

IN THE COURT OF APPEALS FOR THE MIDDLE DISTRICT
OF TENNESSEE AT NASHVILLE

Tracy Simmons v. James L. Harris

**Direct Appeal from the First Circuit Court for Davidson County
No. 99C-2154 Walter C. Kurtz, Judge**

No. M2000-00227-COA-R3-CV - Filed October 25, 2000

The basis of this litigation began as a discrimination suit filed against Middle Tennessee State University (“MTSU”) on March 2, 1995. The Appellant Tracy Simmons (“Simmons”) hired the Appellee James Harris (“Harris”) to represent him in his action against MTSU. The discrimination suit was ultimately dismissed on May 10, 1995. Simmons then appealed to the Sixth Circuit Court of Appeals, and on July 11, 1997, the Court of Appeals affirmed the dismissal. Simmons subsequently filed a complaint against Harris with the Board of Professional Responsibility, which was later dismissed. Harris then brought an action against Simmons for attorney’s fees. The controversy now before us concerns the suit brought by Simmons alleging legal malpractice, malicious prosecution, and abuse of process against Harris. On October 14, 1999, Harris filed a Motion for Summary Judgment and on December 14, 1999, the trial court granted Harris’ motion, dismissing claims for malicious prosecution, abuse of process, and legal malpractice. Thereafter, Simmons submitted a Motion to Reconsider, which was denied. This appeal ensued.

Tenn.R.App.P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ASH, Special Judge Don R., delivered the opinion of the court, in which Judge CRAWFORD and Judge FARMER, joined.

Tracy Simmons, Nashville, Tennessee, for the appellant, *pro se*.

Lawrence Wilson, Nashville, Tennessee, for the appellee, James L. Harris.

OPINION

I.

On May 10, 1993, Simmons filed a complaint with the Middle Tennessee State University’s Equal Opportunity Office. Harris represented Simmons in a suit filed against MTSU on March 2, 1995. The lawsuit was dismissed on May 30, 1995 as a result of the statute of limitations. Simmons appealed the decision to the Sixth Circuit

Court of Appeals *pro se*. The Court of Appeals affirmed the trial court and dismissed the case on July 11, 1997.

Subsequently, Simmons filed a complaint with the Board of Professional Responsibility alleging that Harris failed to exercise reasonable professional judgment in representing him. The complaint was dismissed by the Board.

Next, Harris filed an action in General Sessions Court seeking to collect attorney's fees in the discrimination lawsuit. Harris claimed the fee was based on an hourly rate, whereas Simmons alleged the rate was on a contingency basis. There was no contract indicating a preference for either one. The collection action was ultimately dismissed on September 14, 1998, because Harris was unable to present sufficient proof that he and Simmons had a contract. Simmons again filed a complaint with the Board of Professional Responsibility, which was ultimately dismissed.

On August 3, 1999, Simmons filed a suit against Harris alleging legal malpractice, malicious prosecution, and abuse of process. Simmons argued that Harris' collection action was brought in retaliation to his complaint filed with the Board.

Harris subsequently filed a motion for Summary Judgment. On December 14, 1999, Judge Walter C. Kurtz granted Harris' Motion for Summary Judgment. Consequently, Simmons brought a Motion to Reconsider, which was denied. On this appeal, the issues before the Court are whether the trial court erred in granting Summary Judgment to Harris on Simmons' claims for legal malpractice, malicious prosecution and abuse of process.

II.

Since only questions of law are involved, a trial court's grant or denial of summary judgment is reviewed **de novo** with no presumption of correctness. **See Bain v. Wells**, 936 S.W.2d 618, 622 (Tenn. 1997). If the court finds there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law, the court must affirm the trial court's granting of the summary judgment motion. **See Byrd v. Hall**, 847 S.W.2d 208, 211 (Tenn. 1993). When there is a legitimate dispute as to any material fact or any doubt as to the conclusions to be drawn from the undisputed facts, the order granting summary judgment must be denied. **See Id.**

To determine whether a grant of summary judgment is appropriate, the court must decide "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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." Tenn.R.Civ.P. 56.04.

