

STATE OF MICHIGAN
COURT OF APPEALS

DAVID E. BLOCH,

Plaintiff-Appellant,

v

IRINA E. BLOCH,

Defendant-Appellee.

UNPUBLISHED

March 7, 2013

No. 307640

Genesee Circuit Court

LC No. 08-090010-NZ

Before: GLEICHER, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

The circuit court summarily dismissed plaintiff-husband David E. Bloch's malicious prosecution action because plaintiff failed to create a genuine issue of material fact that defendant-wife Irina E. Bloch instigated the initiation of a prosecution or a civil action against him. Defendant urges this Court to accept that a malicious prosecution tort can be founded simply on an arrest or the onset of police or Child Protective Services (CPS) investigations. Under the common law and MCL 600.2907, however, more is required. It is clear from the record that plaintiff has not and will not be able to establish that a prosecution or a civil proceeding was instituted against him. We therefore affirm the circuit court's summary dismissal of plaintiff's action and its denial of plaintiff's motion to file a second amended complaint.

I. BACKGROUND

This Court previously considered this case when the circuit court dismissed plaintiff's complaint on res judicata grounds. This Court reversed the initial summary dismissal and succinctly outlined the facts underlying this matter as follows:

Plaintiff and defendant were married on April 6, 2001, and have a minor daughter. On May 22, 2007 defendant filed for divorce. The judgment of divorce was finalized on June 16, 2008. According to plaintiff, during the proceedings in the divorce action, defendant sought full custody of the couple's minor child. Plaintiff maintains that, as a result, defendant falsified reports of physical abuse by plaintiff and reported or caused to be reported a number of false allegations of sexual abuse by plaintiff against the couple's child. According to plaintiff, these allegations resulted in two separate child protective service (CPS) investigations, a psychological review of the parties and the child, and a number of police

investigations. Plaintiff was also forced to undergo a psychological evaluation, a polygraph examination, and was subject to at least one arrest. During the divorce proceedings, the trial court found that the allegations were without merit, a finding supported by the psychologist who examined the parties and the child.

After the divorce was final, plaintiff filed suit, seeking damages from defendant. In neither plaintiff's first complaint, nor his amended complaint, did he specifically state a cause of action; but sought damages from defendant's fraudulent conduct and her "malicious, wilfull and wanton acts."²

2 In a later "supplemental brief" in support of his amended complaint, plaintiff characterized his cause of action as a claim for malicious prosecution, and on appeal discusses that cause of action. The trial court noted that plaintiff's claims could also be characterized as sounding in defamation or abuse of process, but did not reach the merits of any of plaintiff's claims. [*Bloch v Bloch*, unpublished opinion per curiam of the Court of Appeals, issued September 2, 2010 (Docket No. 290086) (*Bloch I*), slip op at 1-2.]

When the proceedings continued after the first appeal, plaintiff definitively stated that his claim sounded in malicious prosecution. Defendant again sought summary disposition, this time contending that plaintiff failed to state a claim upon which relief could be granted because he failed to plead that he had been prosecuted or subjected to a civil action. Defendant further argued that plaintiff failed to create a genuine issue of material fact because the evidence established that the prosecutor declined to file charges against plaintiff and the CPS dropped its investigations when it could find no substantiating evidence.¹

Plaintiff responded with his theory that an actual prosecution or initiation of civil proceedings is not required to support a claim for malicious prosecution. Looking to the language of MCL 600.2907, plaintiff argued that he was required to prove only an "action" and not a "prosecution." Under plaintiff's interpretation of the term "action," he believed defendant's instigation of his arrest for domestic violence and making reports of sexual abuse to the child's school counselor were sufficient to meet this requirement.

The circuit court disagreed with plaintiff's interpretation of the elements of the tort. It determined that plaintiff could not establish the requisite prosecution or civil action and therefore summarily dismissed the complaint pursuant to MCR 2.116(C)(10). Finding that no development of the facts could support plaintiff's claim, the circuit court also denied plaintiff's request to file a second amended complaint.

