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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001662-MR

MICHAEL A. O'HARA

APPELLANT

v. APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE REBECCA LESLIE KNIGHT, JUDGE
ACTION NO. 14-CI-00053

NICHOLAS MARSH; JAMIE KINMAN; AND
RONALD LACEFIELD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Michael A. O'Hara appeals from an Order of the Carroll Circuit Court granting Summary Judgment in favor of Nicholas Marsh, Jamie Kinman and Ronald Lacefield. O'Hara argues that the Appellees were not entitled to Summary Judgment on his claim of malicious prosecution, that Marsh was not

entitled to prosecutorial immunity, and that Lacefield was not entitled to Summary Judgment on his defense of advice of counsel. O'Hara also argues that the Appellees were not entitled to qualified official immunity and that he had a statutory right of action for the Appellees' statutory violations. For the reasons addressed below, we find no error and AFFIRM the Summary Judgment on appeal.

On January 2, 2013, Michael Browne¹ appeared in Carroll Circuit Court as the subject of an Emergency Protective Order hearing. He was represented by attorney, and Appellant herein, Michael A. O'Hara. As Browne and O'Hara were leaving the courthouse, O'Hara saw Carroll County Deputy Sheriff Ronald Lacefield attempting to serve Browne with a summons. O'Hara believed that such service was improper because Browne was not a Kentucky resident. Deputy Lacefield continued attempting to serve Browne as they walked to the parking lot and O'Hara continuously tried to prevent the service. In the parking lot, O'Hara reached out and touched Deputy Lacefield's upper arm and stated, "what you're doing is not right." According the record, because of O'Hara's actions, Browne was able to enter his vehicle and drive away without being served.

Deputy Lacefield reported the incident to his supervisor, Carroll County Sheriff Jamie Kinman, who in turn directed Deputy Lacefield to consult

¹ Browne is not a party to this action.

with the Carroll County Attorney Nicholas Marsh. After speaking with Deputy Lacefield, Marsh filed a misdemeanor charge against O'Hara for violation of Kentucky Revised Statute (KRS) 519.020, to wit, obstruction of governmental operations by force. O'Hara was served with a summons and Complaint, after which he retained counsel and defended the charge. In May of 2013, the Carroll District Court dismissed the charge after O'Hara agreed to apologize to Deputy Lacefield.

Thereafter, O'Hara filed the instant action against County Attorney Marsh, Sheriff Kinman and Deputy Sheriff Lacefield. O'Hara asserted claims of malicious prosecution, negligence, intentional infliction of emotional distress ("IIED") and various statutory violations.

The matter proceeded in Carroll Circuit Court, whereupon Marsh, Kinman and Lacefield moved for Summary Judgment. After considering the matter, the circuit court rendered an Order on October 5, 2016, granting Summary Judgment. In support of the Order, the court determined that the claim of malicious prosecution was not sustainable for several reasons, including Kinman and Lacefield's failure to participate in the prosecution, O'Hara's inability to demonstrate that he received a "favorable termination" of the prosecution (i.e., that he was found to be not guilty), no direct evidence of malice, O'Hara's acknowledgement that he did touch Deputy Lacefield, and prosecutorial immunity

as to County Attorney Marsh. The court also determined that Lacefield and Kinman were entitled to qualified official immunity on the negligence claim, and Marsh was entitled to prosecutorial immunity. Finally, the court concluded that the IIED and statutory claims were not supported by the facts. This appeal followed.

