

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2011-CA-00407-COA**

**JAMES L. “BUZZ” MILES**

**APPELLANT**

**v.**

**PAUL MOAK OF RIDGELAND, INC. AND  
WILLOUGHBY S. “CHIP” BURNS**

**APPELLEES**

DATE OF JUDGMENT: 3/8/2011  
TRIAL JUDGE: HON. JEFF WEILL SR.  
COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT  
ATTORNEY FOR APPELLANT: JAMES W. NOBLES JR.  
ATTORNEY FOR APPELLEES: MICHAEL WAYNE BAXTER  
NATURE OF THE CASE: CIVIL - TORTS-OTHER THAN PERSONAL  
INJURY & PROPERTY DAMAGE  
TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED IN  
FAVOR OF APPELLEES ON MALICIOUS-  
PROSECUTION CLAIM AND ABUSE-OF-  
PROCESS CLAIM  
DISPOSITION: AFFIRMED - 09/18/2012  
MOTION FOR REHEARING FILED:  
MANDATE ISSUED:

**BEFORE IRVING, P.J., MAXWELL, RUSSELL AND FAIR, JJ.**

**MAXWELL, J., FOR THE COURT:**

¶1. James L. “Buzz” Miles took possession of a vehicle owned by Paul Moak of Ridgeland Inc. (“Moak”) and agreed to pay Moak \$19,200. After nearly seven months of nonpayment, Moak initiated a criminal action against Miles. The parties reached a settlement prior to trial, and the municipal court dismissed the case. Following dismissal, Miles sued Moak and its general manager for malicious prosecution and abuse of process. Miles appeals the circuit judge’s grant of summary judgment in Moak’s favor, claiming he raised fact issues

on both claims. We disagree. Because a dismissal based on a negotiated settlement is not deemed to have terminated in the accused's favor, his malicious prosecution claim fails. Miles also fails to show a perversion of the legal process, so his abuse-of-process claim also lacks support. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

¶2. Miles owned and operated Autoshow LLC. He had purchased used vehicles from Moak for many years. It was customary for Moak to deliver possession of a vehicle and its bill of sale to Miles prior to receiving payment. Under this arrangement, payment became due only when Moak notified Miles that title to the vehicle was ready to be picked up. The average number of days between Miles taking possession of a vehicle from Moak and Miles's payment for that vehicle was nineteen days. The longest period of nonpayment was fifty-two days.

¶3. On September 30, 2008, Miles took possession of a 2006 GMC Yukon owned by Moak. There was an understanding Miles would pay Moak \$19,200. As was the custom between the parties, Moak later notified Miles that title to the vehicle was ready and that full payment was expected. But Miles refused to pay Moak.

¶4. On April 24, 2009, after nearly seven months without payment, Willoughby S. "Chip" Burns, Moak's general manager, contacted the Ridgeland Police Department and reported the vehicle stolen. Burns informed a Ridgeland police officer that Miles had been in possession of the vehicle for nearly seven months and had continued to ignore Moak's demands for payment. Burns provided a written statement describing the nonpayment. Shortly thereafter, Miles was arrested and charged with embezzlement under contract under

Mississippi Code Annotated section 97-23-25 (Rev. 2006).<sup>1</sup> Following his arrest, Miles admitted to a police officer that he had not paid Moak for the vehicle and had since sold it to a third party.

¶5. On July 27, 2009, Miles's attorney initiated a settlement with Moak. Under its terms, Burns would request the charge against Miles be dismissed in exchange for full payment of the Yukon. The parties followed through with this arrangement, and the municipal court dismissed the case on July 28, 2009.

¶6. On April 14, 2010, Miles sued Moak for malicious prosecution and abuse of process.<sup>2</sup> Moak moved for summary judgment, arguing that Miles had failed to prove three of the six essential elements of malicious prosecution, and as a result, had presented no evidence Moak or Burns had abused the legal process. The circuit court granted summary judgment in Moak's favor on both claims and denied Miles's cross-motion for partial summary judgment.

¶7. On appeal, Miles claims his lawsuit should have survived summary judgment because Moak initiated the underlying criminal action solely to collect a civil debt.

### STANDARD OF REVIEW

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<sup>1</sup> Section 97-23-25 provides:

If any person shall fraudulently appropriate personal property or money which has been delivered to him on deposit, or to be carried or repaired, or on any other contract or trust by which he was bound to deliver or return the thing received or its proceeds, on conviction, he shall be punished by imprisonment in the penitentiary not more than ten years, or be fined not more than one thousand dollars and imprisoned in the county jail not more than one year, or either.

<sup>2</sup> Miles also asserted claims of negligence and gross negligence but does not appeal the circuit court's dismissal those claims.