¹ Defendant also sought summary disposition pursuant to MCR 2.116(C)(7), arguing that the issues raised by plaintiff "were settled and released" in the divorce proceeding. The circuit court denied defendant's motion on this ground and she does not contest that ruling.

II. SUMMARY DISPOSITION

The circuit court properly dismissed plaintiff's claims pursuant to MCR 2.116(C)(10), and could have additionally based the dismissal on (C)(8), because plaintiff failed to plead and can present no evidence to establish that defendant instigated a prosecution or civil action against him, as those terms are correctly understood, as required to support a malicious prosecution action.

"We review de novo the circuit court's summary disposition ruling." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004) (quotation marks and citations omitted).]

We also review underlying issues of statutory interpretation de novo. *In re Complaint of Rovas*, 482 Mich 90, 97; 754 NW2d 259 (2008). The goal of statutory interpretation is to discern the intent of the Legislature based on the language of the statute. "If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997).

MCL 600.2907 is titled "Malicious prosecution or action; civil liability, penalty." The statute provides:

Every person who shall, for vexation and trouble or maliciously, cause or procure any other to be arrested, attached, or in any way proceeded against, by any process or civil or criminal action, or in any other manner prescribed by law, to answer to the suit or prosecution of any person, without the consent of such person, or where there is no such person known, shall be liable to the person so arrested, attached or proceeded against, in treble the amount of the damages and expenses which, by any verdict, shall be found to have been sustained and incurred by him

MCL 600.2907 does not create a cause of action. The statute "add[s] nothing to the substantive law" of malicious prosecution but merely trebles the damages upon receiving a judgment. *LaLone v Rashid*, 34 Mich App 193, 202; 191 NW2d 98 (1971). Rather, "[m]alicious prosecution actions generally have their basis in early common law." *Camaj v SS Kresge Co*, 426 Mich 281, 286; 393 NW2d 875 (1986). Further, "action for malicious prosecution 'is

strictly guarded' and 'is never encouraged except in plain cases.'" *Renda v Int'l Union UAAAIWA*, 366 Mich 58, 74; 114 NW2d 343 (1962).

A. COMMON LAW

Under the common law, there are four elements to a malicious prosecution claim:

In maintaining a claim of malicious prosecution, a plaintiff bears the burden of proving that (1) the defendant has initiated a criminal prosecution against him, (2) the criminal proceedings terminated in his favor, (3) the private person who instituted or maintained the prosecution lacked probable cause for his actions, and (4) the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice. [*Walsh*, 263 Mich App at 632-633.]

To prove "malicious prosecution" arising from the institution of civil proceedings, the plaintiff must establish a "special injury," as well as that "(1) prior proceedings terminated in favor of the present plaintiff, (2) absence of probable cause for those proceedings, and (3) 'malice', more informatively described by the Restatement as 'a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based'." *Friedman v Dozorc*, 412 Mich 1, 48; 312 NW2d 585 (1981).

Despite plaintiff's claims to the contrary, under the common law for a case of malicious prosecution to lie, there must be some steps in a "prosecution." According to numerous treatises on tort law, a plaintiff cannot support his malicious prosecution action by showing he was merely arrested, that a warrant was issued for his arrest or that he was investigated by law enforcement authorities. Rather, the plaintiff must show that he was formally charged with a crime by the prosecutor and a prosecution was initiated. See 1 Cooley, *Torts* (4th ed), § 123, pp 420-421 ("The action does not lie for merely making a complaint and suing out a warrant, where it is not followed by any other steps in the way of a prosecution[.]"); Restatement *Torts*, 2d, § 653 cmt c, p 407 ("The making of the charge is not actionable, however, under the rule stated in this Section unless a prosecution actually results from it, or, in other words, unless criminal proceedings are instituted against the accused by the tribunal or official before whom the charge is made[.]"); Prosser & Keeton, *Torts* (5th ed), § 119, p 871 ("The proceeding must, however, have been commenced. It is not enough that a mere complaint has been made to the proper authorities for the purpose of setting prosecution in motion, where no official action ever has been taken[.]"); 1 Harper & James, *The Law of Torts*, § 4.3, p 303-304 ("The liability for malicious prosecution is based on the improper instigation of a criminal proceeding. Therefore, an abortive attempt to initiate a criminal proceeding . . . does not make the attempt actionable. Thus, one who makes a complaint . . . cannot be liable for malicious prosecution if no action is taken by the officers of the law pursuant thereto.").

