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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000373-MR

THOMAS D. BULLOCK AND BULLOCK & COFFMAN, LLP — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 11-CI-04408

SUSAN HARDY; CLAY AVENUE, LLC; AND E. DAVID MARSHALL — APPELLEE

AND

NO. 2016-CA-000426-MR

DERMOT HALPIN AND HILARY HALPIN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 11-CI-04408

SUSAN HARDY AND CLAY AVENUE, LLC — APPELLEE

OPINION
AFFIRMING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND D. LAMBERT, JUDGES.

CLAYTON, JUDGE: Appellants in the above-styled cases each appeal an order denying their collective motions to dismiss. Though each case is separately briefed, they raise similar issues and are appealing the same order; thus we enter this single opinion to resolve both appeals.

BACKGROUND

This case stems from protracted and lengthy litigation over a home theater system. As panels of this Court and the Kentucky Supreme Court have written volumes regarding the decades-plus litigation, we incorporate by reference those opinions. *Powers v. Halpin*, 2007 WL 1196527 (Ky. App. Apr. 6, 2007) (not reported) (disc. rev. denied Sept. 10, 2008); *Hardy v. Goodwine*, 2009 WL 1830782 (Ky. June 25, 2009) (not reported); *Marshall v. Goodwine*, 332 S.W.3d 51 (Ky. 2010); *Halpin v. Hardy*, 2014 WL 4662326 (Ky. App. Sept. 19, 2014) (not reported).

For brevity's sake, we simplify the facts as follows. In the early 2000s, the Halpins purchased an expensive home theater system from William Hardy (Mr. Hardy), husband of Susan Hardy (Mrs. Hardy), who ran an electronics business out of his home. Unfortunately, the Halpins were unsatisfied with their purchase because the television set did not display HDTV-level quality. Unable to

reach a resolution, the Halpins sued (Suit One) Mr. Hardy and other parties, including the television's manufacturer, ReVox. That suit went to trial, and the jury returned a nearly $50,000.00 verdict in favor of the Halpins. Once attorney's fees, costs, and interest were added, the total judgment neared $150,000.00. A judgment was entered reflecting joint and several liability for all defendants. Every defendant except Mr. Hardy then either went out of business or filed for bankruptcy protection.

Mr. Hardy then appealed the judgment. In the interim, the Hardys, under advice from legal counsel, the Honorable E. David Marshall, formed a limited liability company (Clay Avenue) and sought to protect their assets using the LLC. In 2005, the Halpins then filed a separate suit (Suit Two) against the Hardys and their attorney alleging, among other complaints, fraudulent conveyances and a violation of the Kentucky Consumer Protection Act. Mr. Hardy eventually paid the judgment in full. Subsequently, in 2007, a panel of this Court reversed the Suit One judgment and remanded for a new trial. In 2009, the new trial resulted in a jury verdict of $38,295.91 compensatory damages and no punitive damages.

While Suit One was being resolved between 2005 and 2009, Suit Two proceeded in the trial court. The complaint in that case was amended three times, and the Halpins sought contempt against the Hardys and Marshall. The trial court eventually scheduled a contempt hearing. In response, Mrs. Hardy, Marshall, and the LLC that had been formed sought in this Court a writ of prohibition against the

trial court. In spite of the pending motion for a writ of prohibition, the trial court nonetheless held the contempt hearing and entered a contempt order.

The writ would eventually make its way to the Kentucky Supreme Court, which held that a writ of prohibition should issue against the trial judge because it lacked jurisdiction:

> The Halpins' 2005 complaint [Suit Two] rests entirely on rights derived from the 2005 judgment [entered in Suit One]. The reversal of that judgment nullified those rights, rendered them as though they had never been, and thus mooted the Halpins' claims based on them. The trial court's invocation of potential contempt sanctions for Appellants' alleged breach of those rights is a blatant attempt on the one hand to address moot questions and on the other to disregard, in a backdoor fashion, the effect of the Court of Appeals' reversal of its 2005 judgment [in Suit One]. Considered in either light, the trial court is proceeding outside its jurisdiction. . . . Simply stated, the trial court has no authority to "vindicate" a judgment that has been reversed and thus rendered nonexistent. . . . While it may be unfortunate that the Halpins incurred costs attempting to enforce the 2005 judgment, they were on notice that the judgment could be or had been appealed and was subject to reversal, and so must be deemed to have proceeded at their own risk.

Marshall, 332 S.W.3d at 55 (alterations added).

The trial court then vacated its contempt order and dismissed the third amended complaint in Suit Two. It then entered a final judgment in Suit One, which, due to the smaller jury verdict on the second trial and Mr. Hardy having already paid over $150,000.00 before the judgment was reversed, resulted in a judgment of approximately $7,000.00 in favor of Mr. Hardy against the Halpins.