¶8. We conduct a de novo review of a circuit court’s grant or denial of a motion for summary judgment. *Lewallen v. Slawson*, 822 So. 2d 236, 237 (¶6) (Miss. 2002) (citation omitted). Summary judgment is proper “if the pleadings, depositions, answers to interrogatories 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.” M.R.C.P. 56(c). In determining whether summary judgment was proper, we view the facts in the light most favorable to the nonmovant. *Robinson v. Singing River Hosp. Sys.*, 732 So. 2d 204, 207 (¶12) (Miss. 1999).

¶9. Summary judgment must be granted when the nonmoving party “fails to make a showing sufficient to establish the existence of an element essential to his case and on which he bears the burden of proof at trial.” *Borne v. Dunlop Tire Corp.*, 12 So. 3d 565, 570 (¶16) (Miss. Ct. App. 2009) (citing *Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc.*, 519 So. 2d 413, 416 (Miss. 1988)). To withstand summary judgment, the nonmoving party must produce significant probative evidence of a genuine issue for trial. *Id.* (citing *Price v. Purdue Pharm. Co.*, 920 So. 2d 479, 485 (¶16) (Miss. 2006)).

## DISCUSSION

### I. Malicious-Prosecution Claim

¶10. To succeed on a claim for malicious prosecution, a plaintiff must prove six elements: (1) the institution of a proceeding; (2) by, or at the insistence of the defendant; (3) the termination of such proceeding in the plaintiff’s favor; (4) malice in instituting the proceedings; (5) want of probable cause for the proceeding; and (6) the suffering of the injury or damage as a result of the prosecution.

*Robinson v. Hill City Oil Co.* 2 So. 3d 661, 665 (¶9) (Miss. Ct. App. 2008) (quoting

*McClinton v. Delta Pride Catfish, Inc.*, 792 So. 2d 968, 973 (¶8) (Miss. 2001)). Failure to prove any element by a preponderance of the evidence is fatal to the plaintiff’s claim. *Perkins v. Wal-Mart Stores, Inc.*, 46 So. 3d 839, 845 (¶10) (Miss. Ct. App. 2010) (citing *Robinson*, 2 So. 3d at 665 (¶9)).

**A. Lack of Probable Cause**

¶11. An action for malicious prosecution will not lie if probable cause exists for the initiation of criminal proceedings. *Hudson v. Palmer*, 977 So. 2d 369, 381 (¶33) (Miss. Ct. App. 2007). “Probable cause is determined from the facts apparent to the observer when prosecution is initiated.” *Van v. Grand Casinos of Miss., Inc.*, 767 So. 2d 1014, 1019-20 (¶14) (Miss. 2000) (quoting *Moon v. Condere Corp.*, 690 So. 2d 1191, 1195 (Miss. 1997)). To establish “[p]robable cause requires the concurrence of (1) a subjective element—an honest belief in the guilt of the person accused, and (2) an objective element—reasonable grounds for such beliefs.” *Strong v. Nicholson*, 580 So. 2d 1288, 1294 (Miss. 1991) (citing *Benjamin v. Hooper Elec. Supply Co.*, 568 So. 2d 1182, 1190 (Miss. 1990); *Royal Oil Co. v. Wells*, 500 So. 2d 439, 443 (Miss. 1986)). If the instigator of the action reasonably believed he had a good chance of establishing his case to the judge or jury’s satisfaction, probable cause exists. *Owens v. Kroger Co.*, 430 So. 2d 843, 846 (Miss. 1983).

¶12. In his deposition, Moak’s owner explained his company’s ultimate goal in initiating criminal proceedings was to report a stolen vehicle, not to collect a civil debt. We note that before the Yukon episode, Miles delivered payment to Moak on average within nineteen days. The lag had never exceeded fifty-two days after receiving notification that title to a vehicle was ready to be picked up. Undisputed evidence established Miles ignored or

refused Moak's demands for payment for nearly seven months before Moak sought criminal action. And when questioned by police following his arrest, Miles admitted he had not paid Moak for the vehicle because of insufficient funds and had since sold it to a third party.

¶13. We find Miles's conduct was far enough removed from the parties' normal business practice that a reasonable person would conclude he committed some sort of crime. Thus, Miles failed to present sufficient evidence of a lack of probable cause for the criminal proceeding.

#### **B. Termination of the Criminal Action**

¶14. A claim for malicious prosecution also requires a "termination" of the proceedings in the plaintiff's favor. *Robinson*, 2 So. 3d at 665 (¶9). Not all dismissals qualify as favorable termination for purposes of malicious-prosecution actions. *Stewart v. Se. Foods, Inc.*, 688 So. 2d 733, 737 n.2 (Miss. 1996). To constitute favorable termination in this context, "the dismissal of criminal proceedings must reflect on the merits of the criminal action." *Bearden v. BellSouth Telecomm., Inc.*, 29 So. 3d 761, 764 (¶10) (Miss. 2010) (citing *Van*, 724 So. 2d at 893 (¶15)). A criminal proceeding terminates in favor of the accused "only when [the] final disposition is such as to indicate [his] innocence." *Id.* at 764 (¶11) (quoting Restatement (Second) of Torts § 660 cmt. a (1977)).

