IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 4, 2022 Session

ARACELI CORDOVA ET AL. v. ROBERT J. MARTIN

Appeal from the Circuit Court for Cheatham County
No. CV-6682 David D. Wolfe, Judge

No. M2021-01412-COA-R3-CV

This is an action for malicious prosecution of an attorney's fee claim. The plaintiffs contend that the trial court improperly granted summary judgment to the defendant under the one-year statute of limitations in Tennessee Code Annotated § 28-3-104(a)(1). The court held that the plaintiffs' cause of action accrued when the allegedly-malicious prosecution terminated, and it held that the prosecution terminated when the first court denied the defendant's motion to alter or amend the judgment under Tennessee Rule of Civil Procedure 59.04. The plaintiffs contend that this is wrong because the defendant was a party to and participated in the appeal of those proceedings. They assert that the defendant's action did not terminate until he exhausted his appellate remedies. We agree and hold that the defendant's cause of action did not terminate until his time for filing an appellate brief expired. Thus, we reverse the decision of the trial court and remand with instructions to reinstate the complaint and for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

FRANK G. CLEMENT JR., P.J., M.S., delivered the opinion of the court, in which ANDY D. BENNETT and JOHN W. MCCLARTY, JJ., joined.

David M. Rich, Nashville, Tennessee, for the appellant, Araceli Cordova, individually, and on behalf of her children, Alfredo Garcia Cordova and Yaretsi Araceli Garcia Cordova, and on behalf of her deceased husband, Sergio Garcia Lopez.

Mark R. Olson, Clarksville, Tennessee, for the appellee, Robert J. Martin.

OPINION

FACTS AND PROCEDURAL HISTORY

From March 2013 to June 2014, Robert J. Martin and Gary Hodges served as the attorneys of record for Araceli Cordova, individually and on behalf of her two minor children, Alfredo Cordova and Yaretsi Cordova (collectively, "Plaintiffs"), in *Cordova ex rel. Cordova v. Nashville Ready Mix, Inc.* (*Cordova I*), No. 11CC1-2013-CV-6214 (Cheatham Cnty. Cir. Ct.), *aff'd in part*, *rev'd in part, and vacated in part*, No. M2018-02002-COA-R3-CV, 2020 WL 2534322 (Tenn. Ct. App. May 19, 2020).

As explained in *Cordova I*, Plaintiffs discharged Mr. Martin and Mr. Hodges in June 2014 and settled their wrongful-death claim with the aid of new counsel in September 2016. *Id*. at *2. Plaintiffs then moved to adjudicate an attorney's fee lien asserted by Mr. Martin and Mr. Hodges. *Id*. at *3. The trial court referred those and other matters to a special master, who determined that Mr. Hodges—but not Mr. Martin—had the right to a "reasonable fee" from the settlement proceeds. *Id*. at *4–5. The trial court adopted the special master's recommendations in its order of October 26, 2018. *Id*. at *5. Mr. Martin filed a motion to alter or amend the judgment, which the trial court denied. *Id*.

Meanwhile, Plaintiffs filed a premature notice of appeal. The notice became effective on the day that the trial court entered its order denying Mr. Martin's motion to alter or amend, May 13, 2019. *See* Tenn. R. App. P. 4(d).

After receiving extensions of time, Plaintiffs and The Travelers Indemnity Company filed their respective appellate briefs. This court then entered an administrative order, notifying the parties that "the Appellees . . . Robert J. Martin, and the Estate of Gary J. Hodges . . . failed to file a brief within the requisite time period or any extension of time granted by the Court." In response, Mr. Martin and Mr. Hodges filed a joint motion for "additional time to file an Appellee's Brief." We granted that motion and gave them until January 13, 2020.

Mr. Hodges filed a brief; Mr. Martin did not. Thus, we limited our consideration to Mr. Hodges's fee claim only, reasoning that "Mr. Martin did not appeal the denial of his claim." *Cordova I*, 2020 WL 2534322, at *5 n.9. After addressing the issues raised by the other parties, we remanded the case for further findings related to Mr. Hodges's fee claim and Travelers' subrogation lien. *See id.* at *16. Our mandate was issued on July 31, 2021.

On December 23, 2020, Plaintiff commenced this action by filing a complaint for malicious prosecution against only Mr. Martin. In response, Mr. Martin moved for summary judgment based on the one-year limitations period in Tennessee Code Annotated § 28-3-104(a)(1). After a hearing, the trial court held that Mr. Martin's claim terminated and that Plaintiffs' claim accrued when the *Cordova I* trial court entered its order of May

13, 2019. For this reason, the court held that Plaintiffs' claim was time-barred, and it dismissed the action.