A criminal prosecution in Michigan does not start until an indictment is entered by a grand jury or an information is filed by the prosecutor. MCR 6.112(B); *People v Glass*, 464 Mich 266, 276; 627 NW2d 261 (2001); *People v Baugh*, 243 Mich App 1, 5; 620 NW2d 653 (2000). "In Michigan, prosecution is initiated in the sole discretion of the prosecutor." *Matthews v Blue Cross & Blue Shield of Mich*, 456 Mich 365, 367; 572 NW2d 603 (1998). No

indictment or information entered in this case. Although plaintiff was arrested on suspicion of domestic violence against defendant, the prosecutor chose not to charge him. Although CPS shared with the Davison Township police that the child or defendant had reported possible sexual abuse, the prosecutor again declined to charge plaintiff. There was no prosecution.

There was also no “proceeding” to claim malicious prosecution arising from the institution of civil proceedings. The CPS investigated the reports of sexual abuse raised against plaintiff. The CPS found no substantiating evidence and closed the files. Pursuant to MCL 712A.2(b), a child protective “proceeding” does not begin until a petition is filed alleging that the agency has investigated and found statutory grounds for court jurisdiction. No petition was filed in relation to the couple’s child.

B. STATUTE

Even based on the plain language of MCL 600.2907, a criminal prosecution or a civil proceeding must have been instituted to support a claim. There is scant caselaw in Michigan interpreting the actual language of the statute. In *Camaj*, 426 Mich at 239, the Supreme Court stated, “The words ‘by any process or civil or criminal action, or in any other manner prescribed by law’ logically must be viewed as one phrase modifying the words ‘arrested, attached, or in any way proceeded against.’” A reading of the plain language of MCL 600.2907 indicates that a defendant can be liable for malicious prosecution/action if the defendant has had the plaintiff “arrested, attached, or in any way proceeded against” but only if that occurs “by any process or civil or criminal action, or in any other manner prescribed by law.”

The Legislature did not define the terms used in MCL 600.2907. When defining “legal terms of art,” we may refer to a legal dictionary. *People v Wilcox*, 486 Mich 60, 68; 781 NW2d 784 (2010). “Process” in “civil and criminal proceedings” is defined by Black’s Law Dictionary (6th ed), p 1205, “as any means used by [a] court to acquire or exercise its jurisdiction over a person or over specific property” or “[m]eans whereby [a] court compels [the] appearance of defendant before it or a compliance with its demands.” An “action” “in its usual legal sense means a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law.” *Id.* at 28.

“[I]n any other manner prescribed by law” must be interpreted in light of these definitions of “process” and “action.” When words are placed in such a list in a statute, they must be “construed in accordance with their immediately surrounding text and with a view toward the statute’s overall organization.” *People v Hill*, 486 Mich 658, 662; 786 NW2d 601 (2010). “As a general matter, words and clauses will not be divorced from those which precede and those which follow. When construing a series of terms . . . we are guided by the principle that words grouped in a list should be given related meaning.” *Griffith v State Farm Mut Auto Ins Co*, 474 Mich 521, 533; 697 NW2d 895 (2005) (quotation marks and citations omitted). Accordingly, the statute must permit a suit where a defendant previously acted maliciously to proceed against the plaintiff in some other manner akin to a criminal prosecution or a civil lawsuit, such as before an administrative tribunal.