The Halpins appealed the dismissal of Suit Two. A panel of this Court found the appeal to be frivolous, dismissed the Halpins' appeal in part, and ordered the Halpins to pay the Hardys sanctions in the amount of $5,000.00. The Court also reversed and remanded for issuance of an order that restitution be paid by the Halpins to Mr. Hardy, as the trial court had erroneously calculated the interest due Mr. Hardy for his May 5, 2006 payment-in-full of the original judgment.

While that appeal was occurring, Susan Hardy and Clay Avenue filed a complaint against the Halpins and their attorney, the Honorable Thomas D. Bullock, and his law firm Bullock & Coffman, LLP. Mrs. Hardy and/or Clay Avenue alleged wrongful use of civil proceedings, malicious prosecution, and abuse of process against the Halpins, their attorney, and their attorney's law firm. The defendants therein, Appellants herein, filed motions to dismiss the complaint. Among their dismissal arguments, they claimed the judicial statements privilege grants them immunity from all three claims in the complaint. The trial court denied the motions *in toto*. As it relates to the judicial statements privilege, the trial court relied on *Halle v. Banner Industries of N.E., Inc.*, 453 S.W.3d 179 (Ky. App. 2014), to reject any claim of immunity. The Halpins together filed an appeal, and Bullock and his law firm collectively filed an appeal. Having reviewed the arguments raised on appeal, we reject that the trial court erred by denying the motion to dismiss on the immunity issue. We decline to address any other arguments as this is an interlocutory appeal. Our reasons are as follows.

ANALYSIS

We initially note that this appeal from the denial of a motion to dismiss is interlocutory. *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 885 (Ky. 2009). The Appellants, collectively, invoke our jurisdiction by claiming they made a substantial showing of immunity from suit that should entitle them to an immediate appeal. They allege they are protected by the judicial statements privilege. As the Kentucky Supreme Court has reviewed interlocutory appeals arising under this privilege, *Morgan & Pottinger, Attorneys, P.S.C. v. Botts*, 348 S.W.3d 599, 601 (Ky. 2011), we shall do the same here.

The Appellants claim they are entitled to absolute immunity from the wrongful use of civil proceedings, malicious prosecution, and abuse of process claims. They argue that the claims are based on their actions in prior judicial proceedings; thus they are entitled to immunity pursuant to the judicial statements privilege. We disagree.

Morgan & Pottinger is a four-to-three opinion by the Kentucky Supreme Court that made the limited holding that the judicial statements privilege would grant absolute immunity to the action of bringing a bar complaint and to the statements contained therein. The majority specifically held that the practice of law must bend to permitting anyone to make a bar complaint:

> We do not believe our holding today unduly burdens attorneys or otherwise abrogates a right. Rather, certain causes of action do not exist in privileged situations. Here, "one who elects to enjoy the status and benefits as a member of the legal

> profession must give up certain rights or causes of action . . . ." *Stone,* 348 So.2d at 389. If a bar complaint is determined to be based on probable cause and results in disciplinary action, then clearly the attorney has no cause of action against the complaining party. If the complaint is deemed lacking in probable cause, or even entirely without merit, any harm to the attorney is minimal and would amount to little more than mere inconvenience. In Kentucky, the bar complaint, the investigation by the Inquiry Commission, and the disciplinary proceedings are entirely confidential. SCR 3.150(1). In fact, there is no publication whatsoever unless, and until, a public reprimand or other public discipline is imposed. *Id*. As such, the potential harm suffered by an attorney is at the hands of the malicious complainant – if indeed the complaint lacks merit – is minimal and certainly does not outweigh the competing interests. Further, because of the protection afforded by the confidentiality of KBA proceedings, the attorney is not in the same position as a party to an ordinary suit that might damage reputation or character, where pleadings are public.
>
> Accordingly, we hold today that any communication or statement made to the KBA during the course of a disciplinary hearing or investigation, including the contents of the bar complaint initiating such proceedings, are absolutely privileged. This privilege extends to any claim relating to the act of filing the bar complaint, such as abuse of process, wrongful use of civil proceedings, or malicious prosecution.

Id. at 605.

Indeed, a panel of this Court found *Morgan & Pottinger*'s holding narrowly applied only to attorney disciplinary proceedings. *Halle*, 453 S.W.3d 179. Further, the *Halle* Court held that the judicial statements privilege, outside of the attorney disciplinary context, only applies to statements made during judicial proceedings – "the privilege does not apply to conduct[.]" *Id*. at 186. Thus, if the

tortious claims concern only conduct, a defendant cannot claim the judicial statements privilege for immunity from suit.