The Court in **Byrd**, 847 S.W.2d at 214, established three elements that "lie at the heart of evaluating a summary judgment motion." To make a determination on

summary judgment, we must decide “(1) whether a factual dispute exists; (2) whether that fact is material; and (3) whether that fact creates a genuine issue for trial.” **Id.**

The party seeking summary judgment carries the burden of persuading the court that no genuine issues of material fact exist. **Id.** at 215. Further, if the moving party satisfies their burden, the burden subsequently shifts to the nonmoving party to set forth specific facts to show there is a genuine issue of material fact requiring submission to the trier of fact. **Id.** Moreover, “the non-moving party may not rely on allegations or denials of his pleadings in carrying out his burden.” **Id.**

Furthermore, Rule 56 provides, in pertinent part:

In order to assist the Court in ascertaining whether there are any material facts in dispute, any motion for summary judgment made pursuant to Rule 56 of the Tennessee Rules of Civil Procedure shall be accompanied by a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact shall be supported by a specific citation to the record. Any party opposing the motion for summary judgment must respond to each fact set forth by the movant either (i) agreeing that the fact is undisputed; (ii) agreeing that the fact is undisputed for the purposes of ruling on the motion for summary judgment only; or (iii) demonstrating that the fact is disputed.

In the instant case, Simmons did not comply with Rule 56. Conversely, Harris filed a statement of undisputed facts consistent with Rule 56.03 setting forth facts supported by an affidavit that also incorporated by reference documents from the federal discrimination lawsuit and a letter related to the Board of Professional Responsibility complaint. Pursuant to the requirements of Rule 56, Harris set forth each fact in a separate, numbered paragraph.

Rule 56 specifically requires the non-moving party to file a response either “(i) agreeing that the fact is undisputed; (ii) agreeing that the fact is undisputed for purposes of ruling on the motion for summary judgment only; or (iii) demonstrating that the fact is disputed.” Simmons failed to file a response to the undisputed facts. Simmons filed no supporting affidavits and simply relied on the deposition of Harris. The Rule provides that summary judgment shall be rendered “subject to the moving party’s compliance with Rule 56.03.”

Courts have held that non-compliance with the Rule may result in a refusal by the court to consider the non-moving party’s factual contentions. The Court in **Midwest Imports, Ltd. V. Coval**, 71 F.3d at 1315-16 (7th Cir. 1995), found that a non-moving party’s failure to file a statement of undisputed facts suggest that those facts will not be considered by the court, regardless if the facts can be obtained in the evidentiary materials. (“the required statements are roadmaps, and without them the court should not have to proceed further, regardless of how readily it might be able to distill the

relevant information from the record on its own.”). Consequently, as an effect to Simmons failure to respond to the undisputed facts, Harris’ alleged facts are deemed admitted.

III.

To determine whether summary judgment for Harris is appropriate in this case, we must first determine the state of law concerning the statute of limitations for legal malpractice. In order to bring a successful claim for legal malpractice, an action must be commenced within one year after the cause of action ensued. T.C.A. § 28-3-104 (a)(2). Here, Simmons filed his legal malpractice on August 3, 1999, which was two years beyond the alleged malpractice. Obviously, the legal malpractice claim was clearly filed beyond the statute of limitations as required by T.C.A § 28-3-104 (a)(2). Thus, the trial court properly granted summary judgment in regard to Simmons’ claim for legal malpractice as a matter of law.

IV.

In Tennessee two tort claims may be brought to obtain redress for the alleged misuse of process by another: malicious prosecution and abuse of process. **Donaldson v. Donaldson**, 557 S.W.2d 60, 62 (Tenn. 1977); **Priest v. Union Agency**, 174 Tenn. 304, 125 S.W.2d 142, 143 (1939). Malicious prosecution is the employment of legal process for its apparent purpose, but without probable cause. **Swepson v. Davis**, 109 Tenn. 99, 70 S.W. 65 (1902). To establish the essential elements of an action for malicious prosecution, the plaintiff has the burden of showing that “(1) a prior suit or judicial proceeding was brought against plaintiff without probable cause, (2) defendant brought such prior action with malice, and (3) the prior action was finally terminated in favor of plaintiff.” **See Bell ex rel Snyder v. Icard**, 986 S.W.2d 550, 555 (Tenn. 1999); **Christian v. Lapidus**, 833 S.W.2d 71, 73 (Tenn. 1992). Furthermore, the plaintiff has a “heavy burden of proof” in establishing lack of probable cause and malice. **Kauffman v. A.H. Robins, Company**, 223 Tenn. 515, 523, 448 S.W.2d 400 (Tenn. 1969); **Buda v. Cassel Brothers, Inc.**, 568 S.W.2d 628, 631 (Tenn.App.1978).

