until Officer Carver "got in their face and told them they was impersonating."

Officer Carver also testified the first time he realized Mullins, Denney, and Payne were repo men as opposed to law enforcement was after he had spoken with Meredith and then noticed "RECOVERY" among the words "UNITED STATES RECOVERY AGENT" written in bold, white lettering on the backs of their black T-shirts. Earlier, the men had their backs to Meredith's vehicle in the driveway.

After speaking with Meredith, Carver and Braden then interviewed Mullins, Denney, and Payne. Mullins and Denney admitted they had telephoned Meredith earlier that evening and had taken turns speaking with her, although Mullins insisted he never threatened Meredith with arrest. Mullins insisted he had referred to himself not as a "detective," but as "Agent Mullins with U.S. Recovery Task Force."[18] Mullins also pointed to an I.D. badge he had created and clipped to his utility belt identifying himself as "Agent Mullins" with the "United States Recovery Task Force;" and I.D. badges clipped to the utility belts of Denney and Payne identifying them as "field agents" of that organization.

[18] Mullins admitted this at the ensuing criminal trial.

Denney informed the interviewing officers that he had called LMPD dispatch shortly after he and Mullins had ended their telephone conversation with Meredith; that he had informed LMPD dispatch of Ashley Meredith's whereabouts; and that she had an active warrant.

Payne acknowledged that he, Mullins, and Denney had arrived in their car and parked behind the 1999 Chevy Tahoe and that prior to when Braden had arrived, he had physically positioned himself between Meredith and her vehicle to discourage her from attempting to enter it or leave in it while the other men searched Meredith's vehicle.[19] Payne also stated during the criminal trial that he never told Meredith, or heard Mullins or Denney tell Meredith, they were law enforcement officers; and that if he was ever asked if he was any sort of law enforcement, he had been told to respond by stating that he was a "repossession man."

Carver ultimately arrested Mullins, Denney, and Payne for impersonating peace officers in violation of KRS 519.055. Following a jury trial, Mullins, Denney, and Payne were found "not guilty." The three men sued Carver for malicious prosecution. And, as indicated *supra*, the circuit court dismissed their action after determining they failed to demonstrate Carver lacked probable cause.

[19] During the criminal trial, Mullins testified it was standard procedure to search a vehicle for contraband before effecting a repossession because "they're responsible for anything found in it."

In the present context, "probable cause" has been generally defined as cause "affording a reasonable ground of suspicion, supported by circumstances sufficiently strong within themselves, to warrant a cautious person in the belief that a person accused is guilty of the offense with which he is charged." *Emberton v. Commonwealth*, 269 S.W.2d 206 (Ky. 1954). The standard that must be met for a circuit court to grant summary judgment on claims of malicious prosecution on the basis of probable cause is as follows. The court determines whether the defendant had probable cause for initiating or continuing the proceedings. Restatement (Second) of Torts § 673(1)(c). The jury's role is limited to adjudicating the facts necessary to enable the court to determine the existence, or lack, of probable cause. *Id*. at § 673(2)(a). Where the record shows no conflict as to the investigation made by the defendant before initiating or continuing the proceedings, the issue may be resolved by the court as a matter of law. *Id*. at § 673, Comment (h). Lastly,

> [t]he question of probable cause is to be determined in the light of those facts that the accuser knows or reasonably believes to exist at the time when he acts. His subsequent discovery of exculpatory facts does not indicate a lack of probable cause for initiating the proceedings, although he may make himself liable by subsequently taking an active part in pressing the proceedings.

Id. at § 662, Comment (f).

The criminal statute Mullins was charged with violating, KRS 519.055, has been discussed previously. The rebuttable presumption in this matter is that Carver had probable cause to charge the appellants with impersonating

peace officers. This is because the Jefferson District Court conducted a preliminary hearing pursuant to Kentucky Rule of Criminal Procedure (RCr) 3.14 prior to when this matter was submitted to the grand jury, and it found probable cause regarding Carver's charges against the appellants of impersonating peace officers; a grand jury subsequently returned a true bill regarding those charges; and, either a finding of probable cause at a preliminary hearing or a grand jury's return of a true bill raises a rebuttable presumption that probable cause existed in the defense of a malicious prosecution action. *Craycroft v. Pippin*, 245 S.W.3d 804, 806 (Ky. App. 2008); *Davidson v. Castner-Knott Dry Goods Co., Inc.*, 202 S.W.3d 597, 607 (Ky. App. 2006).[20]

Accordingly, the burden was upon the appellants to demonstrate why the circumstances described above do not amount to probable cause. This is a burden they cannot meet.

In this regard, the appellants appear to have condensed multiple arguments into the following four paragraphs of their brief:

> After Officer Carver arrived on scene, he saw Appellants and their shirts, he knew they were not police officers. In fact, the statements Officer Carver made on the night of the arrest are telling, "Because it's intimidation, it's fear

[20] As a caveat, and as noted in *Commonwealth v. Yelder*, 288 S.W.3d 435, 437 (Ky. App. 2002),

> [T]he purpose of a preliminary hearing is to determine whether there is sufficient evidence to justify detaining the defendant in jail or under bond until the grand jury has an opportunity to act on the charges. [. . .] However [. . .] a grand jury is not bound to give any consideration to the showing made at the preliminary hearing. Thus, a grand jury is free to issue an indictment even if the district court determined a lack of probable cause to support the charges or even if a preliminary hearing was not held.

