IN THE COURT OF APPEALS OF TENNESSEE

FILED

September 29, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

EDWARD E. BRANNON and wife BECKY J. BRANNON,	C/A NO. 03A01-9506-CV-00199
	KNOX COUNTY CIRCUIT COURT
Plaintiffs-Appellants,	
v.	HONORABLE DALE C. WORKMAN, JUDGE
GEORGE THOMAS PYLE and wife NAN D. PYLE,	AFFIRMED IN PART
	VACATED IN PART
Defendants-Appellees.	REMANDED

THOMAS R. HENLEY of LUFKIN & HENLEY, Knoxville, for Appellants.

WANDA G. SOBIESKI of SOBIESKI, MESSER & ASSOCIATES, Knoxville, for Appellees.

O P I N I O N

Susano, J.

This malicious prosecution action arose out of a dispute between neighbors. Edward Brannon (Brannon) and his

wife, Becky Brannon[1], sued George Pyle (Pyle) and his wife Nan Pyle for initiating a charge of criminal trespass against Brannon. The trial court found that Brannon's conviction in General Sessions Court, although subsequently overturned by the Criminal Court in a *de novo* trial, was "prima facie evidence of probable cause" to initiate the charge. That court further found that since Pyle had secured the issuance of the criminal warrant from General Sessions Court Judge Bobby McGee, a licensed attorney, he was "thereby protected from a subsequent malicious prosecution action." The trial court granted summary judgment to the Pyles. The plaintiffs appeal, raising issues[2] that present the following questions for our review:

1. Are there genuine issues of material fact, making summary judgment inappropriate?

2. Was Brannon's conviction in General Sessions Court, although overturned in a *de novo* trial, conclusive evidence of probable cause to initiate the charge against him?

3. Was the conviction in General Sessions court obtained by fraud or perjury?

4. Was the trial court correct in holding that Pyle's presentation of facts to Judge McGee provided him with an "advice of counsel" affirmative defense to the instant action?

[1]Mrs. Brannon's claim is for loss of consortium.

[2]The appellees also raise as an issue that the trial court should have granted them Rule 11 sanctions against the appellants for the filing of this suit. In view of our disposition of this appeal, we do not believe such sanctions are appropriate.

We believe the trial court was correct in granting Mrs. Pyle summary judgment. We also agree with the trial court that the later-reversed conviction in General Sessions Court is *prima facie*, and not conclusive, evidence of probable cause. We also agree with Judge Workman that advice of a licensed attorney can, under some circumstances, defeat a claim for malicious prosecution. Having said all of that, we hasten to add that we find disputed material facts on the issue of probable cause as it pertains to the claim against Pyle that render summary judgment against him inappropriate on both of the legal principles relied upon by the trial court in this case.

I

The Brannons and Pyles are next-door neighbors with a discordant history of disputes and disagreements.[3] The undisputed facts establish that Mr. Pyle had placed a series of stakes, connected by a string, just inside the parties' shared property line. On June 6, 1992, Brannon was mowing his yard. It is clear that he pulled up some of the stakes and threw them into the Pyles' yard, although the circumstances surrounding how and why he did it are in dispute.

Pyle testified in Criminal Court that he was at home when the incident occurred, and that his wife first saw Brannon pulling up the stakes. She called him over to the window. He testified at that point, "my wife and I saw Eddie pulling up the

[3]This is the second time the Pyles have prosecuted Brannon for criminal trespass; they also have accused him in the past of such disruptive behavior as threatening Mr. Pyle with a gun, and attempting to throw a dead raccoon into the Pyles' house. Brannon emphatically denies these allegations.

stakes as he was mowing up that line and flinging them over into my yard." Pyle testified that he then went outside on his porch, watched a few minutes more, and went back inside. He stated that he never saw the string get tangled in Brannon's mower.

Mrs. Pyle testified that she arrived at their house shortly before the incident, and that as she pulled into the driveway she could see Brannon mowing. When she got upstairs she looked out the window and saw Brannon pulling up the stakes and throwing them into the Pyles' yard, whereupon she called her husband to join her at the window.

The facts as Brannon stated them in his affidavit present a markedly different story. His version of how the stakes came to rest in the Pyles' yard is as follows:

> As I was trimming along the line where the pegs and strings were, being as careful as I could, some of the string had gotten down in the grass where I couldn't see it, and it got tangled in my mower and jerked up some of the pegs. I stopped the mower and got some tools from the garage to get the string untangled from the mower. I had to pull up a few more pegs to make slack. When I got the string out, still attached to the pegs, I simply tossed it over in his yard next to the line where he could find it and put it up again.

