IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

CORRECTED: OCTOBER 24, 2008
RENDERED: OCTOBER 23, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000438-DG

JOHN HUNT, OFFICER;
EDDIE SWORD, SGT.; AND
PIKEVILLE POLICE DEPARTMENT — APPELLANTS

V.

ON REVIEW FROM COURT OF APPEALS
NO. 2005-CA-002214-MR
PIKE CIRCUIT COURT NO. 05-CI-00940

JAMES D. LAWSON — APPELLEE

OPINION OF THE COURT BY CHIEF JUSTICE MINTON

AFFIRMING

The sole issue on discretionary review is whether, in a malicious prosecution action, the Court of Appeals erred in concluding that genuine issues of material fact presented in James D. Lawson's pro se claim remained in dispute in spite of defense affidavits in support of summary judgment. Upon review, we conclude that Lawson offered sufficient affirmative evidence, through sworn statements of material fact in his notarized response, to defeat the defendants' otherwise properly supported summary judgment motion, even though he styled his response as a cross motion for summary judgment. So we affirm the decision of the Court of Appeals that reverses, in part, the order of the

circuit court granting summary judgment to appellants and remands the malicious prosecution claim for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Lawson alleges that Appellants Officer John Hunt and Sgt. Eddie Sword, of the Appellant Pikeville City Police Department, falsely arrested and charged him with driving under the influence, possession of marijuana, and possession of drug paraphernalia. After a jury trial, a district court jury acquitted him of the three charges.

After his acquittal, Lawson filed a pro se civil rights action against appellants in the United States District Court for the Eastern District of Kentucky. The district court held that Lawson's complaint was "confusing, unclear[,] and fail[ed] to state with particularity what actions performed by any particular defendant g[a]ve rise to the plaintiff's various claims." Because the court could not determine the nature of the claims without resorting to what it believed to be improper speculation, it dismissed the complaint, without prejudice. In its opinion and order, the district court specified that Lawson might be permitted to re-file his lawsuit, if appropriate.

Instead of re-filing his lawsuit in the United States District Court, Lawson filed a lawsuit in Kentucky state court. In his complaint, he alleged six claims: (1) harassment, (2) criminal conversation, (3) conspiracy, (4) false arrest, (5) illegal search, and (6) malicious

prosecution. In support of his claims, he described the incident giving rise to his arrest.

According to Lawson's complaint, he spent the evening at a bowling alley. He left the bowling alley and drove to a convenience store across the street to put air in his rear tire, which had a slow leak. After taking care of his tire, he went inside the store to buy a cup of coffee. While in the store, he saw Officer Hunt. Officer Hunt asked Lawson about his activities that evening and where he intended to go when he left the store. After speaking with Officer Hunt, Lawson returned to his car to wipe off the headlights. Officer Hunt yelled at Lawson to "hold on." Officer Hunt stopped Lawson, pulled him by his arm, and told him to sit down in front of Officer Hunt's police cruiser. While seated, Lawson saw Sgt. Sword drive into the parking lot and park behind his car.

According to Lawson's complaint, Officer Hunt told Lawson that he was under arrest for robbing a restaurant the previous year. Officer Hunt handcuffed Lawson and took everything out of his pockets. Officer Hunt then placed Lawson in the back of his cruiser. While seated in the cruiser, Lawson saw Officer Hunt search his vehicle and remove certain items that belonged to Lawson's father.

Officer Hunt and Sgt. Sword returned to Officer Hunt's cruiser; they instructed Lawson to get out of the vehicle. They informed him that they were mistaken as to the arrest warrant for the restaurant robbery and that he was now under arrest for driving under the influence,

possession of marijuana, and possession of drug paraphernalia. Officer Hunt administered a field breath test to Lawson. He also conducted a field sobriety test during which Lawson tilted his head back and counted backward from 79 to 63. Lawson contends that he successfully completed the field sobriety test. And he contends that he agreed to give blood and urine samples for further testing.

By the time Lawson filed his complaint in Kentucky state court, one year and nearly eight months had passed since his arrest. However, less than ten months had passed since his acquittal.

Less than two months after Lawson filed his complaint, appellants moved for summary judgment. In their memorandum in support of summary judgment, they argued that the one-year statute of limitations under Kentucky Revised Statutes (KRS) 413.140(1)(a) and (1)(c) had run. In addition, as to the claim for malicious prosecution, appellants argued that the evidence reflected as a matter of law that Officer Hunt and Sgt. Sword had probable cause to arrest Lawson. In support of their motion, appellants attached affidavits from both Officer Hunt and Sgt. Sword.

