

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001617-MR

RICK PIPPIN

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE DENISE CLAYTON, JUDGE  
ACTION NO. 03-CI-000420

CBI SYSTEMS, INC.  
AND KEN WATERS

APPELLEES

OPINION  
AFFIRMING IN PART,  
VACATING IN PART,  
AND REMANDING

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BEFORE: NICKELL AND TAYLOR, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

TAYLOR, JUDGE: Rick Pippin brings this appeal from an October 27, 2005, summary judgment dismissing his claim for malicious prosecution and a July 7, 2006, judgment of the Jefferson Circuit Court dismissing Pippin's claim for abuse of process.

We affirm in part, vacate in part, and remand.

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Pippin initiated this action on January 14, 2003, by filing a complaint in the Jefferson Circuit Court against CBI Systems, Inc. (CBI) and Ken Waters. Therein, Pippin asserted claims for malicious prosecution and abuse of process. Pippin's claims stemmed from an incident in which Waters, on behalf of CBI, filed a criminal complaint/affidavit with the Jefferson County Attorney's Office accusing Pippin of criminal conversion. The specific allegation was that Pippin converted insurance proceeds received for work performed on his home security system by CBI. Pippin was subsequently charged with theft by failure to make required disposition of property over \$300.00 (Action No. 02-F-000262), and such action was ultimately dismissed without a trial and without prejudice. Following dismissal of the criminal action, Pippin filed the instant action against CBI and Waters seeking damages for abuse of process and malicious prosecution.

On October 27, 2005, the circuit court granted partial summary judgment dismissing Pippin's claim for malicious prosecution. Pippin's claim for abuse of process was not dismissed and proceeded to a jury trial. Following a trial, the jury reached a verdict in favor of CBI and Waters and dismissed Pippin's claim for abuse of process. This appeal follows.

Pippin contends that the circuit court erred by permitting CBI and Waters to file an amended answer. Specifically, Pippin contends the court abused its discretion by allowing the amendment because the original answer contained

admissions to allegations that the amended answer subsequently denied.

CBI and Waters admitted in their original answer that they had "falsely and maliciously and without any probable cause" initiated the criminal action by filing a criminal complaint/affidavit with the Jefferson County Attorney's Office. CBI and Waters ultimately retained new counsel, and on April 4, 2005, made a motion for leave to file an amended answer. This motion was filed some two years after the original answer and approximately one year before trial. The circuit court granted the motion. CBI and Waters subsequently amended their answer to deny the allegation that they had falsely and maliciously filed the criminal complaint/affidavit against Pippin.

Ky. R. Civ. P. (CR) 15.01 provides, in relevant part, as follows:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

It is well-established that a circuit court is granted wide discretion in permitting the amendment of pleadings and that such ruling will not be disturbed on appeal absent an abuse of discretion. *Givas v. Boutwell*, 701 S.W.2d 146 (Ky.App.

1985). In this case, we do not believe the circuit court abused its discretion by allowing CBI and Waters to amend their answer. Prior to filing the motion to amend, the parties proceeded as if the allegation had been denied. Pippin had even filed a motion for summary judgment which did not mention or rely upon the admission. Pippin had also deposed Waters and questioned him as if the allegation had been denied. The amended answer was ultimately filed approximately one year before trial. Under these circumstances, we cannot say the circuit court abused its broad discretion by granting the motion for leave to amend the answer.

Pippin next contends the circuit court erred by granting summary judgment dismissing Pippin's claim for malicious prosecution. Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Pippin specifically argues that the circuit court erred by concluding he could not satisfy two of the elements necessary to maintain an action for malicious prosecution - lack of probable cause for the criminal proceeding and termination of the criminal proceeding in his favor. We shall address these arguments seriatim.

To maintain an action for malicious prosecution, the following six elements must be satisfied:

(1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.

*Raine v. Drasin*, 621 S.W.2d 895, 899 (Ky. 1981).

On appeal, Pippin argues he was entitled to a "presumption" that no probable cause existed because the criminal complaint was not submitted to the grand jury and the district court did not conduct a preliminary hearing pursuant to Ky. R. Crim. P. 3.07:

In the case at bar the underlying criminal matter was never submitted to the Grand Jury for an indictment. Additionally, neither the District Court Judge nor the prosecutor requested a probable cause hearing or required a stipulation of probable cause as a prerequisite for the dismissal of the criminal complaint. Appellant is entitled to a presumption that no probable cause existed . . . .

Pippin's Brief at 9. To support Pippin's assertion he relies upon *Conder v. Morrison*, 121 S.W.2d 930 (Ky. 1938). We view *Conder* as clearly distinguishable.