In the instant case, Simmons has the “heavy burden of proof” establishing malice and lack of probable cause on the part of Harris. Reasonable minds would not differ that Harris had probable cause to bring a collection action for attorney fees, regardless when action was brought as long as it was brought in good faith. Further, the record supports that Harris’ collection action was based on the good faith belief that an oral contract existed and that he was due payment for his services. There were no facts to support the contrary of lack of probable cause. The Supreme Court expressly stated in **Byrd v. Hall**, 847 S.W.2d 208, 215, “that the non-moving party may not rely upon the allegations or denials of his pleadings in carrying out his burden” as mandated by Rule 56.05. This burden proved to be too much to overcome for Simmons. Thus, the trial court’s grant of summary judgment was appropriate regarding Simmons’ claim for malicious prosecution.

V.

Simmons third action in accordance with her appeal charges Harris with abuse of process. Abuse 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 issue.” **Priest**, 174 Tenn. at 306, 125 S.W.2d at 143; **Bell ex rel Snyder v. Icard**, 986 S.W.2d 550, 555 (Tenn. 1999); see also Restatement (Second) of Torts § 682 (1977) (“The subsequent misuse of the process, though properly obtained, constitutes misconduct for which the liability is imposed....”); **The Law of Torts** § 4.9 at 4:84 (3rd ed. 1995) (Malicious prosecution is the wrongful assertion of an action, whereas abuse of process is the “improper use, or rather ‘abuse,’ of process in connection therewith....”). In Tennessee, to establish a successful claim for abuse of process, two basic elements must be alleged: “(1) the existence of an ulterior motive; and (2) an act in the use of process after it has been issued, not for maliciously causing process to issue.” **Priest**, 174 Tenn. at 306, 125 S.W.2d at 143.

As the Courts emphasized in **Priest** and **Bell**,

The test as to whether there is an abuse of process is whether the process has been used to accomplish some end which is without the regular purview of the process, or which compels the party against whom it is used to do some collateral thing which he could not legally and regularly be compelled to do.

174 Tenn. at 307, 125 S.W.2d at 144; 986 S.W.2d at 555. Abuse of process does not occur unless it is “directed outside of its lawful course to the accomplishment of some object other than that for which it is provided.” **Id.**

Further, Tennessee as well as a number of other jurisdictions, found that the “mere initiation of law suit, though accompanied by a malicious ulterior motive, will not be enough to establish a cause of action for abuse of process.” **Id.**; **Joseph v. Markovitz**, 27 Ariz.App. 122, 551 P.2d 571, 575 (Ariz.App.1976) (“Proof of abuse of process requires some act beyond the initiation of a lawsuit.”); **Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.**, 42 Cal. 3d 1157, 728 P.2d 1202, 1208, 232 Cal.Rptr. 567 (Cal. 1986) (“The mere filing or maintenance of a lawsuit – even for an improper purpose – is not a proper basis for an abuse of process action.”); **Yoder v. Adriatico**, 459 So.2d 449, 450 (Fla.App.1984) (“The tort of abuse of process is concerned with the improper use of process after it issues.”). The ulterior motive must reach its highest degree in an actual abuse of process “by perverting it to a use to obtain a result which the process was not intended by law to effect.” **Bell**, 986 S.W.2d at 555.

The only facts Simmons presented to the Court were his conclusion that there was an ulterior motive for Harris’ collection claim. Furthermore, regardless of whether Harris had an ulterior motive will not be sufficient for Simmons to establish a cause of action. Without additional facts, Harris’ “**merely instituting**” a collection action does not amount to abuse of process. **See Bell**, 986 S.W.2d at 554 (emphasis added) (“merely

instituting civil proceedings is generally not sufficient to support an abuse of process claim.”). Moreover, Simmons presented no proof that would show Harris had any other reason to file suit other than to collect the delinquent fees. In light of the governing principles established in **Priest** and **Bell**, we are of the opinion that the trial court properly granted Harris summary judgment pertaining to the issue of abuse of process.

VI.

We find that the trial court appropriately granted Harris summary judgment regarding Simmons’ claims for legal malpractice, malicious prosecution, and abuse of process. Thus, judgment of the trial court is affirmed. Costs on appeal are assessed against Simmons.

Judge Don R. Ash