

RENDERED: MAY 29, 2020; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001260-MR

DURBIN WALLACE

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE JEREMY MICHAEL MATTOX, JUDGE
ACTION NO. 16-CI-00539

BEN MARTIN AND
PATRICIA PUTTY¹

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND GOODWINE, JUDGES.

DIXON, JUDGE: Durbin Wallace appeals the order of the Scott Circuit Court

entered on July 18, 2018, granting Officer Ben Martin summary judgment. After

¹ Below, these parties were named as Ben Martin, in his individual capacity as a police officer of the City of Georgetown Police Department, and Patricia Putty, in her individual capacity and official capacity as former Superintendent, Board of Education of Scott County. The appeal does not address Putty's conduct because the case against her is still ongoing in Scott Circuit Court.

careful review of the record, briefs, and law, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

Wallace was employed as a school bus driver in Scott County. On August 27, 2015, Wallace attempted to discipline a five-year-old passenger on his bus. He requested that the child move to an empty front seat and not speak or interact with other children on the school bus. The child moved to the front seat but, nevertheless, continued to talk with the other children. Even after receiving further verbal warning, the child continued to interact with the other passengers. Eventually, Wallace physically moved the child to another empty seat a few rows back. During the move, the child's head bumped the window, and he uttered a noise. These exchanges were recorded by at least one security camera on the bus.

On September 2, 2015, the Scott County Board of Education ("Board") suspended Wallace pending investigation of the incident. On September 3, 2015, the Board informed Officer Ben Martin of the incident. Martin began investigating the matter, conducting interviews and reviewing a recording from the school bus surveillance camera. The investigation led him to file a criminal complaint against Wallace after speaking with a prosecutor in the county attorney's office. Thereafter, Martin obtained an arrest warrant, signed electronically by a district judge. Wallace was arrested the same day and charged with fourth-degree

assault,² which was later amended to harassment.³ As a result of the charges, Wallace's employment was terminated. The matter was ultimately tried on March 4, 2016, and the jury found Wallace not guilty.

On June 30, 2016, Wallace filed the instant suit against Martin and the school superintendent, Patricia Putty,⁴ alleging malicious prosecution, abuse of process, and defamation. After limited discovery was conducted, Martin moved the trial court for summary judgment on the ground of qualified immunity. After the matter was briefed, the trial court granted Martin's motion for summary judgment, and this appeal followed.

COMPLIANCE WITH CIVIL RULES

As an initial matter, CR⁵ 76.12(4)(c)(iv), relating to the requirement of a concise statement of the facts and procedural history of an appeal, requires "ample references to the specific pages of the record, or tape and digital counter number in the case of untranscribed videotape or audiotape recordings . . . supporting each of the statements narrated in the summary." Similarly, CR 76.12(4)(c)(v), relating to arguments raised on appeal, requires "ample supportive

² Kentucky Revised Statutes ("KRS") 508.030, a misdemeanor.

³ KRS 525.070, a misdemeanor.

⁴ Patricia Putty is not a party to this appeal.

⁵ Kentucky Rules of Civil Procedure.

references to the record and citations of authority pertinent to each issue of law[.]” Wallace’s brief contains not one single citation to the record.

Further, we note that Wallace’s brief does not comply with CR 76.12(4)(c)(vii), which provides that the index “shall set forth where the documents may be found in the record.” The purpose of this rule is to ensure that only items in the record are appended to the brief and considered by our court during review. This rule also requires extruding tabs for items in the appendix. Wallace’s brief contains neither an index nor the required tabs.

We have three options: “(1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only, *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990).” *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Because these errors were made by counsel, we will not punish the client. We will review the alleged deficiencies but will not search the record on appeal for evidence to support Wallace’s position. *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003). However, we stress that this Court may not be as lenient in future appeals.

STANDARD OF REVIEW

Summary judgment is appropriate “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.” CR 56.03. An appellate court’s role in reviewing a summary judgment is to determine whether the trial court erred in finding no genuine issue of material fact exists and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). A grant of summary judgment is reviewed *de novo* because factual findings are not at issue. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky. App. 2006) (citing *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000)).