(Internal citations and quotations removed.)

factor, it's big bad bullying that's what it is. That's exactly what it is. I think if I took pictures right now and locked some people up, I'd probably have a good arrest or two or three."[21]

Moreover, Officer Carver was called out to Ms. Meredith's house to investigate an individual with outstanding warrants. However, he never ran a check on Ms. Meredith to search for these warrants, and if he had done so, then he would have discovered that Appellants had been telling the truth regarding Ms. Meredith's warrants, and realized she had lied to him about not having any outstanding warrants.

Second, it was not entirely reasonable for Officer Carver to suspect Appellants of impersonating a peace officer when he himself did not believe Appellants were police officers. Furthermore, Ms. Meredith testified during the probable cause hearing that she knew police officers did not repossess vehicles. In fact, Ms. Meredith took money out to the Appellants in the hopes of preventing the repossession. Thus, it is readily apparent that Ms. Meredith did not believe Appellants were pretending to be police officers.

Officer Carver's discourse with the Appellants also made it apparent that he knew of and participated in the LMPD's animosity fueled investigation against Appellants. It is not difficult to spot the added incentive Officer Carver had to arrest and charge Appellants in order to shut down what the LMPD considered an embarrassing source of complaints.

Finally, Ms. Meredith and another eyewitness gave recorded statements to LMPD on multiple occasions, yet the department and the prosecution has been unable to produce these tapes. It is impossible to know what is on these tapes, but statements by a material witness regarding the events that transpired the night Appellants were arrested are clearly exculpatory evidence. In accordance with *Univ. Med. Ctr., Inc. v. Beglin*, 375 S.W.3d 783, 792 (Ky. 2011), evidence in the exclusive

[21] Mullins testified Carver said this. Carver denied doing so.

> possession of one party, that is later made unavailable or who's [sic] loss cannot be explained, must be adversely held against that party which fails to make its production possible. Thus, the lower court should have presumed the missing statements contained evidence showing Ms. Meredith knew Appellants were not police officers.

(Internal citations to evidence of record omitted.)

To start, the appellants take issue with what they regard as rude treatment and harsh language from Carver when he made his investigation and later arrested them. They also speculate Carver was motivated to arrest them because, as they claim, their activities were "an embarrassing source of complaints" for the LMPD. At most, these are insinuations that Carver had an improper purpose for arresting the appellants. Whether Carver had an improper purpose is irrelevant, however, because it has no bearing upon whether Carver lacked probable cause. *See* Restatement (Second) of Torts § 669A.

The appellants assert summary judgment was inappropriate because "Ms. Meredith and another eyewitness gave recorded statements to LMPD on multiple occasions, yet the department and the prosecution has been unable to produce these tapes;" those tapes may have included "exculpatory evidence;" and the appellants, therefore, should have been accorded some form of evidentiary presumption. But, this argument is meritless because the "LMPD," the "department," and the "prosecution" are not the subjects of the appellants' malicious prosecution claims; only Carver is, and in his individual capacity. Nothing of record demonstrates *Carver* was in "exclusive possession" of any such

statements, or even aware of them at any given time. Therefore, the existence or non-existence of these statements is meaningless.

Next, the appellants argue probable cause was lacking because (1) Carver recognized the appellants were not law enforcement officers; and (2) Meredith recognized the appellants were attempting to effectuate a repossession, and she later testified at the probable cause hearing that she understood vehicle repossession is not a function of law enforcement.

This is a mischaracterization of the testimony. Carver testified he believed the appellants were law enforcement officers *until* he saw "RECOVERY" on the backs of their T-shirts. And, while Meredith testified *later* at the probable cause hearing that she understood vehicle repossessions were not a function of law enforcement,[22] it was her testimony that on the evening of September 7, 2010, she nevertheless believed Mullins, Denney, and Payne were law enforcement officers —despite the fact that the men were attempting to repossess her vehicle—because (1) "Detective Mullins" and his "sergeant" made it clear to her over the telephone they had the authority to arrest her and would do so unless she cooperated in the repossession of her vehicle; (2) Mullins, Denney, and Payne were dressed like what she (and several LMPD officers) recognized as law enforcement officers when they arrived at her father's residence; (3) Mullins, Denney, and Payne never told her they were *not* law enforcement officers; and (4) what she understood about

[22] As a caveat, vehicle repossessions effectuated with the aid of judicial process *can* be a function of law enforcement. *See Henderson*, 763 S.W.2d at 141 ("If the strong arm of the law is needed, then the creditor must secure judicial intervention when a police officer is carrying out or sanctioning the repossession.")

vehicle repossessions not being a function of law enforcement eluded her that evening in light of the impression the appellants had made upon her on her over the telephone and what she characterized as their intimidating conduct after they arrived. In her words, she was "scared shitless" at the time.