In addition, Brannon stated that Pyle was not present when the incident occurred:

> I believe Tom Pyle was not even at home when this happened. He was not in sight at the window with Mrs. Pyle at the time it was

> happening. He drove into his driveway and went into his basement after it happened. My wife and her sister came into our driveway right after it happened, and they saw Mr. Pyle drive into his driveway in his car.

In her affidavit, Mrs. Brannon supports her husband's assertion that Pyle was not at home at the time:

> I was out with my sister on the day Tom Pyle says my husband Eddie Brannon criminally trespassed on his property.
>
> When we drove into our driveway Eddie was untangling the string from the lawnmower. . . . After I had been there a few minutes Tom Pyle came rushing up the street in the car he always drove, his wife never drives that car, and he quickly turned into his driveway, got out and rushed into the basement of his house. . . He could not have been there when the lawnmower got caught in the string and the pegs and string were pulled up.

II

In deciding whether a grant of summary judgment is appropriate, we must determine "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." Tenn. R. Civ. P. 56.03. We take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences from that evidence in its favor, and discard all countervailing evidence. *See* ***Byrd v. Hall,*** 847 S.W.2d 208, 210-11 (Tenn. 1993). If, after applying this standard, we are convinced that there are no genuine issues of material fact and that the moving party is

entitled to judgment under the applicable law, we must affirm the grant of summary judgment. If, however, we find a genuine issue of material fact, we must reverse, for ***Byrd*** makes it clear that "the [summary judgment] procedure is clearly not designed to serve as a substitute for the trial of genuine and material factual matters." ***Id.*** at 210.

In determining whether there are genuine issues for trial, our focus is upon the material facts, which are "those facts that must be decided in order to resolve the substantive claim or defense at which the motion is directed." ***Id.*** at 211. To prove a malicious prosecution claim, the plaintiff must show that (1) the defendant instituted a prior suit or judicial proceeding against him or her without probable cause, (2) the defendant brought the prior action with malice, and (3) the prior action was finally terminated in the plaintiff's favor. ***Roberts v. Federal Express Corp.,*** 842 S.W.2d 246, 247-48 (Tenn. 1992). Prior to 1992, the law in Tennessee was that the question of the existence of probable cause in a malicious prosecution case was one for the court; but the Supreme Court in ***Roberts*** held that the question is properly for the jury to decide. ***Id.*** at 249.

III

As an initial matter, we find there is no evidence that would support a finding that defendant Mrs. Pyle "instituted a prior suit or judicial proceeding" against Brannon.[4]

[4]The extent of Mrs. Pyle's involvement was to look out the window and call her husband over to take a look. Although she did testify at the criminal trial, it was Mr. Pyle alone who initiated the charges against

Consequently, we affirm the trial court's grant of summary judgment as to Mrs. Pyle.

However, regarding Mr. Pyle's actions, when we take all the evidence offered by the nonmoving party as true, as we must, ***Payne v. Breuer***, 891 S.W.2d 200, 202 (Tenn. 1994), we find that there are genuine issues of material fact for a jury. The parties are in disagreement about whether the string got tangled in Brannon's mower, or whether he started pulling up the stakes for no apparent reason. Further, and more importantly, there is a question of fact as to whether Pyle was even home at the time of the incident. These matters are in dispute; create a genuine issue on the element of probable cause; and therefore are for the trier of fact.

In determining the issue of whether the disputed facts create a "genuine issue," the question is whether, presented with the relevant facts as Brannon has offered them, a reasonable jury could find that no probable cause existed to bring a charge of criminal trespass against Brannon. *See* ***Byrd,*** 847 S.W.2d at 212. Probable cause "is established where 'facts and circumstances [are] sufficient to lead an ordinarily prudent person to believe the accused was guilty of the crime charged.'" ***Roberts***, 842 S.W.2d at 248.

We believe a reasonable jury, presented with evidence that (1) Brannon's sole misconduct was accidentally getting the string tangled in his lawnmower, (2) no part of Brannon's

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Brannon.

anatomy crossed over the property line except his hands in pulling up a few stakes to get some slack, and (3) Pyle was not even home at the time of the event, but arrived shortly thereafter, might well conclude that Pyle did not have probable cause to bring a criminal trespass charge against Brannon.