¶15. Under Mississippi law, "dismissal reached as a result of a voluntary settlement or compromise does not constitute a termination in favor of the accused." *Van*, 724 So. 2d at 892 (¶11) (citing *Jones v. Donald Co.*, 137 Miss. 602, 602, 102 So. 540, 540 (1925); *Stewart*, 688 So. 2d at 737 n.2). In a factually similar case, the United States Court of Appeals for the Fifth Circuit held that dismissal of embezzlement charges following an agreement to pay for

the allegedly embezzled items does not constitute favorable termination. *Brabham v. O'Reilly Auto., Inc.*, 274 Fed. Appx. 373, 376 (5th Cir. 2008) (unpublished).

¶16. Here, there is no dispute that Miles, through his attorney, initiated a compromise settlement with Moak. In a letter dated July 27, 2009, Miles's attorney confirmed that, in exchange for full payment of the Yukon, Moak would ask the municipal court to dismiss the embezzlement charge against Miles. Moak ultimately received payment, and the court agreed to dismiss the case. The dismissal resulted from the parties' compromise and does not establish Miles's innocence of the charge. Thus, the dismissal of Miles's embezzlement charge does not qualify as a favorable termination.

### **C. Malice**

¶17. Malice refers to the defendant's objective in bringing the criminal proceeding. *See Nassar v. Concordia Rod & Gun Club, Inc.*, 682 So. 2d 1035, 1042 (Miss. 1996) (citing *Strong*, 580 So. 2d at 1293). In the context of a malicious-prosecution claim, malice "occurs when the primary purpose of prosecuting is one other than 'bringing an offender to justice.'" *Coleman v. Smith*, 914 So. 2d 807, 811-12 (¶12) (Miss. Ct. App. 2005) (quoting *Strong*, 580 So. 2d at 1293). Unlike probable cause, the malice inquiry focuses primarily on the defendant's subjective state of mind at the time he filed the criminal action. *See Page v. Wiggins*, 595 So. 2d 1291, 1293 (Miss. 1992).

¶18. Miles argues Moak and Burns initiated the criminal charge to collect a civil debt, not to bring Miles to justice. But there is no record evidence to support his contention. Miles failed to offer any evidence that Moak or Burns threatened him with criminal charges as a means to coerce payment. Nor is there evidence that Moak solicited Miles to pay in

exchange for dismissal of the embezzlement charge. As previously discussed, Miles initiated the settlement discussion and agreed to a mercy dismissal. Therefore, we find Miles failed to prove malice on the part of Moak or Burns.

¶19. Based on Miles’s failure to prove three of the six essential elements of malicious prosecution, we find the circuit court properly granted summary judgment in Moak’s favor.

## **II. Abuse-of-Process Claim**

¶20. To maintain an abuse-of-process claim, the plaintiff must prove the following elements by a preponderance of the evidence: (1) the defendant made an illegal use of process, (2) the defendant had an ulterior motive for exercising such illegal use of process, and (3) damage resulted from the perverted use of process. *Ayles ex rel. Allen v. Allen*, 907 So. 2d 300, 303 (¶10) (Miss. 2005) (citing *McLain v. West Side Bone & Joint Ctr.*, 656 So. 2d 119, 123 (Miss. 1995)). “An action for abuse of process differs from an action for malicious prosecution in that the latter is concerned with maliciously causing process to issue, while the former is concerned with the improper use of process after it has been issued.” *State ex rel. Foster v. Turner*, 319 So. 2d 233, 236 (Miss. 1975). The “crucial element of [abuse of process] is the intent to abuse the privileges of the legal system.” *Allen*, 907 So. 2d at 303 (¶10) (citing *McLain*, 656 So. 2d at 123).

¶21. We find Miles fails to show any perversion or unauthorized use of any legal process. Moak lawfully initiated the embezzlement action. Although Miles claims Moak abused the criminal process to collect a civil debt, Moak had probable cause to believe Miles’s nonpayment constituted a crime. Because Miles fails to show any improper use of process, we find summary judgment was proper on this claim.



**¶22. THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, ROBERTS, CARLTON AND FAIR, JJ., CONCUR. RUSSELL, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION.**

**RUSSELL, J., CONCURRING IN PART AND DISSENTING IN PART:**

¶23. I agree with the majority’s holding regarding Miles’s malicious-prosecution claim. The majority also finds that the trial court properly granted Moak’s<sup>3</sup> motion for summary judgment because Miles failed to establish the three elements necessary for an abuse-of-process claim. In my view, (1) Moak made an illegal use of a legal process; (2) it had an ulterior motive; and (3) damage resulted from its improper use of process. Therefore, I respectfully dissent.