The more glaring flaw of this aspect of what the appellants have argued is it presumes what Carver or Meredith believed or should have believed is relevant to whether a violation of KRS 519.055 occurred. It is not. The statute is violated based upon the conduct of the offender, not the belief of the victim. The pertinent part of the statute provides:

> (1) A person is guilty of impersonating a peace officer if he pretends to be a peace officer, or to represent a law enforcement agency or act with the authority or approval of law enforcement agency, with *intent* to induce another to submit to the pretended official authority or otherwise to act in reliance upon the pretense to his prejudice.

(Emphasis added.)

The appellants' emphasis upon the word "RECOVERY" on the backs of their shirts and in the minute details of their badges also ignores the three other words that accompanied it: "UNITED STATES" and "AGENT." KRS 519.055 only requires an offender to pretend to be a "peace officer," a term broadly enough defined in KRS 466.010(31)[23] to simply mean a governmental agent with "authority to make arrests." So long as that is the impression an offender intends

[23] KRS 446.010(31) defines a "peace officer" to include "sheriffs, constables, coroners, jailers, metropolitan and urban-county government correctional officers, marshals, policemen, and other persons with similar authority to make arrests[.]"

to make, KRS 519.055 does not require an offender to purport to be a member of any specific or actual law enforcement agency. It is not a defense for the offender to assert that his intended victim should have been less gullible, or should have been charged at all times and under all circumstances with knowledge of what real peace officers can and cannot do.

The appellants also assert there were active warrants for Meredith's arrest that evening, and that Meredith's statements and the "proof" she had prepared to demonstrate she had resolved her active warrants (consisting of website printouts from a Jefferson District Court docket) were false and misleading. To the extent this is in any way relevant, however, it further undermines the appellants' argument that they did not intend to give Meredith the impression that they were functioning as law enforcement officers, as opposed to repo men. It reflects the appellants knew she had active warrants; and Meredith's decision to prepare "proof" that she had resolved her active warrants, in anticipation of the appellants' arrival at her father's residence, demonstrates Meredith attempted to convince the *appellants*, upon their arrival, that there were no grounds to *arrest* her.

Mullins, Denney, and Payne have failed to rebut the presumption that Carver had probable cause to arrest them for impersonating peace officers in violation of KRS 519.055. Indeed, the manner in which these appellants were dressed, taken with what Meredith related to Carver about how these appellants had behaved prior to his involvement, demonstrates probable cause existed for

Carver to believe these appellants pretended to be governmental agents with arrest powers to compel Meredith's compliance with the repossession of her vehicle. Accordingly, the circuit court committed no error in summarily dismissing the appellants' malicious prosecution claims against Carver.

The Deshondre Watters Incident: *Louisville Repossession Task Force Limited Liability Company and Mullins v. Phillips, Szydlowski, Hoover, and King*

The third and final aspect of this appeal involves an incident that occurred on the evening of September 28, 2011—a few days after a jury found Mullins "not guilty" in the Ashley Meredith incident, and a few weeks after Mullins had reorganized his repossession business into an entity he named "Louisville Repossession Task Force Limited Liability Company" (referred to hereinafter as "Louisville Repossession"). To the extent that the word "appellants" is used in the context of this discussion, it references only Mullins and Louisville Repossession. We will also reference appellees Joel Phillips, Victor Szydlowski, Shawn Hoover, and Sgt. Michael King collectively as "officers."

The evidence detailing what occurred that evening consists of three videotaped depositions (given by Sgt. King, Phillips, and Hoover); four audio recordings made by Szydlowski during his investigation and interviews of various witnesses; two pictures taken by the police of the scene of the incident; and two affidavits, dated October 10, 2014, from (respectively) Mullins and one of his "agents," Corey Napier.

Hoover was working as a flex detective with the sixth division of the LMPD, driving an unmarked car in an area of Louisville where narcotics arrests were frequent. To paraphrase his deposition testimony, he was heading northbound on Preston Highway when a silver Mitsubishi Lancer "flew" past him. He followed, observing the Lancer periodically brake heavily; slow down by a Thornton gas station (where he watched the Lancer's occupants "looking around"); make a U-turn; head southbound on Preston; and then turn left heading eastbound on Indian Trail toward an apartment complex. At this point, Hoover telephoned two of the other flex detectives in his flex unit, Phillips and Szydlowski, and asked them to back him up. He told them he was following a car with occupants whom he believed were drug users looking for a dealer.

Hoover continued east on Indian Trail one block beyond where the Lancer had parked in front of the apartment complex, and he began to circle back. He believed the occupants of the Lancer would enter the apartment complex to get drugs, and his intention was to park further away and observe. He testified that when he was about fifty yards away, however, he witnessed the Lancer using its driver's side to block in a silver Dodge Magnum from the rear; a black Ford Expedition using its driver's side to block the Magnum from the front; and the Magnum was also blocked on one side by a dumpster. Two men wearing black T-shirts with badges on the left breast had exited the Lancer and were standing at the rear of the Magnum. Two men (one wearing a white polo shirt—later identified as Mullins—and the other wearing a black T-shirt, both with badges on the left

breast) had exited the Expedition and were standing at the front of the Magnum. The two men at the front were pointing handguns at the occupants of the Magnum, and one or more of the men were yelling at those occupants—although Hoover could not hear the specifics of what was being said.

