

RENDERED: NOVEMBER 7, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001694-MR

SUSAN McCROBIE

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NOS. 00-CI-01090, 00-CI-01601
AND 01-CI-01493

BARBARA ANDERSON

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: McANULTY AND SCHRODER, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

SCHRODER, JUDGE: Susan McCrobie ("Susan") appeals from a judgment of the Hardin Circuit Court wherein a jury found in favor of Barbara Anderson ("Barbara") on Susan's claim for abuse

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

of process. On appeal, Susan asserts that the trial court should have directed a verdict in her favor on the abuse of process claim and erred by allowing Barbara's attorney to testify during the trial of this issue. Having reviewed the record, the arguments presented by these parties and the applicable law, we reject Susan's assertions and affirm the judgment of the trial court.

This case has its roots in an alleged affair between Barbara and Susan's husband, Harry McCrobie ("Harry"), that turned sour. Harry claims that he had an extramarital affair with Barbara and that the relationship ended bitterly in 1998. Barbara denies that she had an affair with Harry. Harry claimed that Barbara, with the assistance of her husband, Chester, and Barbara's mother, Wanda Scott, filed several criminal charges against him in Hardin County. The first set of charges, harassing communications, was filed on May 3, 1999, and dismissed with prejudice on August 4, 1999. The second set of misdemeanor charges was filed May 5, 1999, and these charges were ultimately dismissed with prejudice. A third set of charges, two counts of harassing communications, was filed August 25, 1999. These charges proceeded to a jury trial, wherein Harry was found not guilty. Two felony charges of intimidating a witness were filed after Harry's acquittal, but the Hardin County grand jury failed to return an indictment on

these charges. The charges of intimidating a witness were eventually dismissed with prejudice. Finally, Scott brought a harassment charge in Bullitt County that appears to have been dismissed without prejudice and with instructions to Harry to stay away from Scott and her family. Ultimately this charge was modified to a dismissal with prejudice.

After all of the criminal charges had been dismissed, Harry filed a civil complaint against Barbara, Chester, and Scott alleging malicious prosecution and outrage. On October 23, 2000, Susan filed a separate complaint against Barbara and Scott alleging that Barbara and Scott intentionally engaged in an outrageous course of conduct towards her. In her complaint, Susan alleged that Barbara and Scott verbally abused her, prevented her from getting into her vehicle on one occasion, followed her around Elizabethtown for no reason, and engaged in offensive gestures towards her. After filing her complaint, Susan filed a criminal harassment charge against Barbara. Eventually, Barbara and Scott answered the civil complaints and filed a counterclaim against Susan for abuse of process and wrongful use of civil proceedings.

In April 2001, Harry and Susan's civil claims proceeded to a jury trial. The counterclaim was not tried at this time. The jury found that the Andersons and Scott were liable to Harry for malicious prosecution and imposed \$4,650.00

in compensatory damages and \$1,000.00 in punitive damages.² The Andersons and Scott appealed the jury's verdict to this Court. In an unpublished opinion rendered August 9, 2002, a panel of this Court affirmed the judgment against the Andersons, but reversed the judgment against Scott.³ Concerning Susan's claim, the jury found for Barbara and Scott. At this point, the criminal harassment charge filed by Susan against Barbara and Barbara and Scott's counterclaim against Susan were pending.

Sometime after the conclusion of the April 2001 trial, the Andersons and Scott authorized their trial counsel, C. Mike Moulton, to attempt to settle this matter with the McCrobies. Moulton contacted the McCrobies' attorney, James Kelly, and verbally proposed an offer of settlement. Moulton's proposed settlement offer provided that Barbara and Scott would agree to dismiss their counterclaim against Susan in exchange for Harry agreeing to vacate the judgment he obtained against the Andersons and Scott and Susan requesting the dismissal of the harassment charge against Barbara. Additionally, Moulton's proposal also required the parties to agree in writing to not

² The jury apportioned liability as follows: 80% to Barbara; 10% to Chester; and 10% to Scott.

³ The judgment against Scott was reversed because the record revealed that the criminal charges Scott filed against Harry in Bullitt County were dismissed by compromise of the accused. Accordingly, a panel of this Court held that Harry failed to satisfy the requirements of Raine v. Drasin, Ky., 621 S.W.2d 895, 899 (1981) and Broadbudd v. Campbell, Ky. App., 911 S.W.2d 281 (1995), that the proceedings at issue were terminated in his favor. Anderson v. McCrobie, No. 2001-CA-001227-MR. The Kentucky Supreme Court denied discretionary review on June 4, 2003.

pursue any and all future criminal or civil actions against each other that could have been brought prior to the signing of the agreement. Receiving no response from Kelly concerning his proposal, Moulton forwarded a letter, dated May 8, 2001, to Kelly making the same offer. Kelly, on behalf of the McCrobies, rejected this settlement offer on May 17, 2001. As a result of this rejection, the Andersons and Scott filed their appeal from Harry's judgment, Barbara proceeded to trial on the harassment charge, and Barbara and Scott pursued their counterclaim against Susan.⁴