In his affidavit, Officer Hunt stated that on the day of Lawson's arrest, he received a call from Sgt. Sword informing him that he had seen Lawson driving to the convenience store. So Officer Hunt drove to the store to question Lawson about a burglary. While talking to Lawson, Officer Hunt noticed a strong odor of alcohol and believed that Lawson

was impaired. Officer Hunt administered a field breath test to Lawson, which Officer Hunt contends reflected that Lawson had consumed alcoholic beverages. In addition, Officer Hunt stated that he administered two verbal field sobriety tests. In one test, when asked to count backward from 62 to 47, Lawson counted from 61 to 49 and asked where to stop. In another test, when asked to say the alphabet from "D" to "Q," Lawson said "A" through "T" and the "Q." Officer Hunt requested that Lawson perform the physical sobriety tests of walking a straight line and standing on one leg; however, Lawson said he could not perform those tests because of physical injuries or ailments.

Officer Hunt placed Lawson under arrest for driving under the influence. Officer Hunt searched Lawson and found what he recognized as marijuana, a partially-consumed cigarette, and sheets of rolling paper. Consequently, Lawson was also charged with possession of marijuana and drug paraphernalia.

After his arrest, Officer Hunt took Lawson to the hospital to provide blood and urine samples for testing. Officer Hunt read Lawson his rights and informed him of his obligation to submit to testing. According to Officer Hunt's affidavit, Lawson refused to submit to testing. So Officer Hunt took him to jail.

Officer Hunt attached to his affidavit a copy of the citation that he issued to Lawson the night of the arrest. The citation supports Officer Hunt's affidavit, except that Officer Hunt wrote on the affidavit that the

breath test was "Not Requested." Officer Hunt also attached to his affidavit a report of a forensic laboratory examination. The report reflects that the laboratory received three exhibits connected to Lawson's citation for testing: (1) plant material weighing approximately 1.6 grams, (2) one partially-consumed cigarette containing plant material weighing approximately 0.1 gram, and (3) sheets of rolling papers. Testing on the plant material revealed that the substance contained marijuana; however, the lab did not examine the other two exhibits. The report shows that the evidence was submitted for testing by Officer Hunt five days after Lawson filed his complaint in Kentucky state court, which was over nine months after Lawson's district court acquittal.

Sgt. Sword stated in his affidavit that he witnessed Lawson pull into the convenience store. Evidently, Sgt. Sword was aware that Officer Hunt wanted to interview Lawson in connection with a burglary. So Sgt. Sword notified Officer Hunt that Lawson was at the store. And Officer Hunt, in response to Sgt. Sword's call, arrived at the store and interviewed Lawson. Later, Sgt. Sword advised Officer Hunt that just before Officer Hunt's arrival, Sgt. Sword saw Lawson operating a motor vehicle.

Ten days after appellants filed their motion for summary judgment, the trial court issued an order giving Lawson thirty days "to file a written response to the motion for summary [judgment;] after a response has been filed[,] it will be submitted for a decision."

Having not yet received a copy of the trial court's order, in the interim, Lawson filed a motion for trial by jury in which he refuted appellants' assertions that the statute of limitations had run on his claims and that Officer Hunt had probable cause for the arrest. In response to Officer Hunt's statement that Lawson refused a blood test, Lawson contended that Officer Hunt never took him into the hospital to provide a blood and urine sample; and Lawson never refused to give a blood and urine sample. And in response to the trial court's order, Lawson filed a motion for summary judgment. In support, he reiterated his version of what occurred on the night of his arrest and his arguments from his motion for a trial by jury. He filed no documents formally labeled as affidavits, but his motion containing his allegations of material fact was notarized as having been made under oath and subscribed before a notary public.

Less than two weeks after Lawson filed his motion for summary judgment, the trial court issued an order summarily granting appellants' motion for summary judgment. Lawson appealed.

Agreeing, at least in result, except as to the malicious prosecution claim, the Court of Appeals held that all the claims accruing on the date of the arrest were time-barred even in view of the relevant statutory tolling provision. The Court of Appeals affirmed the award of summary judgment as to all claims except the malicious prosecution claim. Regarding the malicious prosecution claim, the Court of Appeals agreed

with Lawson that his malicious prosecution claim accrued only on his acquittal. Consequently, it was not time-barred. The Court of Appeals was not persuaded that the defense affidavits in support of summary judgment eliminated all genuine issues of material fact presented in Lawson's pro se complaint. So the Court of Appeals reversed the award of summary judgment as to the malicious prosecution claim and remanded for further proceedings.

As a result of the Court of Appeals' opinion, only the malicious prosecution claim remains. We granted discretionary review on appellants' motion. Lawson did not file a cross-motion for discretionary review.

II. STANDARD OF REVIEW.

The summary judgment standard of review is well settled in our case law. Summary judgment should only be used "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 and against the movant."[1] "It is only proper where the movant shows that the adverse party could not prevail under any circumstances."[2] We will affirm the grant of summary judgment when

---

1 Roberson v. Lampton, 516 S.W.2d 838, 840 (Ky. 1974) (*quoted in* Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985)).