An abuse-of-process claim alleges that a plaintiff instituted a criminal or civil legal process primarily to accomplish a purpose for which the process was not designed. It has two elements: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding. *Garcia v. Whitaker*, 400 S.W.3d 270, 276 (Ky. 2013) (citations omitted). These elements focus on conduct and intent. Thus, because abuse-of-process claims involve conduct and have at their core "the improper use of judicial proceedings and the defendant's motive for using the *process* rather than the *statements* made during the course of a judicial proceeding[,]" "the judicial statement privilege has no application to abuse of process claims." *Halle*, 453 S.W.3d at 187 (emphasis in original).

Though the Appellants request that we reverse *Halle*, we discern no valid argument for such action. Accordingly, the trial court did not err by denying the motion to dismiss inasmuch as it relates to the abuse-of-process claim.[1]

[1] Bullock & Coffman, LLC, present a summary allegation that they "may" be covered by a "broader privilege" because they are a law firm. They cite only to a footnote from *Halle* to support their conclusory position. They otherwise make no argument, cite to no law, and fail to cite to the record, all in violation of Kentucky Rules of Civil Procedure 76.12(4)(c)(iv). For its failure to follow the appellate briefing rules, we elect to only review the record for manifest injustice regarding this issue. *Ray v. Ashland Oil, Inc.*, 389 S.W.3d 140, 147 (Ky. App. 2012). We hold that Bullock & Coffman, LLC, suffers no manifest injustice by being treated the same as the remaining appellants.

That leaves us with the two remaining claims of wrongful use of civil proceedings and malicious prosecution. Wrongful use of civil proceedings and malicious prosecution have similar elements, which are:

> (1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings,
>
> (2) by, or at the instance, of the plaintiff,
>
> (3) the termination of such proceedings in defendant's favor,
>
> (4) malice [for criminal actions] or improper purpose [for civil actions] in the institution of such proceeding,
>
> (5) want or lack of probable cause for the proceeding, and
>
> (6) the suffering of damage as a result of the proceeding.

Garcia, 400 S.W.3d at 274 (alterations added); *D'Angelo v. Mussler*, 290 S.W.3d 75, 79 (Ky. App. 2009). The notable difference between the two is the malice or improper purpose element. Where the underlying action is civil, the tort pursued is wrongful use of civil proceedings, and one examines whether the plaintiff had an improper purpose in instituting the action. *See Prewitt v. Sexton*, 777 S.W.2d 891, 893-95 (Ky. 1989). Conversely, when the underlying action is criminal, the tort pursued is malicious prosecution, and one examines whether the plaintiff was malicious in bringing the action. *See ibid*.

Claims for malicious prosecution and wrongful use of civil proceedings often accompany claims of abuse of process. Nonetheless, there is a distinction between them:

> While the two torts of abuse of process and malicious prosecution often accompany one another, they are distinct causes of action. As aforementioned, malicious prosecution occurs when one institutes a criminal or civil action or process "maliciously or without justification." "Abuse of process, however, consists of 'the employment of legal process for some other purpose than that which it was intended by the law to effect.'" Indeed, we must look for "[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process . . . ."

Garcia, 400 S.W.3d at 277 (citations omitted).

In the instant case, the claims of malicious prosecution and wrongful use of civil proceedings are premised upon the Appellants' conduct, not on statements they made in their judicial pleadings. Indeed, their conduct has already been questioned as a panel of this Court has already once sanctioned the Halpins for filing a frivolous appeal. *Halpin v. Hardy*, 2014 WL 4662326 (Ky. App. Sept. 19, 2014) (not reported). At this point in the instant proceedings, because all three claims are premised on conduct during the judicial proceedings and/or the intentions and purposes for that conduct, Appellants are not entitled to immunity from suit under the judicial statements privilege. Whether the Appellees will be successful in their underlying claims is yet to be determined. At this juncture, answering only the limited question of whether the Appellants are entitled to

immunity from suit under the judicial statements privilege, we AFFIRM the trial court and find no error in its order denying the motion to dismiss.

The Appellants' remaining arguments concern non-immunity, substantive issues regarding the denial of their motion to dismiss. We will not address them in this interlocutory appeal, as the only issue properly before us is the immunity claim.

CONCLUSION

Because the underlying claims for abuse of process, malicious prosecution, and wrongful use of civil proceedings examines only the Appellants' conduct and intentions or purposes for initiating legal proceedings, we hold that the Appellants are not entitled to immunity from suit pursuant to the judicial statements privilege. Accordingly, we AFFIRM the trial court's order only on the immunity claim and REMAND the case for further proceedings.

ALL CONCUR.

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