On September 20, 2001, a jury returned a not guilty verdict in Barbara's criminal harassment trial. At the conclusion of the criminal trial, Moulton forwarded another letter⁵ to Kelly reviving the earlier offer to settle the outstanding civil proceedings between the parties. This letter provided in pertinent part as follows:

Since the issues involved in the criminal trial were the issues involved in Mr. [sic] McCrobie's civil complaint, I will be filing a motion to amend the counterclaim in the pending civil matter. However, before proceeding with that motion, and before spending time and money on depositions in the pending civil case, I would like to once

⁴ In August 2001, Barbara and Scott amended their counterclaim to include a claim against Susan for malicious prosecution. This claim stemmed from the jury verdict in favor of Barbara and Scott in Susan's civil claim against them.

⁵ Moulton's second letter, incorrectly dated March 14, 2001, was sent to Kelly on September 24, 2001.

again see if it is possible to resolve this matter. The settlement offer previously made and rejected is once again being offered. That settlement offer is that the judgment in the initial case be invalidated and all current and civil appellate actions be dismissed. Additionally, all parties will enter into an agreement foregoing the right to file any civil or criminal action that could be brought between the parties, real or imagined, concerning incidents occurring prior to date of the agreement. Hopefully, at that point, all ties between the parties will be severed and they can get on with there [sic] respective lives.

On October 1, 2002, in response to this settlement offer, Harry and Susan filed a new complaint against the Andersons and Scott for abuse of process. In numerical paragraphs four (4) and five (5) of that complaint, the McCrobies allege:

4. That the Defendants, through their attorney, have threatened that unless the Plaintiff, Susan McCrobie, drop [sic] her criminal complaint and the Plaintiff, Harry McCrobie, gives up his Judgment for money against the Defendants, then the Defendants, Barbara Anderson and Wanda Scott, would continue prosecuting their Counterclaim for abuse of process and would also file an additional cause of action for malicious prosecution through amendment of their Counterclaim against the Plaintiff, Susan McCrobie, and that these threats were made in the presence of others and have now been carried out and the Defendants are actively proceeding with these claims in order to force the Plaintiffs to settle on their terms.

5. That the continuation of the original Counterclaim for abuse of process and the Amended Counterclaim alleging the new offense of malicious prosecution constitute wrongful use of the process of this Court, as the motive is to force the Plaintiffs to stop pursuing lawful remedies, and that because of the wrongful conduct of the Defendants, the Plaintiffs will have to employ [sic] an attorney to defend these actions and will suffer emotional distress and mental suffering.

In response, Barbara filed a second amended counterclaim on October 9, 2001, adding a claim of malicious prosecution. This cause of action stemmed from the not guilty verdict Barbara received from the jury at her criminal harassment trial. Thereafter, the McCrobies amended their complaint to include an allegation that the Andersons and Scott were abusing civil process by appealing the judgment Harry obtained as a result of the April 2001 trial in an effort to pressure Harry into vacating his award. Ultimately, the trial court granted summary judgment to these appellees on Harry's complaint for abuse of process and permitted the remaining claims to proceed to trial. The trial court, however, ordered this trial bifurcated after determining that Moulton would need to testify in the phase of the trial encompassing Susan's claim for abuse of civil process on Barbara's behalf concerning the motives behind his settlement offer.

On June 17, 2002, a bifurcated jury trial commenced on the issues outstanding in this matter. The first portion of the trial concerned only Barbara and Scott's counterclaim against Susan for malicious prosecution and wrongful use of a civil proceeding. After hearing the evidence, the jury returned a verdict for Barbara and Scott, but awarded no damages. During the second portion of the trial, the jury heard evidence and considered Susan's abuse of process claim against Barbara. Ultimately, the jury rejected Susan's claim by returning a verdict in Barbara's favor. This appeal followed.

On appeal, Susan first argues that the trial court erred by failing to direct a verdict in her favor on her abuse of process claim against Barbara. We disagree.

When a motion for directed verdict is made, "the trial court must consider the evidence in its strongest light in favor of the party against whom the motion was made and must give him the advantage of every fair and reasonable intendment that the evidence can justify." Lovins v. Napier, Ky., 814 S.W.2d 921, 922 (1991). A directed verdict is appropriate only when, "drawing all inferences in favor of the nonmoving party, a reasonable jury could only conclude that the moving party was entitled to a verdict." Buchholtz v. Dugan, Ky. App., 977 S.W.2d 24, 26 (1998). The trial court cannot grant a motion for directed verdict "unless there is a complete absence of proof on

a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." Taylor v. Kennedy, Ky. App., 700 S.W.2d 415, 416 (1985). "On appeal, the appellate court considers the evidence in the same light." Lovins, 814 S.W.2d at 922.