Doug Key and Jeff Parker, two bystanders, witnessed what occurred immediately before Hoover had circled back; they were interviewed by Szydlowski shortly after this incident and gave statements that were recorded and made a part of the evidence presented to the circuit court. Parker stated the Magnum had been driving through the apartment complex parking area when the Expedition pulled right in front of it. The Magnum tried to back up, and then the Lancer pulled in and blocked it from the rear. The rear end of the Magnum then backed into and struck the driver's side of the Lancer. Whereupon, a man in a white shirt jumped out of the Expedition, pointed a gun at the Magnum's occupants and shouted "'Hold it, get out of the car, turn the car off!' like a cop;" the black-shirted men surrounded the Magnum; and one of the occupants of the Magnum shouted "What's going on, why you all pulling up on me? I ain't done nothing!" Both Key and Parker stated that they had each witnessed narcotics arrests in the neighborhood before, and they believed what they had witnessed was a narcotics arrest.

For his part, Hoover testified the four men appeared to be flex detectives like himself, based upon their similar attire,[24] the badges on their shirts,[25] the manner in which they were acting, and the manner in which they had positioned their vehicles at the front and back of the Magnum—what he recognized as a well-executed, high-risk felony traffic stop or "police takedown." Based upon this, he believed an LMPD narcotics flex unit from another division had arrived on the scene and was in the process of making an arrest. He decided to back them up, and he related this to Phillips and Szydlowski, with whom he was still speaking on his cellular telephone. Then he turned off his cellular telephone and approached the scene.

As Hoover pulled up the four men were facing his direction, and he did not see the backs of their shirts. In Hoover's words, the men were "converging on the car" in a manner resembling "police tactics." As to what happened next, Hoover testified:

> I'm pulling in, at that point, I'm going to back them up, I'm watching the Magnum, I'm thinking they're police so I'm not really paying attention who has a gun at that point. I pull in, and I pull up, hit my lights, emergency lights, reds and blues and I'm in a Chevy Impala, unmarked car. So I pull in, I pull up, hit my lights and they look at me like they just seen a ghost. And I was looking at them and at this point I still thought they were police and I don't know why they were looking as

[24] Hoover also recalled Mullins was wearing a utility belt with a gun holster, a magazine with fifteen rounds of ammunition, a taser, and a "big D-cell flashlight like the police carry."

[25] The badges were roughly the same shape and style as those Mullins had used for his "United States Recovery Task Force" T-shirts, but these badges stated "Louisville Repossession Task Force."

> confused as they were. And I start walking up and I see them, they're just like real kinda hesitant like.

As Hoover pulled up or shortly thereafter, he witnessed Mullins "retreat" and put the handgun he was carrying into his Expedition. Shortly thereafter, Mullins told Hoover that the driver of the Magnum had backed into and struck Corey Napier, who was one of the two black-shirted men standing at the rear of the Magnum. Hoover testified that based upon what Mullins said and his continuing belief that Mullins and the other three men wearing black shirts were police officers, he handcuffed the driver of the Magnum (who identified himself as Deshondre Watters) and told him to sit on the ground at the rear of the vehicle on the driver's side.[26] Around this point in time, Hoover then noticed the backs of the four men's shirts stated "RECOVERY AGENT"; Mullins told Hoover he and his men were there to repossess the Magnum; and Hoover realized the four men he was with were not police officers. "A very long minute" later, Hoover further testified, Phillips and Szydlowski arrived. They were followed by Sgt. King, the commanding officer of their flex unit, who had also been notified of what had occurred.

Mullins refused to allow officers to search his Expedition. A search warrant was later executed, and two handguns were discovered inside and out of plain view (one in the glove compartment and another underneath the front passenger seat).

[26] The passenger of the Magnum, James Kennedy, was also handcuffed and sat with Watters. Hoover could not recall who handcuffed Kennedy or sat him there.

After further investigation, Sgt. King, along with Detectives Phillips, Szydlowski, and Hoover, collectively charged Mullins with impersonating a peace officer, per KRS 519.055; two counts of wanton endangerment in the first degree, per KRS 508.060; two counts of unlawful imprisonment in the first degree, per KRS 509.020; and tampering with physical evidence, per KRS 524.100. Thereafter, Mullins was jailed for one day; the Commonwealth Attorney declined to prosecute and dismissed these charges; and Mullins, along with Louisville Repossession, sued Sgt. King, Phillips, Szydlowski, and Hoover in their individual capacities for abuse of process, false imprisonment, and intentional interference with prospective advantage. These civil claims were summarily dismissed by the circuit court.