2 Paintsville Hosp. Co., 683 S.W.2d at 256 (*affirmed as proper standard of review in Kentucky courts in* Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 483 (Ky. 1991)).

"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."[3]

While summary judgment serves the purposes of "expedit[ing] the disposition of cases and avoid[ing] unnecessary trials when no genuine issues of material fact are raised,"[4] the rule should "be cautiously applied."[5] And, on motion for summary judgment,

> [t]he 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. 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. The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. It clearly is not the purpose of the summary judgment rule, as we have often declared, to cut litigants off from their right of trial if they have issues to try.[6]

"Questions relating to the credibility of witnesses and the weight of the evidence must await trial."[7]

---

3 Kentucky Rules of Civil Procedure (CR) Rule 56.03.

4 Steelvest, 807 S.W.2d at 480.

5 *Id.*

6 *Id.* (internal citations omitted).

7 James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273, 276 (Ky. 1991), *modified on denial of reh'g*, 814 S.W.2d 273 (Ky. 1991).

III. RESOLUTION OF THE ISSUE.

In general, actions for malicious prosecution are not favored in the law, especially where, as we have here, the charge is of a crime that affects the public.[8] The action is not favored for at least two reasons. First, public policy favors the exposure of crimes.[9] Second, sustaining actions for malicious prosecution in every case resulting in an acquittal or dismissal of criminal charges "would serve as a deterrent to the enforcement of the criminal law, since the prosecutor would hesitate to set the criminal law in motion if he was rendered liable for damages, unless the prosecution should be successful[.]"[10]

In spite of the general disfavor, our case law recognizes that malicious prosecution claims are necessary to deter persons from procuring the arrest of another "maliciously and without probable cause."[11] To balance the competing interests, to win a malicious prosecution claim the plaintiff must show six basic elements:

> (1) the institution or continuation of original judicial proceedings . . . administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.[12]

---

8 Davis v. Brady, 218 Ky. 384, 291 S.W. 412, 412-13 (1927).

9 *Id.* at 413.

10 *Id.* at 412-13.

11 *Id.* at 413.

12 Raine v. Drasin, 621 S.W.2d 895, 899 (Ky. 1981). Although Raine refers to "malicious prosecution" of underlying civil suits, as well as criminal actions,

At this point in the case, we are concerned with the fifth element, want or lack of probable cause for the proceeding. And the particular issue in this case is whether the determination of want or lack of probable cause for the proceeding is a question of law for the court or a question of fact for the jury. The answer is "it depends." As explained in Schott v. Indiana Nat. Life Ins. Co.:[13]

> What facts and circumstances amount to probable cause is a question of law. Whether they exist or not in any particular case where the evidence is conflicting is a question of fact to be determined by the jury. But, where there is no conflict in the evidence, whether the facts shown amount to probable cause is ordinarily a question of law for the court.

Turning to the facts of this case, all that can be said about them at this point is that they remain in dispute. We note that the defendants in this action offered supporting affidavits indicating that 1) Sgt. Sword had seen Lawson operating a motor vehicle shortly before 2) Officer Hunt stopped Lawson, smelled a strong odor of alcohol on his breath, noticed other signs of impairment while talking with him, and administered verbal field sobriety tests that Lawson failed. Hunt's affidavit also stated that he administered a field breath test that showed that Lawson had consumed alcoholic beverages, but the accompanying citations said that

---

we have made clear in later cases that a tort action concerning the wrongful bringing of an underlying civil case is properly referred to as "wrongful use of civil proceedings." Prewitt v. Sexton, 777 S.W.2d 891, 893 (Ky. 1989); Mapother & Mapother, P.S.C. v. Douglas, 750 S.W.2d 430, 431 (Ky. 1988) (setting forth elements of wrongful use of civil proceedings claim).

[13] 160 Ky. 533, 169 S.W. 1023, 1024 (1914).

a breath test was not requested. Hunt's other observations were enough to establish probable cause for DUI proceedings, regardless of whether or not breath tests were conducted, such that a malicious prosecution claim (requiring a showing of lack of probable cause in the underlying criminal proceeding) could not stand.[14] Thus, although perhaps an issue of fact arose by Officer Hunt's sworn statement that he administered a breath test on Lawson being refuted by the notation on the Uniform Citation attached to Hunt's statement stating that a breath test was "NOT REQUESTED," this was not a material issue of fact.