¶24. A trial court’s grant of summary judgment is reviewed de novo. *Hubbard v. Wansley*, 954 So. 2d 951, 956 (¶9) (Miss. 2007). Summary judgment will be granted only when there is no genuine issue of material fact to be decided, and the moving party is therefore entitled to judgment as a matter of law. *See Monsanto Co. v. Hall*, 912 So. 2d 134, 136 (¶5) (Miss. 2005). “To withstand summary judgment, the party opposing the motion must present sufficient proof to establish each element of each claim.” *Morton v. City of Shelby*, 984 So. 2d 323, 330 (¶14) (Miss. Ct. App. 2007) (citing *Galloway v. Travelers Ins. Co.*, 515 So. 2d 678, 684 (Miss. 1987)).

¶25. According to our supreme court, the “crucial element” of an abuse-of-process claim

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<sup>3</sup> I refer to the Appellees collectively as “Moak,” unless specified otherwise.

“is the intent to abuse the privileges of the legal system.” *Ayles ex rel. Allen v. Allen*, 907 So. 2d 300, 303 (¶10) (Miss. 2005) (citing *McLain v. West Side Bone & Joint Ctr.*, 656 So. 2d 119, 123 (Miss. 1995)). In this case, Moak asserts that it reported what it believed to be a crime, motivated only by the desire to see that justice was done. However, the record indicates otherwise. That is, Moak’s ulterior motive in exercising such an illegal, or improper, use of process was to *receive payment for a civil debt*.

¶26. It is undisputed that Miles acquired the vehicle through the normal course of business with Moak. The terms of the sale of the Yukon were in accordance with the custom and practice in the wholesale used car business in Mississippi: (1) the seller delivers possession of the motor vehicle and keys to the vehicle, along with a bill of sale; (2) no payment is expected at the time of sale since the title documents for the vehicle usually are not in the hands of the seller; (3) payment for the motor vehicle is expected *at the time the title is tendered to the buyer*; and (4) in the meantime, the buyer has the authority to sell the vehicle to third persons and deliver to them the necessary application for title, allowing the third party to obtain license plates and file the application.

¶27. Within ninety days of the transaction, on December 15, 2008, Moak submitted a claim to Western Surety Co. to collect on Mile’s surety bond. In the claim, Moak did not allege that Miles had stolen the vehicle. Rather, Moak admitted that the purpose of the claim was to collect payment. On February 17, 2009, CNA Surety responded, stating that if the Moak was still holding title of the vehicle, then Moak could recover payment. Again on April 24, 2009, CNA Surety sent a letter stating that until CNA Surety received a claim for the title of the vehicle, CNA Surety would not be able to assist Moak. However, it does not appear that

Moak ever tendered the title to CNA Surety or Western Surety Co. to process for payment. Instead, Moak turned to the criminal process to collect the civil debt.

¶28. Also, Burns reported the vehicle to the Ridgeland Police Department as “stolen.” When questioned under oath, Burns admitted that although he had filed criminal charges, he did not intend for Miles to be arrested. Burns further admitted that he did not intend for Miles to go to jail. Additionally, while the vehicle was reported as stolen, Moak did not file an insurance claim with its carrier, and the record indicates that Moak had no expectation of the return of the vehicle. The record is silent as to why Moak would not want Miles arrested or sent to jail if Moak believed that a crime had occurred. Additionally, by reporting the vehicle as stolen, it would be reasonable to expect the car to be returned. Instead, Moak’s actions reflect use of the criminal process to coerce Miles into providing payment.

¶29. Finally, while it was Miles’s attorney who initiated the compromise to dismiss the criminal charges upon payment for the vehicle, the record indicates that if Miles’s attorney had not contacted Moak, Moak would have allowed the court to go forward with the criminal proceedings. These actions further indicate that Moak’s primary motive was to obtain payment for the vehicle, not to see that justice was done.

¶30. It is clear from the record that Moak’s ulterior motive was to receive payment of a civil debt, thus satisfying the second element of an abuse-of-process claim. And it is well established “that the use of criminal process . . . in an effort to collect a civil debt will support an action for abuse of process,” in turn satisfying the first element of an abuse-of-process claim. *McCornell v. City of Jackson, Miss.*, 489 F. Supp. 2d 605, 610 (S.D. Miss. 2006). Because Miles suffered damages as a result of this improper use of process, he established

the three elements to support a claim for abuse of process. I submit that the record evidence presents, at the very least, a genuine issue for the fact-finder precluding summary judgment.

¶31. Based on the discussion above, I would reverse summary judgment and remand for further proceedings on this issue.