On appeal, Mullins' and Louisville Repossession's arguments are based upon the notion that the evidence supports Sgt. King, Phillips, Szydlowski, and Hoover lacked probable cause to arrest Mullins for the above-described offenses. Based upon that, the appellants contend a genuine issue of fact existed which should have precluded the circuit court from summarily dismissing their civil claims of false imprisonment, abuse of process, and intentional interference with prospective advantage.

Before we discuss the specifics of the appellants' arguments, however, some clarification is required.

One assumption throughout the appellants' arguments appears to be that if probable cause was lacking, it would support an inference that these officers

had an improper motive for instituting judicial process against Mullins and would permit a jury to find these officers liable to both Mullins and Louisville Repossession for abuse of process. As noted, however, "probable cause" is not an element of abuse of process. Aside from that, the record does not support that any officers threatened Mullins with judicial process or initiated judicial process to coerce Mullins into abandoning the business of *legally* effectuating repossessions or for any other reason collateral to punishing him for the criminal conduct they charged him with. As such, this claim was properly dismissed.

It also appears the appellants assume, for purposes of their false imprisonment claim, that the officers were required to have probable cause regarding *each* of the offenses with which they charged Mullins. This assumption is incorrect. False imprisonment requires (1) the detention of the plaintiff, and (2) the unlawfulness of such detention. *See Southern Ry. Co. in Ky v. Shirley*, 121 Ky. 863, 90 S.W. 597, 599 (1906). A cause of action for false arrest will not lie where the arresting peace officer had reasonable grounds for the arrest and used no more force than necessary. *See Lexington–Fayette Urban County Government v. Middleton*, 555 S.W.2d 613, 617–18 (Ky.App.1977); *see also City of Lexington v. Gray*, 499 S.W.2d 72, 74 (Ky. 1972). In other words, if a peace officer arrested the plaintiff on the basis of multiple charges and probable cause existed to arrest on the basis of *one* of those charges, the arrest was not unlawful and an action for false imprisonment necessarily fails.

With that said, we now proceed to the specifics of the appellants' arguments.

First, they argue that because prosecuting attorneys have a general duty to prosecute criminal offenses and the Commonwealth decided not to prosecute Mullins after these officers charged him with these offenses, this is evidence that the officers lacked probable cause to charge him with these offenses. Thus, in their view, an evidentiary dispute existed that should have precluded summary judgment.

But, no authority is cited for this proposition. No such authority exists. To the contrary, when proceedings are abandoned by a public prosecutor acting upon his own initiative after the prosecution had passed into his control, it has no bearing upon the question of probable cause or legal justification. *See* Restatement (Second) of Torts § 665(2).

Second, they argue probable cause was lacking because the officers did not arrest anyone other than Mullins following this incident. To the extent this qualifies as an argument, it also lacks merit. Whether probable cause existed to arrest anyone else has no bearing upon whether probable cause existed to arrest Mullins.[27]

[27] As a side note, Hoover testified he and the other officers only charged Mullins because (1) Mullins was the driver of the Expedition that cut off the Magnum and started the chain of events; and (2) Mullins was the only person Hoover could positively identify (due to Mullins wearing a white shirt as opposed to a black shirt, and due to Hoover's attention being more focused upon the Magnum when he arrived) as one of the two men who had pointed guns at the front end of the Magnum, and as the individual who put his handgun in the Expedition.

Third, they assert that over the course of discovery they requested any video footage of the scene of Mullins' arrest taken by cameras in the police cars that arrived on the scene and that none was produced. They also note that during the audio recording Szydlowski made of his post-incident investigation, he asked an unnamed officer to turn on his camera. Because no video footage was produced, Mullins and Louisville Repossession reason that a jury should be allowed to infer that no probable cause existed to arrest Mullins.

This argument lacks merit for a variety of reasons. The appellants do not cite where in the record they made such a request, nor have we discovered such a request in our own review of the record. Furthermore, Hoover testified during his deposition that he did not have a camera in his unmarked car, and that flex patrol officers do not have cameras in their unmarked cars. The appellants cite nothing to the contrary. Given that Hoover was the only officer who witnessed this incident as it was unfolding, and that the events giving rise to the charges asserted against Mullins had effectively ended prior to the arrival of any other officers who may have had cameras, there is no reason to believe any video footage taken by later-arriving officers would have been relevant to the issue of probable cause; nor, for that matter, do Mullins and Louisville Repossession offer any suggestions regarding what such video footage would have demonstrated or how it would have added to what is already of record.

Fourth, they assert there was no basis for Mullins to be charged with two counts of wanton endangerment because, when Mullins was pointing a gun

and shouting at Watters, Mullins was actually trying to save someone's life. In support, they point to two October 10, 2014 affidavits, respectively from Mullins and one of his "agents" (Corey Napier) the appellants filed with their response to the appellees' motions for summary judgment. Both affidavits represent that when Watters backed up in his Magnum, Napier was behind him; the Magnum was crushing Napier's leg between its rear bumper and the driver's side of the Lancer; and what Mullins was actually shouting at Watters was "Stop, you're killing him!" in an effort to get Watters to put the Magnum out of reverse and prevent Napier from being harmed further.