It is well-established that a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Casualty Co. v. Belknap Hardware & Mfg. Co.*, 281 S.W.2d 914, 916 (Ky. 1955). “[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to require a resort to surmise and speculation.” *O’Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citation omitted). “[T]he proper function of summary judgment is to terminate litigation when, as a matter

of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

IMMUNITY

On appeal, Wallace argues the trial court erred by determining Martin was entitled to qualified immunity resulting in the dismissal of Wallace’s claims against Martin.

The standards for immunity are well-settled:

“Official immunity” is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. It rests not on the status or title of the officer or employee, but on the function performed. *Salyer v. Patrick*, 874 F.2d 374 (6th Cir. 1989). . . . [W]hen an officer or employee of a governmental agency is sued in his/her representative capacity, the officer’s or employee’s actions are afforded the same immunity, if any, to which the agency, itself, would be entitled But when sued in their individual capacities, public officers and employees enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. 63C Am.Jur.2d, *Public Officers and Employees*, § 309 (1997). Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, *i.e.*, those involving the exercise of discretion and judgment, *id.* § 322; (2) in good faith; and (3) within the scope of the employee’s authority. *Id.* § 309; Restatement (Second) [of the Law of Torts § 895D cmt. g. (A.L.I. 1979)].

Yanero v. Davis, 65 S.W.3d 510, 521-22 (Ky. 2001).

Here, absolute immunity is unavailable as a complete defense to Wallace's complaint as Martin was not sued in his representative capacity. Therefore, we must determine what qualified immunity Martin enjoys, if any, as an affirmative defense to Wallace's claims against him. Wallace alleges Martin committed the intentional torts of malicious prosecution, abuse of process, and defamation. Unfortunately, the trial court failed to consider the applicability of qualified immunity to each of Wallace's claims separately. Yet, qualified immunity is not a blanket shield for all tort claims. In fact, in Kentucky, qualified immunity has only generally protected negligent acts. *Id.* at 521.

INTENTIONAL TORTS

Yanero, the seminal authority on governmental immunity in Kentucky, held that qualified official immunity protects discretionary acts *negligently* performed by public officials so long as they are acting within their authority and in good faith. *Id.* "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who *knowingly* violate the law." *Stanton v. Sims*, 571 U.S. 3, 6, 134 S.Ct. 3, 5, 187 L.Ed.2d 341 (2013) (per curiam) (emphasis added) (citations and internal quotation marks omitted). "[W]hen sued in their individual capacities, public officers and employees enjoy only qualified official

immunity, which affords protection from damages liability for *good faith* judgment calls made in a legally uncertain environment.” *Yanero*, 65 S.W.3d at 522 (emphasis added) (citation omitted). However, by their very nature, most intentional torts preclude acting in good faith. Stated another way,

in the context of qualified official immunity, “bad faith” can be predicated on a violation of a constitutional, statutory, or other clearly established right which a person in the public employee’s position presumptively would have known was afforded to a person in the plaintiff’s position, *i.e.*, objective unreasonableness; or if the officer or employee *willfully or maliciously* intended to harm the plaintiff or acted with a corrupt motive. 63C Am.Jur.2d, *Public Officers and Employees*, § 333 (1997).

Id. at 523 (emphasis added). Thus, while immunity may extend to negligent acts, to what extent does qualified immunity apply to intentional, willful, or malicious conduct?

MALICIOUS PROSECUTION

We begin with Wallace’s claim that Martin’s conduct constituted malicious prosecution. The elements of a malicious prosecution claim are:

- 1) the defendant initiated, continued, or procured a criminal or civil judicial proceeding, or an administrative disciplinary 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; and in the civil context, means seeking to achieve a purpose other than the proper

adjudication of the claim upon which the underlying proceeding was based;

4) the proceeding, except in ex parte civil actions, terminated in favor of the person against whom it was brought; and

5) the plaintiff suffered damages as a result of the proceeding.