In *Conder*, the Court simply held that where a grand jury indicts an individual, a presumption of probable cause arises; however, the subsequent acquittal by a jury of that individual operates to rebut the presumption and "opens" the door for additional evidence upon the issue of probable cause.

See *id.* In our case, Pippin was never indicted by a grand jury and later acquitted upon those criminal charges by a jury. As such, *Conder* is simply inapposite. See *id.*

The circuit court in this case inferred that probable cause existed upon commencement of the criminal proceeding against Pippin on the premise that the prosecution was advised as to all the facts bearing on the guilt or innocence of Pippin. We do not believe that Kentucky law permits such an inference in malicious prosecution actions nor do we believe that the circuit court correctly addressed the probable cause issue below.

In analyzing the probable cause element of a malicious prosecution claim, it has long been the rule in Kentucky that whether certain facts constitute probable cause, i.e. the existence of probable cause, is a question of law for the court to decide. *Hendrie v. Perkins*, 240 Ky. 366, 42 S.W.2d 502 (1931). In circumstances where the trial court concludes that facts exist to establish lack of probable cause and those underlying facts are in dispute, then there is a fact question for the jury to decide. *Prewitt v. Sexton*, 777 S.W.2d 891 (Ky. 1989). In reviewing the summary judgment entered by the circuit court, the court's order only addresses the dismissal of the criminal charges without prejudice. As noted, the circuit court then infers that probable cause existed. We cannot ascertain from the circuit court's order whether other factual allegations asserted by Pippin on the probable cause issue were addressed. We believe this constituted reversible error and warrants remand

for reconsideration by the circuit court for the reasons that follow.

Upon close review of the record below, Pippin raised several factual issues before the circuit court as pertains to the conduct of Ken Waters on behalf of CBI that would appear to be relevant in the determination of whether there existed a lack of probable cause in initiating the criminal proceedings against Pippin. Again, we cannot determine whether the circuit court considered these facts. Whether the prosecutor in the criminal action below was advised of all facts bearing on the guilt or innocence of Pippin is not relevant in the evaluation of whether there was a lack of probable cause. Assuming the prosecutor recommended prosecution, this would look to an affirmative defense, if the circuit court determines that the basic elements have been established to maintain an action for malicious prosecution under *Raine*, 621 S.W.2d 895. See also *Smith v. Kidd*, 246 S.W.2d 155 (Ky. 1952).

We note that Pippin has not clearly raised in his brief that there were disputed factual issues for the circuit court to consider in determining whether there was a lack of probable cause for Waters and CBI to initiate the criminal action. Nonetheless, we review questions of law by the trial court *de novo* and further may review such matters under CR 61.02 notwithstanding that the issue may not have been sufficiently raised or preserved for review. In ruling on the existence of probable cause or the lack thereof, the circuit court must

address the facts presented, upon a review of the record as a whole. We cannot conclude that occurred in this case. Upon remand, the circuit court is instructed to consider all facts in determining the existence of probable cause in this action to determine whether the malicious prosecution claim may go forward.

Also, Pippin alleges that the circuit court erred by concluding that he failed to demonstrate that the criminal proceedings terminated in his favor. The circuit court found that the criminal proceedings were dismissed without prejudice and, thus, were not terminated in his favor.

For purposes of maintaining a malicious prosecution claim, a criminal proceeding is terminated in favor of defendant when the termination is related to the merits of the case and is reflective of the innocence or lack of criminal responsibility of defendant. *Alcorn v. Gordon*, 762 S.W.2d 809 (Ky.App. 1988); *Davidson v. Castner - Knott Dry Goods Co.*, 202 S.W.3d 597 (Ky.App. 2006). A mere dismissal of the indictment does not *per se* equate with a favorable termination; rather, the dismissal must be a reflection of the merits of the case and the innocence of defendant. *Davidson*, 202 S.W.3d 597. In this regard, it has been recognized that a dismissal of an indictment upon "technical or procedural reasons" does not reflect the merits of the case and does not constitute a favorable termination as required to maintain a malicious prosecution claim. *Id.*

In this case, the record is unclear upon whether the dismissal of the criminal complaint in district court against Pippin was based upon the merits or upon other technical or procedural reasons. The record does reflect that an order of dismissal without prejudice was initially entered by the court, and, thereafter, it appears that another order was entered dismissing the case again. The parties are in disagreement concerning the second dismissal, whether the second dismissal was with prejudice, and the legal effect of the second dismissal.<sup>2</sup> And, the record is scant upon both the reasons underlying the court's first dismissal of the criminal proceedings against Pippin and the second dismissal altogether.