This argument also lacks merit. Mullins was charged with two counts of wanton endangerment in the first degree as specified in KRS 508.060. In relevant part, the statute provides:

> (1) A person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.

Under this statute, pointing a gun at another person is sufficient evidence to support the charge of wanton endangerment. *Key v. Commonwealth*, 840 S.W.2d 827, 829 (Ky. App. 1992). The evidence presented also demonstrates Mullins pointed a gun at Watters and his passenger, James Kennedy; therefore, it was appropriate to charge Mullins with two counts of wanton endangerment in the

first degree—one count for each person. *See West v. Commonwealth*, 161 S.W.3d 331, 337 (Ky. App. 2004).

While Mullins asserts he acted the way he did in order to save another person's life from a hazardous situation, he ignores that one of the motivations for charging him with these offenses—as each of the officers testified during their depositions—was that the evidence garnered from the investigation supported probable cause to believe Mullins created the hazardous situation. In light of what is discussed above, we agree such probable cause existed.

Moreover, Mullins' assertion is at best relevant to an affirmative defense he might have raised to a jury if he were prosecuted for these offenses; it is irrelevant to whether probable cause existed to arrest him.[28] This is especially true where, as here, (1) none of the investigating officers witnessed either Mullins'

[28] For parity of reasoning in the context of a grand jury's decision to *indict* on a charge of wanton endangerment (as opposed to an officer's decision to charge), *see Hancock v. Commonwealth*, 998 S.W.2d 496, 498 (Ky. App. 1998):

> In the case before us, the indictment charged that:
>
> > [Hancock] committed the offense of First Degree Wanton Endangerment by repeatedly engaging in sexual intercourse with M.L.B. when he knew he had been diagnosed as having HIV and by so doing engaged in conduct which created a serious risk of death or serious physical injury to M.L.B. under circumstances manifesting an extreme indifference to the value of human life....
>
> In light of the deadly nature of HIV, the conduct alleged in the indictment provided a sufficient basis to support a charge of wanton endangerment. On its face, the indictment was valid. Additionally, Hancock's contentions that M.L.B. consented to sexual intercourse with him and that she knew he was HIV-positive had no bearing on the issue of whether the indictment stated a chargeable offense as a matter of law. His arguments more properly related to any defense that Hancock may have raised before the jury and were improperly and prematurely offered as a basis to support a motion dismiss an indictment. The court is limited to a determination of whether the indictment was valid on its face and whether it conformed to the requirements of RCr 6.10. *Commonwealth v. Hamilton*, Ky.App., 905 S.W.2d 83 (1995). We have found no flaw in the indictment.

version of events, or Napier being crushed between the Magnum and Lancer; (2) the bystanders' account of what occurred did not mention this salient detail, and it conflicted with Parker's statement that what Mullins said was "Hold it, get out of the car, turn the car off!;" (3) emergency medical services were never called to the scene; and (4) no medical records were ever adduced indicating Napier was injured in any way. To the contrary, each of the officers deposed in this matter testified they witnessed Napier walking around the scene unassisted during their investigation and that he appeared uninjured. During his deposition, King also identified Napier in one of the two investigative photographs taken of the scene (and of record in this matter); the photograph features Napier standing unassisted next to Mullins' expedition, smoking a cigarette.

Fifth, the appellants argue the officers lacked probable cause to arrest Mullins for two counts of unlawful imprisonment in the first degree. As to why, the appellants point out that one of the two photographs of the arrest scene (featuring Napier smoking by the Expedition) demonstrates there might have been three feet between the front end of the Magnum and the side of the Expedition after the rear of the Magnum collided with the Lancer; and they argue this could have been enough room for Watters to have maneuvered his vehicle and escaped. They also note Mullins stated in his October 10, 2014 affidavit that he only stopped in front of the Magnum *after* he witnessed the Magnum backing up into Napier.

This argument lacks merit for a number of reasons. Pursuant to KRS 509.020(1), "A person is guilty of unlawful imprisonment in the first degree when

he knowingly and unlawfully restrains another person under circumstances which expose that person to a risk of serious physical injury." Here, even if Watters did have an adequate amount of space between the front end of his vehicle and the side of Mullins' Expedition, the appellants' argument forgets that *Mullins also had a gun trained on Watters and Kennedy*; Parker, one of the two bystanders interviewed by the police after this incident, stated he heard Mullins[29] say "Hold it, get out of the car, turn the car off!;" and, as noted, none of the investigating officers witnessed Napier being crushed between the Magnum and Lancer. That is enough for probable cause.