Martin v. O’Daniel, 507 S.W.3d 1, 11-12 (Ky. 2016) (emphasis added). *Martin* held qualified official immunity does not shield a police officer from a malicious prosecution claim. In so holding, the Court explained:

Acting with malice and acting in good faith are mutually exclusive. Malice is a material fact that a plaintiff must prove to sustain a malicious prosecution claim. [*Raine v. Drasin*, 621 S.W.2d 895, 899 (Ky. 1981).] But, it is also a fact that defeats the defendant’s assertion of qualified official immunity. Official immunity is unavailable to public officers who acted “*with the malicious intention to cause a deprivation of constitutional rights or other injury . . .*” *Yanero*, 65 S.W.3d at 523 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)[]).

It thus becomes apparent that the very same evidence that establishes the eponymous element of a malicious prosecution action simultaneously negates the defense of official immunity. In simpler terms, *if a plaintiff can prove that a police officer acted with malice, the officer has no immunity; if the plaintiff cannot prove malice, the officer needs no immunity.*

Id. at 5 (latter emphasis added).

Consequently, pursuant to *Martin*, here, Martin is not entitled to summary judgment on the ground of qualified official immunity. If Martin acted with malice, he is not entitled to immunity; if he had no malice, he needs no immunity, since proof of malice is a necessary element to prevail on a claim of malicious prosecution. Therefore, the trial court erred in granting summary judgment to Martin on the alleged malicious prosecution claim on the basis of qualified immunity.

ABUSE OF PROCESS

Next, we turn to Wallace's claim of abuse of process. A plaintiff may pursue abuse of process claims against "one who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which that process is not designed[.]" *Sprint Communications Co., L.P. v. Leggett*, 307 S.W.3d 109, 113 (Ky. 2010) (citing RESTATEMENT (SECOND) OF TORTS § 682 (1977)). The significance of the word "primarily" is that no action for abuse of process lies "when the process is used for the purpose for which it is intended, but there is an *incidental motive of spite or an ulterior purpose of benefit to the defendant.*" RESTATEMENT (SECOND) OF TORTS § 682, cmt. b. (1977) (emphasis added). Thus, abuse of process requires that a complaint allege: "(1) an *ulterior purpose* and (2) a *willful* act in the use of the process not proper in the regular conduct of the proceeding." *Simpson v. Laytart*, 962 S.W.2d 392, 394 (Ky. 1998)

(emphases added) (citations omitted). However, a review of Wallace’s complaint reveals he has failed to state a claim for abuse of process against Martin. The complaint states, “The Defendant Putty was instrumental in the filing and prosecution of assault charges against the Plaintiff for an ulterior motive rather than to promote justice.” Such is not alleged against Martin and is fatal to Wallace’s ability to prevail on this claim. It goes without saying, a plaintiff must allege each element of a claim to prove the offense asserted. Thus, qualified immunity, if any, is irrelevant to an abuse of process claim against Martin.

DEFAMATION

Finally, Wallace has also contended he was defamed. To establish a claim for defamation, the following elements must be proven:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. As we have repeatedly stated, words are said to be actionable per se when there is a conclusive presumption of both *malice* and damage.

Toler v. Süid-Chemie, Inc., 458 S.W.3d 276, 282 (Ky. 2014), *as corrected* (Apr. 7, 2015) (emphasis added) (internal quotation marks and footnotes omitted).

Nevertheless, not all defamatory remarks are actionable.

In certain circumstances, however, otherwise defamatory-per-se communications are allowed because the societal interest in the unrestricted flow of

communication is greater than the private interest. Specifically, we have recognized a privilege for individuals communicating “where the communication is one in which the party has an interest and it is made to another having a corresponding interest.”

Id. (footnotes omitted).