Accordingly, we hold that summary judgment was simply premature upon this issue. Upon remand, the record concerning the dismissal of the criminal proceeding against Pippin must be more fully developed, and, thereafter, the circuit court may reconsider the issue of favorable termination in accordance with the above cited authority.

Pippin finally contends that the circuit court erred by denying his motion for directed verdict in the trial of the abuse of process claim; by entering judgment against him; and by denying his motions for judgment notwithstanding the verdict and for a new trial. Pippin does not articulate how the circuit

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<sup>2</sup> District Judge Whittinghill originally dismissed the criminal complaint against Rick Pippin on August 21, 2002, without prejudice. However, District Judge Delahanty entered another order of dismissal on January 21, 2003, without any reference to prejudice. The prosecutor appealed the January 21, 2003, order to the circuit court, but later apparently dismissed the appeal for being untimely filed.

court erred; rather, he merely makes broad assertions without any legal or factual support. Pippin has not presented this Court with sufficient facts to glean any understanding of the issue and further, has not cited any legal authority to support his argument. See CR 76.12(4). Based upon the foregoing, we summarily reject Pippin's above allegations of error at trial.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed in part, vacated in part, and this cause is remanded for proceedings not inconsistent with this opinion.

NICKELL, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, DISSENTS AND FILES SEPERATE OPINION.

BUCKINGHAM, SENIOR JUDGE, DISSENTING: The majority vacated the summary judgment as it pertains to the issue of probable cause and remanded the issue to the trial court because it could not determine whether the trial court had considered all facts in the case relative to that issue. Summary judgment determinations are reviewed *de novo* by appellate courts. See *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001). In my opinion, we should determine for ourselves whether probable cause existed as a matter of law or whether there were factual issues in that regard. We should not just remand the matter to be sure the trial court considered everything or to have the trial court determine if there were fact issues, or remand the matter because the trial court may not have analyzed

the issue properly. We should review this summary judgment issue ourselves *de novo*.

More importantly, the issue of whether the criminal proceedings were terminated in Pippin's favor is a question of law. See *Davidson*, 202 S.W.3d at 606. This issue is for our *de novo* review as well. See *Cabinet v. Comcast Cablevision of South*, 147 S.W.3d 743, 747 (Ky.App. 2003) (appellate review is *de novo* when addressing an issue of law). Therefore, as with the probable cause issue, I conclude that this court should decide this issue rather than remand it to the trial court.

Furthermore, I am concerned that the majority has implied to the trial court that on remand it must examine the underlying facts and determine whether the charge against Pippin was dismissed on the merits or for technical or procedural reasons. This was the approach taken by this court in the *Davidson* case. *Id.* at 606. I believe the *Davidson* court was wrong.

In *Davidson*, the court remanded so that the trial court could determine the real reason why the charge had been dismissed. *Id.* The court ignored the holding of the Kentucky Supreme Court in *Commonwealth v. Hicks*, 869 S.W.2d 35 (Ky. 1994). In *Hicks*, the court stated as follows:

Unmistakenly, this means that without a notation to the contrary, i.e., "without prejudice" or "with leave to refile," any dismissal, other than a dismissal for lack of jurisdiction, for improper venue, for want of prosecution under Rule 77.02, or for failure to join a party under Rule 19, operates as an

adjudication on the merits. *Polk v. Wimsett*, Ky.App., 689 S.W.2d 363 (1985). Said otherwise, a judgment or order of dismissal, except on grounds noted in the Rule, must be construed as being with prejudice unless it says otherwise.

*Id.* at 38.

Very simply, as *Hicks* pertains to this case, if the order of Judge Whittinghill applies, then the criminal case against Pippin was not terminated in Pippin's favor because the case was dismissed without prejudice. If, however, the order of Judge Delahanty applies, the case was terminated in Pippin's favor because the order did not state otherwise. In other words, I disagree with remanding the issue because it involves a question of law, and I disagree with any analysis by this court or the trial court that is contrary to *Hicks*.<sup>3</sup> I conclude that, in accordance with the principle of the *Hicks* case, the criminal proceedings against Pippin were dismissed with prejudice by Judge Delahanty's order and thus were terminated in his favor. Therefore, the trial court erred as a matter of law in ruling against Pippin on this issue.

In short, as the issues of whether the court properly granted summary judgment on the issue of probable cause and whether the district court judgment was a judgment terminated in Pippin's favor are both subject to our *de novo* review, I conclude that this court must address the issues directly and

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<sup>3</sup> The Kentucky Supreme Court recently cited its *Hicks* decision with approval in *Commonwealth v. Sowell*, 157 S.W.3d 616, 618 (Ky. 2005).

not simply remand to the trial court for further consideration and/or explanation. Thus, I respectfully dissent.

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