Moreover, what Mullins represented in an affidavit about when and why he pulled his Expedition in front of the Magnum—an affidavit he executed years after this incident—is not what he represented prior to his arrest when Szydlowski was investigating and interviewed him at the scene of the incident that evening. At that time, Mullins told Szydlowski he pulled in front of the Magnum "to stop this, uh, guy, talk to him about this car" and that the Lancer pulled in behind the Magnum "at the same time."[30]

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[29] Parker only stated this was said by the man wearing the white shirt. Mullins was, however, the only man out of the four who stopped after Szydlowski's investigation, which

[30] In the record of the case which the appellants presented as evidence in response to the appellees' motions for summary judgment, there was the following exchange:

> SZYDLOWSKI: Do you want me to put this flashlight in your van, or car? Because they're not gonna let you take it into corrections. Your nice, new mag-light you have? I'll throw it in, I'll put it into evidence and she can get it out of evidence? Alright? And you understand what we were talking about earlier, right? I mean, I want to reiterate that because I probably want—

Sixth, the appellants argue the officers lacked probable cause to arrest Mullins for impersonating a peace officer, per KRS 519.055. Their argument, as it goes, is that Watters said he did not believe Mullins was a police officer; Mullins did not tell Watters he was a police officer; and Mullins was therefore arrested for this offense simply because he had a badge on his shirt, and carried a gun, ammunition, taser, and a large, black flashlight on a utility belt—things that, in and of themselves, are not illegal.

We have discussed KRS 519.055 previously. As to the appellants' contentions that Watters said he did not believe Mullins was a police officer or hear him say anything to that effect, Watters' belief is irrelevant in this context. Moreover, what the appellants *say* Watters believed or heard Mullins say is unsupported by the record; the DVD they have labeled as "Ex. 16 Watters

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> MULLINS: You know, I mean, never in my life, you know, have I ever thought that, you know, one of my guys would be pinned up against a car and what to do.
>
> SZYDLOWSKI: Yeah?
>
> MULLINS: I mean—
>
> SZYDLOWSKI: Yeah, when you block a car in, I mean, you're gonna have to think about—
>
> MULLINS: It wasn't my intention to block him in, you know, I just—
>
> SZYDLOWSKI: Just one of those things that happens.
>
> MULLINS: I didn't know that he, I didn't know that he was gonna pull up behind him at the same time, you know, me pulling up in front. You know. I was the initial one to tell them, hey, I'm ready to stop this, uh, guy, talk to him about this car.
>
> SZYDLOWSKI: Well everything that goes bad goes bad real fast.
>
> MULLINS: Right.

Statement," which they cite as their evidentiary source in this regard, contains nothing from Watters and is instead—for reasons known only to the appellants—a compilation of music.[31]

Their contentions that it was legal for Mullins to wear what he was wearing and that Mullins could not have committed this offense because he did not state that he was a peace officer, also misunderstand the breadth of the statute. KRS 519.055(1) prohibits "pretend[ing]" to be a peace officer for the purpose of inducing "another to submit to the pretended official authority or otherwise to act in reliance upon the pretense to his prejudice." The ordinary meaning of "pretend"[32] is "to give a false appearance of being, possessing, or performing," "to make believe," "to claim, represent, or assert falsely," "to feign an action, part, or role." MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY 984 (11th ed. 2005). In other words, while falsely *claiming* to be something is one way to pretend, it is not the only way. One may also pretend by giving a false appearance and feigning a role.

Here, the officers who charged Mullins with violating KRS 519.055 regarded the uniform Mullins was wearing as a costume for the role of a peace officer. Mullins, of course, has argued over the course of this appeal that his uniform should not be mistaken for that of a peace officer because the words "recovery agent" were written on the back of his shirt. But, Mullins does not

[31] Specifically, "Ex. 16 Watters Statement" contains the musical stylings of "Mr. Scruff" in his album, "Ninja Tuna;" Bob Acri in his album "The Cavalcade of Music Foundation Presents Bob Acri;" and Richard Stoltzman's "Maid with the Flaxen Hair."

[32] "Pretend" is not defined in KRS 519.055 or elsewhere in the Kentucky Penal Code. Therefore, it must be given its common and approved usage. KRS 446.080(4).

dispute that, absent those words on the *back* of his shirt, what he was wearing was otherwise indistinguishable from the uniform of an LMPD flex detective. Moreover, every account of what occurred indicated Mullins jumped out of his vehicle and was *facing* Watters with his gun drawn.

The officers who charged Mullins also evaluated what Mullins was wearing in conjunction with how Mullins had been observed acting. From the positions of the Lancer, Magnum, and Expedition, and from what Parker and Key witnessed, all of the officers (and even Parker and Key) agreed the way the Magnum had been stopped mimicked a well-executed police tactic. Moreover, Parker related that when Mullins jumped out of his Expedition and aimed his gun at the Magnum, Mullins shouted "Hold it, get out of the car, turn the car off!" like, Parker added, "*a cop*." As discussed, using force and intimidation to demand compliance is not consistent with the role of a repo man. It is consistent with the role of a peace officer. In light of the above, probable cause existed for the officers to believe Mullins was pretending to be a peace officer in order to induce compliance; thus, probable cause existed to charge Mullins with this offense.