This appeal followed.

ISSUES

Plaintiffs raise one issue on appeal:

> Whether the Cheatham County [Circuit Court] erred in dismissing Plaintiff-Appellant's malicious prosecution tort claim when that claim was filed within one (1) year of the Defendant-Appellee concluding prosecution of his malicious claims by waving [sic] his right to appeal on January 13, 2020[,] after an order extending his deadline to continue to prosecute his case was granted by this Court on appeal.

Mr. Martin raises no other issues, but he requests an award of his appellate attorney's fees under Tennessee Code Annotated § 27-1-122.

STANDARD OF REVIEW

Whether a claim is barred by the statute of limitations is a question of law that we review de novo with no presumption of correctness. *See Owens v. Truckstops of Am.*, 915 S.W.2d 420, 424 (Tenn. 1996).

ANALYSIS

"A defense predicated on the statute of limitations triggers the consideration of three components—the length of the limitations period, the accrual of the cause of action, and the applicability of any relevant tolling doctrines." *Redwing v. Cath. Bishop for Diocese of Memphis*, 363 S.W.3d 436, 456–57 (Tenn. 2012). Here, the length of the limitations period is one year, *see* Tenn. Code Ann. § 28-3-104(a)(1), and Plaintiffs have raised no tolling doctrines.[1] Thus, we focus on the second element of Mr. Martin's defense: accrual.

[1] In the third subsection of their argument, Plaintiffs contend that Mr. Martin's motion to extend the time for filing an appellee's brief "tolled" the statute of limitations. "Tolling doctrines," such as equitable estoppel and fraudulent concealment, "suspend or extend the running of the limitations period." *Redwing*, 363 S.W.3d at 459. The substance of Plaintiffs' argument, however, is that their cause of action did not even **accrue** until Mr. Martin exhausted his right to appeal. *Compare* Toll, *Black's Law Dictionary* (11th ed. 2019) (defining "toll" in relevant part as "to stop the running of") *with* Accrue, *Black's Law Dictionary* (11th ed. 2019) ("To come into existence as an enforceable claim or right; to arise . . . ."). Thus, there are no "tolling doctrines" at issue.

A cause of action for malicious prosecution accrues, if at all, when the allegedly-malicious proceedings end in a final termination that favors the defendant. *See Christian v. Lapidus*, 833 S.W.2d 71, 73 (Tenn. 1992). Several Tennessee appellate decisions have addressed the "favorable" component, but few have addressed the "finality" component.

Most recently, in *Mynatt v. National Treasury Employees Union, Chapter 39*, — S.W.3d ——, No. M2020-01285-SC-R11-CV, 2023 WL 3243237 (Tenn. May 4, 2023), the Tennessee Supreme Court set a uniform standard for determining whether a termination is "favorable":

> A plaintiff can pursue a claim for malicious prosecution only if an objective examination, limited to the documents disposing of the proceeding or the applicable procedural rules, indicates the termination of the underlying criminal proceeding reflects on the merits of the case and was due to the innocence of the accused.

Id. at *3. Although the court framed this standard in the context of a criminal proceeding, it applies equally to civil actions. *Id.*[2]

The Court's holding in *Mynatt* does not address the issue before us today, which is when civil proceedings "terminate" so as to trigger the limitations period for malicious prosecution when the proceedings involve multiple parties, multiple claims, and an appeal by some but not all parties.[3] After reviewing the arguments of the parties, the record, and

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[2] We express no opinion on the applicability of our holding in this case to malicious prosecution claims based on criminal proceedings, which may differ in several material respects. *Compare, e.g.*, *Mynatt*, 2023 WL 3243237, at *6 (recognizing that criminal trial followed by acquittal is the prototypical "favorable termination") *with* Tenn. R. App. P. 3(c), adv. comm. cmt. ("The only limitation placed upon the right of appeal by the state in criminal actions is that it may not appeal upon a judgment of acquittal."); *cf. Swift v. Campbell*, 159 S.W.3d 565, 573 (Tenn. Ct. App. 2004) ("Finality in criminal proceedings is far more ephemeral than in civil proceedings. Convictions that have been affirmed on direct appeal are not necessarily final because they remain subject to collateral challenge in both state and federal courts.").