The tort of abuse of process involves "the irregular or wrongful employment of a judicial proceeding." Bonnie Braes Farms, Inc. v. Robinson, Ky. App., 598 S.W.2d 765, 766 (1980) (citations omitted). The essential elements of an action for abuse of process include an ulterior purpose and a willful act in the use of the process not proper in the regular conduct of a proceeding. Simpson v. Laytart, Ky., 962 S.W.2d 392, 394 (1998). Abuse of process consists simply of "the employment of legal process for some other purpose other than that which it was intended by the law to effect." Raine v. Drasin, Ky., 621 S.W.2d 895, 902 (1981); Flynn v. Songer, Ky., 399 S.W.2d 491 (1966). Accordingly, in order for an abuse of process claim to be viable, some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process is required. Id. There exists no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. Id., at 394-395 (citing W. Prosser, Handbook of the Law of Torts, Section 121 (4th ed. 1971)).

Looking at the record in this case, we cannot say that the jury's verdict is so palpably or flagrantly against the evidence as to merit a reversal. The record reveals that Barbara was only pursuing the legal remedies available to her after Susan rejected the offer to resolve this matter. Barbara's counterclaim against Susan for abuse of process and wrongful use of civil proceedings possessed merit after a jury determined that Barbara and her mother did not engage in outrageous conduct toward Susan. Moreover, Barbara's claim for malicious prosecution became viable after Barbara was acquitted of the criminal harassment charges that Susan had pressed against her. After Barbara's offer of compromise was rejected, Barbara simply carried out these two claims against Susan to an authorized conclusion. While Barbara may have possessed bad intentions in prosecuting her counterclaims against Susan, there is no indication from the record that Barbara had an ulterior purpose in filing her counterclaims or that these claims were improper. Thus, we believe that the circuit court appropriately denied Susan's motion for a directed verdict because the evidence clearly established that Barbara did not abuse the judicial process by employing legally sanctioned process to resolve her claims against Susan.

Next, Susan argues that the trial court erred by allowing Barbara's trial counsel on the counterclaim issues, C.

Mike Moulton, to testify as a witness at the portion of the trial that dealt solely with Susan's claim for abuse of process.

Susan asserts that Kentucky law does not permit a lawyer to testify in favor of a party whom he represents. Indeed, this long-standing principle is espoused in Rule 3.7 of the Kentucky Rules of Professional Conduct (Supreme Court Rule 3.130):

(a) A lawyer shall not act as an advocate at trial in which the lawyer is likely to be a necessary witness except where:

(1) The testimony relates to an uncontested issue;

(2) The testimony relates to the nature and value of legal services rendered in the case; or

(3) Disqualification of the lawyer would work a substantial hardship on the client.

The commentary to Rule 3.7 understands the difficulties a trial court endures when confronted with a situation wherein an attorney who represents one of the parties at trial may be required to testify concerning a particular issue:

[1] Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between lawyer and client.

[2] The opposing party has proper objection where the combination of roles may prejudice that party's rights in the

litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

SCR 3.130-3.7, Comment (1), (2).

A review of the record reveals that Moulton's testimony concerning his efforts to settle all pending litigation on behalf of the Andersons and Scott did not violate Rule 3.7. First, there is no indication that the roles of advocate and witness were combined during the trial of Susan's claim for abuse of process. In fact, the trial of Susan's claim was bifurcated from the trial of Barbara's counterclaims, with the counterclaims tried first, after the trial court learned that Moulton would be required to testify since his offer was the central component of Susan's abuse of process claim. In bifurcating the trial, the trial court prohibited attorney Moulton from acting as Barbara's advocate during the trial of Susan's claims and, during that portion of the trial, Moulton did not present evidence to the jury on Barbara's behalf or make arguments to the jury explaining or commenting on the evidence presented therein. In fact, another attorney, Lyn Taylor Long, represented Barbara during this portion of the bifurcated trial.⁶ Since attorney Moulton did not act as Barbara's advocate during

⁶ Lyn Taylor Long is Moulton's law partner.

the trial of Susan's abuse of process claim, we cannot say that the trial court erred or permitted Moulton to violate the Kentucky Rules of Professional Conduct.

Moreover, the record reveals that, prior to the beginning of the bifurcated trial containing only Susan's abuse of process claim, the trial court admonished the jury that Moulton was testifying like any other witness and that the jury was not to give Moulton's testimony any additional weight even though Moulton represented Barbara during the first portion of the trial. This admonition was designed to ensure that the jury did not confuse Moulton's roles as an advocate in one part of the trial and as a necessary witness during the second part. Absent any evidence to the contrary, the trial court's admonition to the jury concerning Moulton's testimony cured any prejudice that might have resulted during trial. See King v. Grecco, Ky. App., 111 S.W.3d 877, 884 (2002). Accordingly, we deem Susan's arguments concerning this issue to be totally lacking in merit.

For the aforementioned reasons, the judgment of the Hardin Circuit Court is affirmed.

McANULTY, JUDGE, CONCURS.

HUDDLESTON, SENIOR JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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