There is evidence that defendant instigated plaintiff’s arrest and the CPS investigations. However, no prosecution, civil proceeding, or any similar action occurred as a result.

Accordingly, even if MCL 600.2907 created a separate cause of action, plaintiff would have failed to state a claim or create a genuine issue of material fact.

C. CASE LAW

Plaintiff discusses various cases in his quest to convince this Court that an actual prosecution or civil action is unnecessary to support his tort claim. The problem with plaintiff's argument is that he does not understand the legal terms he uses or the process by which a criminal action progresses. Plaintiff repeatedly claims he was "charged" with domestic violence. But plaintiff was only accused and arrested and then released without charges being brought.² Plaintiff also believes that no actual prosecution occurs unless the matter proceeds to trial and the wrongfully accused party is acquitted. As noted, however, a prosecution begins when a grand jury enters an indictment or the prosecutor files an information with the court.

An in-depth analysis of the caselaw in this state governing malicious prosecution and malicious civil action suits shows that there is no precedent for permitting suit in the absence of an actual prosecution or commencement of a civil action as those terms are properly understood. See *Matthews*, 456 Mich at 367-368 (the plaintiff had been acquitted following a bench trial); *Camaj*, 426 Mich at 283 (the plaintiff had been charged with larceny, but the charge was dismissed when the complaining witness failed to appear at trial); *Koski v Vohs*, 426 Mich 424, 427; 395 NW2d 226 (1986) (the plaintiff was charged, but the charges were dismissed when the complaining witness failed to appear at the preliminary examination); *Friedman*, 412 Mich at 16 (the plaintiff successfully defended against a previous medical malpractice lawsuit); *Renda*, 366 Mich at 69 (the court quashed the complaint on the eve of trial when the prosecution's star witness eluded capture); *Cox v Williams*, 233 Mich App 388, 389-390; 593 NW2d 173 (1999) (the charges against plaintiff were dismissed when the complaining witness refused to testify); *Kauffman v Shefman*, 169 Mich App 829, 832; 426 NW2d 819 (1988) (civil suit was dismissed

² See *People v Ross*, 235 Mich 433, 444; 209 NW 663 (1926), explaining the confusion between being accused of and charged with a crime:

A charge is the first step in the prosecution of a crime; it is an accusation in legal form, made in the course of procedure for the apprehension of an offender and his trial before a court of competent jurisdiction.

A criminal charge, strictly speaking, exists only when a formal written complaint has been made against the accused and a prosecution initiated. It is true the popular understanding of the term is "accusation," and it is freely used with reference to all accusations, whether oral, in the newspapers, or otherwise; but in legal phraseology it is properly limited to such accusations as have taken shape in a prosecution. In the eyes of the law a person is charged with crime only when he is called upon in a legal proceeding to answer to such a charge. Mere investigation by prosecuting officers, or even the inquiry and consideration by examining magistrates of the propriety of initiating a prosecution, do not of themselves create a criminal charge. [Quotation marks and citations omitted.]