[3] The only Tennessee appellate decision to address a similar circumstance is *Selker v. Savory*, No. W2001-00823-COA-R3-CV, 2002 WL 1905312, at *3 (Tenn. Ct. App. Aug. 13, 2002). In *Selker*, this court held that the statute of limitations for malicious prosecution is "not tolled by the period for appeal." *Id*. at *3. The decision in *Selker*, however, is of limited persuasive value because it was based solely on our decision in *Parrish v. Marquis*, No. W1999-02629-COA-R3-CV, 2000 WL 1051842 (Tenn. Ct. App. July 31, 2000). In *Parrish*, we held that a cause of action for malicious prosecution accrued when the underlying civil action "terminated," which was when the court "entered its order" of dismissal. *Id*. at *4. The court in *Selker* construed this language as "plainly" holding "that the cause of action accrued when the prior action was dismissed with prejudice, **not when the period for notice of appeal expired**." *Selker*, 2002 WL 1905312, at *3. This interpretation is not supported by a reading of *Parrish I*, which only mentioned in passing that the prior action was not appealed. *See* 2000 WL 1051842, at *1 ("Miller did not appeal the

the relevant law, we conclude that the underlying civil action terminated as to Mr. Martin when his appellate remedies were exhausted.

Malicious prosecution is one of two torts in Tennessee "that may be brought to obtain redress for the alleged misuse of legal process by another."[4] *Donaldson v. Donaldson*, 557 S.W.2d 60, 62 (Tenn. 1977). The other is abuse of process. *Id*.; *see also Blalock*, 2012 WL 4503187, at *4 (identifying abuse of process, malicious prosecution, wrongful imprisonment, and attorney malpractice as claims that "involve misuse or abuse of the legal system"). A comparison of these related torts provides a helpful context for our decision.

Regardless of whether the proceedings were civil, criminal, or administrative, "[t]he elements for malicious prosecution are the same." *Mynatt*, 2023 WL 3243237, at *3; *see,* generally, *Pera v. Kroger Co.*, 674 S.W.2d 715, 722 (Tenn. 1984) (applying tort to administrative proceedings). To prove a claim, the plaintiff must produce evidence that the defendant instituted or continued a judicial proceeding against the plaintiff (1) "without probable cause" and (2) "with malice" and that (3) the proceedings "terminated in the plaintiff's favor." *Mynatt*, 2021 WL 3243237, at *3. The tort is based on the principle that "when malice motivates a specious claim, which results in injury to the legally protected rights of another, a remedy should be afforded." *Kauffman v. A. H. Robins Co.*, 448 S.W.2d 400, 404 (Tenn. 1969). Allowable damages include those that "proximately result to the plaintiff, his person, property, or reputation." *Ryerson v. Am. Sur. Co. of New York*, 373 S.W.2d 436, 437 (Tenn. 1963).

But to prove a claim for abuse of process, only two elements must be proven: "(1) the existence of an ulterior motive; and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge.'" *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 555 (Tenn. 1999). Thus, "[a]buse of process differs from malicious prosecution in that abuse of process lies 'for the improper use of process *after* it has been issued, not for maliciously causing process to

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court's order of dismissal."). Thus, the court in *Parrish I* did not address whether a cause of action for malicious prosecution accrues before or after the time for appeal, and we respectfully decline to follow the holding in *Selker*. *See also* Restatement (Third) of Torts: Liab. for Econ. Harm § 24 (2020) (stating general rule that a claim for malicious prosecution cannot be brought "until the time allowed for appeal in the principal case has passed").

[4] "Process has been defined broadly as 'any means used by court to acquire or exercise its jurisdiction over a person or over specific property.'" *Blalock v. Preston L. Grp., P.C.*, No. M2011-00351-COA-R3CV, 2012 WL 4503187, at *4 (Tenn. Ct. App. Sept. 28, 2012) (quoting *Black's Law Dictionary* (5th ed. 1979)).

issue.'" *Id*. at 555 (quoting *Priest v. Union Agency*, 125 S.W.2d 142, 143 (Tenn. 1939)). The additional-use requirement "distinguishes this tort from that of malicious prosecution, which arises solely upon the filing of a complaint without probable cause." *Givens v. Mullikin ex rel. Est. of McElwaney*, 75 S.W.3d 383, 403 (Tenn. 2002).[5]

Accordingly, abuse of process and malicious prosecution are subject to different accrual rules:

> Unlike an action for malicious prosecution where a legal termination of the prosecution complained of is essential, in an action for abuse of process it is not necessary, ordinarily, to establish that the action in which the process issued has terminated unsuccessfully. For this reason, a cause of action for abuse of process has been generally held to accrue, and the statute of limitations to commence to run, from the termination of the acts which constitute the abuse complained of, and not from the completion of the action which the process issued.