Because the defendants had filed a properly supported summary judgment motion showing no genuine issues of material fact for trial, Lawson could not defeat their motion "without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial."[15]

---

[14] *See* Meadows v. Thomas, 117 Fed.Appx. 397, 402-03 (6th Cir. (Ky.) 2004) (upholding summary judgment on malicious prosecution claim as there was probable cause to arrest and prosecute Meadows for DUI based on Officer Thomas's observations of "(1) Meadows's alleged illegal passing of vehicles on KY 353; (2) Meadows's alleged running of the stop sign and reckless driving (tail gaiting); (3) Meadows's allegedly red, glossy eyes; (4) Meadows's undisputed trespass onto Thomas's property; (5) Meadows's undisputed verbal confrontation with Thomas and refusal to produce identification for a known law enforcement officer; (6) Meadows's undisputed difficulty in exiting the vehicle; and (7) Meadows's undisputed refusal to participate in field sobriety tests"); Commonwealth v. Semuta, 902 A.2d 1254, 1259-60 (Pa.Super. 2006) (finding probable cause to arrest for DUI established by officer's observations of Semuta driving without headlights at midnight, Semuta's flushed face and glassy eyes, odor of alcohol in vehicle, poor performance on physical field sobriety tests, and result of preliminary blood test).

[15] Steelvest, 807 S.W.2d at 482.

Appellants argue that the holding of the Court of Appeals allows a party to defeat a motion for summary judgment by simply relying on unsworn statements in the pleadings despite the fact that Lawson's statements in his cross-motion for summary judgment were actually "sworn" to the notary. To the contrary, the holding of the Court of Appeals reinforces well-settled case law that a trial court should not render summary judgment if there is any genuine issue of material fact.

In addition, appellants point to the fact that Lawson did not file a "counter-affidavit" when faced with their motion for summary judgment and supporting affidavits. They contend that it was incumbent upon Lawson to offer evidence to controvert their motion. Especially given his pro se status,[16] we hold that under the unique facts and circumstances of this case, Lawson's summary judgment motion, with its recitation of factual allegations and the notary's indication that it was "subscribed and sworn" before the notary, ought to be regarded as a counter-affidavit in Lawson's favor. We still firmly hold that "affirmative evidence" (including but not limited to statements under oath, such as affidavits

---

[16] *See* Haines v. Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) ("Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' Accordingly, although we intimate no view whatever on the merits of petitioner's allegations, we conclude that he is entitled to an opportunity to offer proof.") (citations omitted).

and deposition testimony) must be brought forth to defeat a properly supported summary judgment motion.[17] Unsworn allegations in pleadings will not serve as "affirmative evidence" sufficient to defeat an otherwise properly supported summary judgment motion.[18] However, under the unique facts and circumstances of this case, Lawson's factual allegations in his summary judgment motion, *which were sworn before the notary*, effectively served as counter-affidavits and, thus, constituted "affirmative evidence" sufficient to defeat the defendants' summary judgment motions. We do not believe the merits of the summary judgment motions before the trial court in this case depend on whether Lawson labeled the document containing his version of the facts as an "affidavit" or a "motion for summary judgment," especially in light of his pro se status and his efforts to have his statements "sworn" before a notary. Rather, the parties clearly "swore" to almost completely opposite versions of the facts surrounding Lawson's arrest; thus, establishing a genuine issue of material fact for trial.

IV. CONCLUSION.

Genuine issues of material fact remain on Lawson's malicious prosecution claim. So we affirm the opinion of the Court of Appeals that reversed the trial court's award of summary judgment to appellants on

---

[17] *See* Steelvest, 807 S.W.2d at 482 (requiring affirmative evidence to defeat a properly supported summary judgment motion).

[18] *See* Educational Training Systems, Inc. v. Monroe Guar. Ins. Co., 129 S.W.3d 850, 853 (Ky.App. 2003) ("pleadings are not evidence.").

that portion of Lawson's complaint and remanded the case for further proceedings.

Abramson, Cunningham, Noble, Schroder, and Venters, JJ., sitting. All concur. Scott, J., not sitting.

COUNSEL FOR APPELLANTS:

Russell H. Davis, Jr.
Baird & Baird, PSC
162 Second Street
P. O. Box 351
Pikeville, Kentucky 41502-0351

COUNSEL FOR APPELLEE:

James D. Lawson, #154385, *Pro se*
Marion Adjustment Center
95 Raywick Road
St. Mary, Kentucky 40063

Supreme Court of Kentucky

2007-SC-000438-DG

JOHN HUNT, OFFICER;
EDDIE SWORD, SGT.; AND
PIKEVILLE POLICE DEPARTMENT — APPELLANTS

V.

ON REVIEW FROM COURT OF APPEALS
NO. 2005-CA-002214-MR
PIKE CIRCUIT COURT NO. 05-CI-00940

JAMES D. LAWSON — APPELLEE

ORDER OF CORRECTION

The Opinion of the Court by Justice Minton, rendered October 23, 2008, is CORRECTED on its face by the substitution of page 1. Said correction does not affect the holding.

ENTERED: October 24, 2008.

CHIEF JUSTICE JOHN D. MINTON, JR.