O'Hara first argues that the Carroll Circuit Court erred in granting Summary Judgment on his claim of malicious prosecution. After directing our attention to the elements of malicious prosecution, O'Hara asserts that there was no probable cause for his criminal prosecution. He also argues that KRS 421.260 prohibited Lacefield from serving the summons on Browne, and that Lacefield's efforts to serve the summons in violation of that provision were unlawful.² O'Hara goes on to argue that he had an ethical duty to his client to contest the service, that his physical contact with Lacefield did not rise to the level of violence, force or physical interference necessary to violate KRS 519.020, and that the statute excepts the use of physical force to resist a public official's unlawful conduct. Finally, O'Hara maintains that the criminal proceeding was instituted by, or at the insistence of, each of the Appellees, and that the criminal proceeding was

² As Appellees point out in their brief, it is debatable whether or not KRS 421.260 even applies to the parties of a legal action. The unpublished case of *H.B. v. B.A.*, 2015-CA-000698-ME, 2016 WL 4934542 (Ky. App. Sept. 16, 2016), suggests that the statute only applies to provide immunity to a witness forced to be in the state pursuant to a summons.

terminated in O’Hara’s favor. In sum, O’Hara argues that the grant of Summary Judgment was improper and the Carroll Circuit Court erred in failing to so rule.

In order to prevail on a claim of malicious prosecution, the plaintiff must establish that,

- 1 – the defendant initiated, continued or procured a criminal proceeding against the plaintiff;
- 2 – the defendant acted without probable cause;
- 3 – the defendant acted with malice which, in the criminal context, means seeking to achieve a purpose other than bringing an offender to justice;
- 4 – the proceeding terminated in favor of the person against whom it was brought; and,
- 5 – the plaintiff suffered damages as a result of the proceeding.

See Martin v. O’Daniel, 507 S.W.3d 1 (Ky. 2016), citing *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981).

In applying the elements of malicious prosecution to the facts, the Carroll Circuit Court found several reasons that O’Hara could not prevail if the matter moved forward to trial. First, the court determined that O’Hara could not prove that Kinman or Lacefield participated in the prosecution. *See Raine, supra*, requiring proof that the Defendant instituted or continued the judicial proceedings. This determination is supported by the record, which reveals that Lacefield merely reported the facts to Kinman, who then directed Lacefield to speak with Marsh. It was Marsh, in his capacity as Carroll County Attorney, who prosecuted the criminal action against O’Hara. The Carroll Circuit Court correctly concluded that

as a matter of law, the conduct of Deputy Lacefield and Sheriff Kinman did not constitute participating in O'Hara's criminal prosecution.

The court went on to find that O'Hara likewise could not demonstrate that he received "favorable termination." Citing *Alcorn v. Gordon*, 762 S.W.2d 809, 812 (Ky. App. 1988), the court determined that favorable termination must reflect the innocence of the accused. In the underlying matter, the charges were dropped against O'Hara only after he apologized. We find persuasive the court's reasoning that O'Hara's apology in exchange for a dismissal does not reflect his actual innocence.

O'Hara goes on to argue that no probable cause existed to support the criminal charge against him, thus bolstering his claim of malicious prosecution. As the parties are well aware, probable cause in this context is that which would "induce a man of ordinary prudence to believe that the person prosecuted had committed the crime charged." *Louisville & N.R. Co. v. Sharp*, 282 Ky. 758, 140 S.W.2d 383, 385 (1940). O'Hara acknowledges that he physically impeded Deputy Lacefield, that he physically touched Lacefield, that his intent was to prevent the service of the summons, and that because of his efforts, his client was able to leave without being served. O'Hara focuses on his claim that the service was not valid, which in his view justified his interference with Deputy Lacefield. The record contains no proof that Lacefield's attempt to hand Browne a summons,

in and of itself, was unlawful. The circuit court determined that O'Hara's remedy was not to physically block Lacefield from carrying out his duties, but rather to quash the summon in court. This conclusion is supported by the record and the law.

O'Hara also argues that Lacefield was not entitled to Summary Judgment on his defense of "advice of counsel." According to O'Hara, this defense to a claim of malicious prosecution is available only to a litigant who discloses all material facts to his attorney and the disclosure is both truthful and complete. *Garcia v. Whitaker*, 400 S.W.3d 270, 275 (Ky. 2013). O'Hara maintains that Lacefield did not inform County Attorney Marsh of O'Hara's verbal declaration that the attempted service was unlawful, and that Browne resided out of state. O'Hara asserts that Lacefield then signed a criminal complaint under oath that he knew, or should have known, was groundless and fabricated. As such, O'Hara argues that Lacefield's defense of advice of counsel was misplaced and the Carroll Circuit Court erred in failing to so rule.