Blalock, 2012 WL 4503187, at *7 (quoting *Hyde Const. Co. v. Koehring Co.,* 321 F. Supp. 1193, 1207 (S.D. Miss. 1969)).

The distinction is helpful here because it illustrates what the Tennessee Supreme Court recognized sixty years ago in *Ryerson v. American Surety Co. of New York*, 373 S.W.2d 436 (Tenn. 1963): "A malicious prosecution action is one to recover damages **caused by a judicial proceeding** instituted with malice and without probable cause." *Id*. at 437 (emphasis added). Thus, the right of action does not accrue until the underlying **proceeding** is "legally terminated."

Here, Mr. Martin intervened in a pending civil action and asked the court to adjudicate his claim for a fee from the settlement proceeds. The trial court denied his claim in its order of October 26, 2018. But the court retained jurisdiction over the action until it entered its order denying Mr. Martin's motion to alter or amend on May 13, 2019. At that time, Plaintiffs' notice of appeal became effective, and jurisdiction was vested in this court. *See* Tenn. R. App. P. 4(e); Tenn. R. Civ. P. 13(a), adv. comm. cmt.; *accord First Am. Tr. Co. v. Franklin-Murray Dev. Co.*, 59 S.W.3d 135, 141 (Tenn. Ct. App. 2001).

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[5] As we have observed before, both "arise" and "accrue" have been used to describe the time at which a right of action vests. *See Smith v. Tenn. Nat'l Guard*, No. M2016-01109-COA-R3-CV, 2017 WL 1207881 (Tenn. Ct. App. Mar. 31, 2017), *rev'd on other grounds,* 551 S.W.3d 702 (Tenn. 2018). The tort of malicious prosecution "arises" from the malicious commencement or continuation of meritless litigation, *see Givens*, 75 S.W.3d at 403, but it does not "accrue" until the action is terminated, *see Christian*, 833 S.W.2d at 73.

Once jurisdiction was transferred to this court, Mr. Martin essentially had three options: (1) move to be dropped as a party to the action, *see* Tenn. R. App. P. 19(e); (2) participate in the appeal by filing a brief, *see* Tenn. R. App. P. 27(b); or (3) do nothing and let the proceedings run their course. At first Mr. Martin indicated his intention to participate in the appeal by moving for an extension of time to file a brief. But he ultimately did not follow through, and he participated no further in the appeal.

For this reason, Plaintiffs contend that the proceedings terminated as to Mr. Martin when his time for filing a brief ended on January 13, 2020. We agree.

In *Creech v. Addington*, 281 S.W.3d 363 (Tenn. 2009), the Tennessee Supreme Court considered whether a trial court's judgment dismissing two defendants—the Links—from a multi-party civil action was final for res judicata. *Id*. at 377. The order of dismissal was entered in 1998. *Id*. Three years later, the trial court granted summary judgment to two more defendants, Parker and Flowers. *Id*. The proceedings continued until early 2003 when the trial court dismissed the complaint against the last remaining defendant. *Id*. The plaintiffs then filed a notice of appeal, but only as to the order of summary judgment for Parker and Flowers. *Id*.

On appeal, the Tennessee Supreme Court held that the judgment as to Parker and Flowers was not final because, in Tennessee, "a 'judgment is not final and res judicata where an appeal is pending.'" *Id*. at 377–78 (quoting *McBurney v. Aldrich,* 816 S.W.2d 30, 34 (Tenn. Ct. App. 1991)). However, the Court held that the judgment as to the remaining defendants became final "[o]nce the thirty-day period for filing a notice of appeal expired." *Id*. at 377.

When *Creech* was decided, only parties who filed a notice of appeal had a right to request relief from judgment on appeal. *See Spectra Plastics, Inc. v. Nashoba Bank*, 15 S.W.3d 832, 840 (Tenn. Ct. App. 1999) (holding that judgment was "not properly before this Court" because the party neither joined nor filed a notice of appeal). But in 2015, Tennessee Rule of Appellate Procedure 3 was amended to include subdivision (h), which states that "upon the filing of a single notice of appeal in a civil case, issues may be brought up for review and relief pursuant to these rules by any party." *See In re Amendments to Tennessee Rules of Appellate Procedure*, No. ADM 2014-01791, at *3 (Tenn. Jan. 2, 2015). With Rule 27, this amendment essentially extended the appellee's time for appeal to the date on which the appellee's brief is due. *See* Tenn. R. App. P. 27(b) ("If appellee is also requesting relief from judgment, the brief of the appellee shall contain the issues and arguments involved in his request for relief . . . .").