based on another party's remedy of the financial harm sought to be redressed); *Abdul-Mujeeb v Sears Roebuck & Co*, 154 Mich App 249, 252; 397 NW2d 193 (1986) (the plaintiff was charged and taken before the district court, which refused to bind him over for trial); *Hall v Citizens Ins Co*, 141 Mich App 676, 680; 368 NW2d 250 (1985) (the court issued a default judgment against the plaintiff, which was later set aside); *Young v Motor City Apartments Ltd Dividend Housing Ass'n No 1 & No 2*, 133 Mich App 671, 674; 350 NW2d 790 (1984) (prior civil litigation went to trial and resolved in the current plaintiff's favor); *Raudabaugh v Baley*, 133 Mich App 242, 245-246; 350 NW2d 242 (1983) (criminal charges were brought against a plaintiff but were later dismissed); *Pauley v Hall*, 124 Mich App 255, 259; 335 NW2d 197 (1983) (the defendant's prior civil litigation against the plaintiff had been summarily dismissed); *Drouillard v Metro Life Ins Co*, 107 Mich App 608, 612; 310 NW2d 15 (1981) (the plaintiff was found not liable following a jury trial); *Norberg v Muskegeon*, 104 Mich App 329, 330; 304 NW2d 573 (1981) (the charges were dismissed prior to trial because the underlying ordinance had been repealed); *Markowicz v Pappas*, 102 Mich App 1, 5; 300 NW2d 713 (1980) (the plaintiff had been arraigned on charges before the district court); *Rivers v Ex-Cell-O Corp*, 100 Mich App 824, 830; 300 NW2d 420 (1980) (the plaintiff was charged and bound over for trial, but the circuit court quashed the information); *Ft Wayne Mortgage Co v Carletos*, 95 Mich App 752, 758; 291 NW2d 193 (1980); (the plaintiff was indicted by a grand jury, but the charges were later dismissed); *Ringo v Richardson*, 88 Mich App 684, 689; 278 NW2d 717 (1979) (the plaintiff had been acquitted following a bench trial); *Rowbotham v DAIE*, 69 Mich App 142, 147-148; 244 NW2d 389 (1976) (civil proceeding was summarily dismissed); *Wilson v Yono*, 65 Mich App 441, 496; 237 NW2d 494 (1975) (the plaintiff was acquitted at trial); *Taft v J L Hudson Co*, 37 Mich App 692, 695 (charges dismissed at the close of the prosecution's case-in-chief); *LaLone*, 34 Mich App at 196-197 (the plaintiff was bound over for trial but the circuit court quashed the information).

In every malicious prosecution case considered by the appellate courts of this state, the plaintiff was required to make the introductory showing that, at a minimum, the prosecutor charged him in an information or a grand jury entered an indictment, or a civil or administrative action was actually initiated. Plaintiff cannot make this showing and his claims were doomed from the beginning.

D. GROUNDS FOR DISMISSAL

The circuit court correctly dismissed plaintiff's complaint under MCR 2.116(C)(10) as he failed to create a genuine issue of material fact that defendant's instigation of his arrest and the CPS investigations led to a prosecution or civil action necessary to support his malicious prosecution claim. In addition, the court could have granted summary disposition under MCR 2.116(C)(8). Plaintiff did not claim in his complaint, amended complaint, or the supplements he filed that the prosecutor charged him with a crime or presented an information to the court or that the CPS filed a petition with the court to take jurisdiction over the couple's child. Accordingly, we affirm the circuit court's summary dismissal of plaintiff's claims.

II. AMENDMENT OF THE COMPLAINT

We review a circuit court's decision on a plaintiff's motion to amend his or her complaint for an abuse of discretion. *Wormsbacher v Phillip R Seaver Title Co*, 284 Mich App 1, 8; 772 NW2d 827 (2009). "A trial court abuses its discretion when it selects an outcome that does not

fall within the range of reasonable and principled outcomes.” *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). We review underlying issues of statutory interpretation de novo. *Rovas*, 482 Mich at 97.

MCR 2.118(A)(2) states: “[A] party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.” MCR 2.116(I)(5) further provides that, when the court dismisses a party’s claims pursuant to MCR 2.116(C)(8), (9) or (10), “the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.” “[A]mendment is generally a matter of right, rather than grace.” *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). An amendment is not justified, however, when such amendment would be futile. *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000).

As discussed at length, any amendment to plaintiff’s malicious prosecution complaint would be futile. Although plaintiff was arrested on defendant’s assault accusation, he was never charged by the prosecutor. The prosecutor also declined to charge plaintiff with child sexual abuse. And the CPS never initiated proceedings against plaintiff or involving his daughter as it did not file a petition of adjudication. The undisputed evidence, when viewed in the correct legal perspective, can never support plaintiff’s malicious prosecution action. Further proceedings cannot change that result.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Karen M. Fort Hood