Having found persuasive the circuit court's determination that O'Hara could not prove the elements of malicious prosecution as to Lacefield and Kinman, this argument is moot. Nevertheless, we find no error in the Carroll Circuit Court's conclusion that Lacefield's reliance on the advice of counsel defense was a bar to the claim of malicious prosecution. The advice of counsel defense applies

whether counsel is a private attorney or a public prosecutor, and extends to situations where the complainant files a criminal complaint. *Id.* Lacefield fairly and accurately conveyed to Kinman and Marsh the relevant facts, after which Marsh chose to pursue a criminal complaint against O'Hara. We are not persuaded that Lacefield's purported failure to advise Marsh of O'Hara's objections to the summons render the defense ineffective. Lacefield told Kinman and Marsh what he observed, and it was on this basis that Marsh moved forward with the criminal proceeding against O'Hara.

O'Hara also argues that Marsh is not shielded by prosecutorial immunity because Marsh failed to conduct an outside investigation of the incident. He directs our attention to *BEG Investments, LLC v. Alberti*, 85 F.Supp.3d 13, 42 (D.D.C. 2015), for the proposition that a prosecutor's actions pertaining to the creation or investigation of a noise complaint may not be shielded by prosecutorial immunity. In *BEG Investments*, the court determined that such immunity may not apply when the prosecutor is performing the investigative function normally performed by a detective or police officer. We have no basis for concluding that *BEG Investments* applies herein, as Marsh was not performing an investigative function normally performed by a detective or police officer. Further, *BEG Investments* addressed a fact pattern where the prosecutor was alleged to have fabricated evidence for the purpose of prosecuting a statutory violation. There is

no allegation in the matter before us that Marsh was performing an investigative function, nor that he fabricated evidence as against O'Hara. We agree with the circuit court that prosecutors are absolutely immune for actions performed in the judicial phase of prosecution, *McCollum v. Garrett*, 880 S.W.2d 530, 535 (Ky. 1994), that Marsh did not act outside the bounds of this privilege, and that Marsh is absolutely immune from O'Hara's claim.

In a related matter, we also find no error in the circuit court's conclusion that Lacefield and Kinman are entitled to qualified official immunity. Such immunity is found when 1) the employee's conduct involved the allegedly negligent performance of a discretionary function, 2) the conduct fell within the scope of the employee's authority, and 3) the conduct was performed in good faith. *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). O'Hara asserts that there was a corrupt motive in Lacefield and Kinman's actions; therefore, the "good faith" element of *Yanero* was not met. O'Hara, however, does not reveal the basis of this claim and we cannot conclude that the Carroll Circuit Court erred in failing to find such bad faith.

Lastly, O'Hara maintains that he had a statutory right of action for the Appellees' statutory violations. Specifically, O'Hara asserts claims under KRS 421.260, KRS 519.020, KRS 523.010, and KRS 522.010, as brought through KRS 446.070. This latter statute provides for a statutory negligence *per se* claim. While

O'Hara challenges the circuit court's conclusion that he was not a member of the protected class envisioned by the enactment of KRS Chapter 446, it was amply demonstrated that the Appellees are nonetheless entitled to qualified official immunity on the underlying claim.

Summary judgment "shall be rendered forthwith if 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. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). 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. *Id.* "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* Finally, "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to O’Hara, and resolving all doubts in his favor, we find no error in the Carroll Circuit Court’s entry of Summary Judgment in favor of the Appellees. O’Hara could not prevail on the elements of malicious prosecution if the matter proceeded to trial and immunity is properly applied to shield them from liability in this matter. For the foregoing reasons, we AFFIRM the Summary Judgment on appeal.

ALL CONCUR.

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