Because he filed a motion for extension of time to file his brief, Mr. Martin's time for filing an appeal did not expire until January 13, 2020, at which time he had exhausted his appellate remedies and the judgment was final as to him. *See In re Shyronne D.H.*, No. W2011-00328-COA-R3-PT, 2011 WL 2651097, at *6 (Tenn. Ct. App. July 7, 2011) ("[I]t is an inescapable conclusion that, in Tennessee, a judgment from a case in which an appeal

is pending is not final and cannot be res judicata until all appellate remedies have been exhausted.").

Mr. Martin, however, contends that this case is analogous to and controlled by the Tennessee Supreme Court's decision in *Christian v. Lapidus*, 833 S.W.2d 71 (Tenn. 1992). In *Christian*, the defendant "abandoned" the underlying civil action against the plaintiffs by filing an amended complaint that contained no allegations against them. *Id.* at 72. Because an amended complaint supersedes the original, the Court held that "the legal effect was to remove the [plaintiffs] from the lawsuit." *Id.* at 73. Accordingly, the Court held that judicial proceedings terminated as to the plaintiffs "when the amended complaint operated to excise them as parties."[6] *Id.* at 75.

According to Mr. Martin, he too "abandoned his cause of action" after the trial court entered its order on October 26, 2018. We disagree. Although Mr. Martin ultimately did not appeal the judgment against him, we know of no authority—and Mr. Martin has provided none—that would lead us to construe his decision not to appeal a judgment on the merits of his claim as an "abandonment" within the purview of the holding in *Christian*. Not only did Mr. Martin lose on the merits of his claim, he continued to participate in the civil action by filing a motion to alter or amend and thereafter, on appeal, asking this court for more time to file an appellate brief. His failure to file a brief did not excise him as a party to the action. *See* Tenn. R. App. P. 13 (stating that failure to file an appellee brief may result in the matter being decided on the record and the brief of the appellant); *see also* Tenn. R. App. P. 19 (allowing the addition or removal of parties by court order).

Mr. Martin also makes several conclusory and seemingly contradictory assertions about his role in the underlying proceedings. Mr. Martin argues that he "was dismissed" and "ceased to be a party" after the trial court denied his claim. He asserts that he "purposely did not appeal" the trial court's ruling, but he also implicitly acknowledges that he participated in the appeal by arguing that his claim was extinguished when he "was **no longer** a party to the appeal." (Emphasis added). None of these arguments are supported by relevant authority or citation to the record. *See* Tenn. R. App. P. 27(a)(7), (b) (requiring appellee briefs to include an argument "with citations to the authorities and appropriate references to the record"); Tenn. Ct. App. R. 6(b) (requiring briefs to include "specific reference to the page or pages of the record" in support of arguments or assertions of fact).

Finally, Mr. Martin repeatedly misrepresents the substance of our statement in footnote 9 of *Cordova I*, where we simply acknowledged that "our analysis [was] limited to Mr. Hodge's claim to recover his attorney's fees" because "Mr. Martin did not appeal the denial of his claim." *See* 2020 WL 2534322, at *5. Mr. Martin represents that we "found specifically that [he] was not before the court," and he characterizes our comment as a

[6] This line of reasoning was reaffirmed by our Supreme Court most recently in *Ingram v. Gallagher*, —— S.W.3d ——, No. E2020-01222-SC-R11-CV, 2023 WL 3487083 (Tenn. May 17, 2023).

ruling that he "was no longer a party to the appeal, in [sic] his case concluded." This is incorrect. As explained, Tennessee's procedural rules do not excise appellees from a civil action simply because they do not seek affirmative relief during the appellate proceedings. *See* Tenn. R. App. P. 29(c).

For these reasons, we respectfully disagree with the trial court's conclusion that Plaintiffs' claim accrued in May 2019. Accordingly, we reverse its judgment dismissing the action and remand with instructions to reinstate the complaint and for further proceedings consistent with this opinion. Because we have resolved the appeal in favor of Plaintiffs, we pretermit Mr. Martin's request for his appellate attorney's fees.

IN CONCLUSION

The judgment of the trial court is reversed, and this matter is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against the appellee, Robert J. Martin.

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FRANK G. CLEMENT JR., P.J., M.S.