There has been some confusion concerning the nature of qualified “immunity” and of the qualified “privilege” applicable to defamation cases. Qualified immunity concerns the protection afforded a governmental employee’s actions, whereas government employment is unnecessary for the qualified privilege permitted specifically for defamation actions. The difference has been explained that immunities

[a]re grounded principally in the special status of the defendant as a governmental entity, or an officer thereof, or a family member. The immunity was traditionally quite broad and protected the defendant even in cases that undoubtedly involved tortious behavior. The idea was that, though the defendant might be a wrongdoer, social values of great importance required that the defendant escape liability. The immunity thus might be thought to differ from a privilege, such as the privilege of self-defense, which may reflect the judgment that the defendant’s action is not tortious at all, or if tortious, is morally justified.

W. Page Keaton, et al., *PROSSER AND KEATON ON THE LAW OF TORTS*, § 131, at 1032 (5th ed. 1984).

Nevertheless, for analysis herein, whether non-liability is pursuant to immunity or privilege, the result will be the same as liability

turns on the necessity of proof of malice, as Wallace has alleged defamation per se. Wallace contends the oral and written statements made by Martin concerning the alleged assault complaint constitute slander per se. *See Toler*, 458 S.W.3d at 282 (communication involving false allegations of unfitness to perform a job example of per se classification).

Martin, however, maintains he is entitled to qualified immunity (privilege) for any statements made regarding the charges against Wallace. Again, *Toler* explains the limits of this privilege:

The qualified privilege is just that: qualified. Not an absolute defense, the privilege’s protection can be lost through unreasonable actions amounting to abuse. Indeed, the party asserting a qualified privilege may still be responsible for falsehoods if both *actual malice and falsity* are affirmatively shown. The qualified privilege operates to allow defendants the necessary latitude to communicate freely while maintaining accountability when the defendant operates outside of or contrary to the privilege. In this context, accordingly, *actual malice* refers to “malice in fact”—read: malevolence or ill will. A defendant who enjoys the qualified privilege may make defamatory statements, “unless maliciously uttered.” Our case law and the relevant treatises—by focusing on the utterance of the defamatory statement rather than its veracity—evidence this distinction. With the qualified privilege, it is not so much *what* was said as it is *how* it was said. After all, the qualified privilege will provide protection despite a statement’s falsity, assuming, of course, the privilege is not abused.

Id. at 283-84 (initial emphasis added) (footnotes omitted). *Toler* continues:

What, then, is the impact of the qualified privilege on a plaintiff's claim of defamation per se? With defamation's confusing jargon, we have spilled much ink attempting to gain a clearer understanding of the qualified privilege and its role, seemingly to no avail. Ordinarily, because the law does not presume an individual's misconduct, the falsity of defamatory statements is presumed. In addition, malice is presumed in the defamatory-per-se context. The qualified privilege, however, negates this presumption. The result: false and defamatory statements will not give rise to a cause of action *unless maliciously uttered*; or, perhaps better stated, despite the law's presumption of malice where publications are defamatory per se, yet where the publication is made under circumstance disclosing qualified privileges, it is relieved of that presumption and the burden is on the plaintiff to prove actual malice.

Id. at 283 (emphasis added) (internal quotation marks, brackets, and footnotes omitted).

Thus, as the Supreme Court held in *Martin*, acting with malice and acting in good faith are mutually exclusive. *Martin*, 507 S.W.3d at 5. Malice destroys a defendant's assertion of qualified official immunity. *Id.* Official immunity is unavailable to public officers who acted "with the malicious intention to cause a deprivation of constitutional rights or other injury . . ." *Yanero*, 65 S.W.3d at 523 (quoting *Harlow*, 457 U.S. at 815, 102 S.Ct. at 2736-37) (emphasis omitted). Therefore, we believe *Martin*'s reasoning applies with equal force to defamation per se suits.

OTHER CONTENTIONS OF ERROR

Because the trial court erred in granting summary judgment to Martin on the ground he was entitled to qualified official immunity, we need not address Wallace's remaining contentions of error.

CONCLUSION

Therefore, and for the foregoing reasons, the order entered by the Scott Circuit Court is REVERSED, and the matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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