Seventh, the appellants argue the officers lacked probable cause to charge Mullins with tampering with evidence based upon Mullins placing his handgun in his glove box when Hoover arrived. As an aside, the appellants do not contest that Mullins attempted to conceal his handgun in the glove box. Rather, they argue probable cause did not exist to charge Mullins with the offense of tampering with evidence because (1) Mullins was not the subject of any criminal

proceeding when he put his gun in his glove box; (2) Mullins did not believe, at that time, that he would be charged with any crimes relating to what he had done with his handgun; and (3) Szydlowski stated at an indeterminate time during one of the four audio recordings of his investigation, "this guy [Mullins] has taken and put his gun up, . . . which I appreciate." On page 14 of their brief, the appellants ask: "If Mullins was the subject of this investigation, why would Officer Szydlowski appreciate that Mullins put his gun up and *not be concerned with the fact that Mullins attempted to conceal evidence*?" (Emphasis added.)

The offense of tampering with physical evidence is defined in KRS 524.100. The statute provides:

> (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending *or may be instituted*, he:
>
> (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding; or
>
> (b) Fabricates any physical evidence with intent that it be introduced in the official proceeding or offers any physical evidence, knowing it to be fabricated or altered.
>
> (2) Tampering with physical evidence is a Class D felony.

(Emphasis added.)

In light of the above, the appellants misunderstand the nature of this offense by contending that Mullins needed to be the subject of criminal proceedings at the time he placed his handgun in his glovebox. As further explained in the relevant part of the 1974 Kentucky Crime Commission/LRC Commentary accompanying this statute,

> [I]n the instant provision *it is not necessary that the evidence be subpoenaed or the proceeding even be initiated.* Rather, it is sufficient if the defendant believes an official proceeding may be instituted and if he engages in the proscribed conduct with the specified intent to impair the truth or availability of evidence he believes will be used or to introduce fabricated or altered evidence.

(Emphasis added.)

Whether Mullins subjectively believed he would be charged with any crimes relating to what he had done with his handgun at the time Hoover arrived would have been an appropriate question for a jury, had he been prosecuted for this offense. However, Hoover testified that, upon arrival and the activation of his red and blue sirens, he witnessed Mullins "retreat" to the Expedition and conceal his handgun. In light of what Hoover observed of Mullins' conduct, it was not unreasonable for Hoover to infer Mullins believed an official proceeding might be instituted with regard to his use of the handgun, and that Mullins intended to impair the availability of that evidence.

Lastly, it is unclear what Szydlowski meant when he remarked that Mullins "has taken and put his gun up . . . which I appreciate." Also, it is

unimportant. Szydlowski's belief that Mullins would or would not be criminally charged—which is apparently the point of the appellants' use of this particular quote—is not relevant to whether Mullins committed this offense.[33]

We have discussed the balance of the appellants' arguments regarding why, in their view, the circuit court erred in summarily dismissing their civil claims against these officers; and we have explained why these arguments have no merit. Probable cause existed regarding not one, but all of the charges asserted against Mullins. This defeats Mullins' claim of false imprisonment. It also defeats Mullins'—and Louisville Repossession's—additional claims of intentional interference with prospective advantage; it demonstrates the officers did nothing more than assert a legally protected interest (*e.g.*, their mandated duty of law enforcement).

Civil conspiracy: *Mullins, Denney, Payne and Louisville Repossession v. Cirillo, Carver, Hoover, King, Phillips, and Szydlowski*

Lastly, all of the above-captioned appellants contend the circuit court erred in summarily dismissing the claim of civil conspiracy they collectively asserted against all of the above-captioned appellees.

The tort of civil conspiracy was explained in *Peoples Bank of Northern Kentucky, Inc. v. Crowe Chizek and Co. LLC*, 277 S.W.3d 255, 260-1 (Ky. App. 2008):

[33] We cannot hazard a guess about Szydlowski's intent behind making this statement. As noted, Mullins placed his handgun in his glove box. Thereafter, the officers asked for his consent to search his vehicle; Mullins refused his consent; and the officers were then required to obtain a search warrant.

> [C]ivil conspiracy . . . has been defined as "a corrupt or unlawful combination or agreement between two or more persons to do by concert of action an unlawful act, or to do a lawful act by unlawful means." *Smith v. Board of Education of Ludlow*, 264 Ky. 150, 94 S.W.2d 321, 325 (1936). In order to prevail on a claim of civil conspiracy, the proponent must show an unlawful/corrupt combination or agreement between the alleged conspirators to do by some concerted action an unlawful act. *Montgomery v. Milam*, 910 S.W.2d 237, 239 (Ky. 1995).

Importantly, civil conspiracy is not a free-standing claim; rather, it merely provides a theory under which a plaintiff may recover from multiple defendants for an underlying tort. *See Davenport's Adm'x v. Crummies Creek Coal Co.*, 299 Ky. 79, 184 S.W.2d 887, 888 (1945).

Here, the appellants based their theory of civil conspiracy upon each of their causes of action discussed above. As such, we agree that dismissing their claim of civil conspiracy was proper. Their causes of action were all correctly dismissed as a matter of law. Accordingly, the appellants' claim of civil conspiracy has no tort to be based upon and cannot survive.

Conclusion

In light of the foregoing, we AFFIRM.[34]

ALL CONCUR

[34] The appellees also contend the balance of the appellants' claims should have been dismissed on the basis of qualified immunity. In light of our disposition of this appeal, we decline to address this point.

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