IV

Several issues remain to be addressed. The first is the appellees' assertion, upheld by the trial court, that Pyle's seeking out of Judge McGee for advice before initiating the charge affords him the affirmative defense of advice of counsel. This defense is well-recognized in Tennessee; for it to apply, the defendant must show that he honestly sought advice of counsel, that he fully disclosed all the material facts he knew and could have known through reasonable diligence, that his counsel advised the prosecution, and that he acted in good faith upon such advice. ***Thompson v. Schulz***, 240 S.W.2d 252, 256 (Tenn. App. 1949).

It is not clear on the record before us exactly what Pyle told Judge McGee. If he did not fully disclose all the facts he knew or could have ascertained with due diligence, the defense of advice of counsel is not available. ***Sullivan v. Young***, 678 S.W.2d 906, 911-12 (Tenn. App. 1984). It is not apparent whether he told Judge McGee that "the day [Brannon] pulled up the stakes he did not get on my property," as he testified under oath in Criminal Court. If he did, it would have been unusual indeed for Judge McGee to have believed "that probable cause existed to charge Mr. Brannon with criminal trespass," as Judge McGee stated in his affidavit.

We find that, as in the case of ***Perry v. Sharber***, 803 S.W.2d 223, 226 (Tenn. App. 1990), "it is not at all clear that [the judge's] advice to the defendant was based upon a full and

honest presentation of all material, ascertainable facts." Faced with such a situation, Tennessee courts have not hesitated to hold the advice of counsel defense inapplicable. ***Id.*** at 226-27; *see* ***Cohen v. Cook***, 462 S.W.2d 502, 508-9 (Tenn. App. 1969); ***Carter v. Baker's Food Rite Store***, 787 S.W.2d 4, 8 (Tenn. App. 1989); ***Klein v. Elliott***, 436 S.W.2d 867, 876-79 (Tenn. App. 1968); ***Citizens' Savings & Loan Corp. v. Brown***, 65 S.W.2d 851, 853 (Tenn. App. 1932); ***Lawson v. Wilkinson***, 447 S.W.2d 369, 374 (Tenn. App. 1969). We believe there are disputed facts on the advice of counsel issue that make summary judgment inappropriate.

V

Finally, we must address the issue of the legal effect of Brannon's conviction in General Sessions court, overturned by the Criminal Court in a *de novo* trial. The trial court below found that "plaintiff Edward E. Brannon's conviction. . .is prima facie evidence of probable cause." The appellees argue that the reversed conviction is *conclusive* evidence of probable cause and urge us to adopt Restatement 2d of Torts, § 667(1). Because the argument that Brannon's conviction provides conclusive evidence of probable cause is dubious, at best, under the facts of this case, we decline to adopt the Restatement view.

It is advisable at this point to engage in a brief discussion of the substantive law of criminal trespass, because in this case a relatively obscure point of that law becomes quite important. The Tennessee criminal trespass statute reads in pertinent part as follows:

> (a) A person commits criminal trespass who, knowing he does not have the owner's effective consent to do so, enters or remains on property, or a portion thereof.
>
> * * *
>
> (c) For purposes of this section, *"enter" means intrusion of the entire body.*

T.C.A. § 39-14-405. (Emphasis added.) Thus, for Pyle to have had probable cause, he must have had reason to believe that Brannon's whole body crossed over onto his property.

At the first trial, for reasons unrevealed by the record, "the question of whether Brannon's entire body intruded onto Mr. Pyle's property was never raised," according to the affidavit of General Sessions Court Judge Gail Jarvis, who tried and convicted Brannon at that level. On appeal in Criminal Court, Pyle unequivocally testified that "[t]he day [Brannon] pulled up the stakes he did not get on my property." Based upon this testimony, the Criminal Court correctly ruled, as a matter of law, that Brannon was not guilty of the charge and dismissed the case. The question posed to us, therefore, is what effect Brannon's subsequently overturned conviction has upon his malicious prosecution claim.

This appears to be the first time an appellate court in Tennessee has been specifically asked to choose between a conclusive presumption and a *prima facie* presumption in the context of the facts of this case. The decisions in other jurisdictions on this point are by no means uniform; however, they can fairly be characterized as supporting one of two general rules:

> (1) The conviction, although reversed on appeal, is conclusive evidence of the existence of probable cause, unless obtained by fraud, perjury or other corrupt means.[5]
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> (2) The overturned conviction is *prima facie* evidence, creating a presumption of probable cause, which the plaintiff may rebut by providing competent and convincing evidence which clearly overcomes it.

The "conclusive presumption" rule has found favor with the majority of jurisdictions considering the issue.[6] However, we believe the minority, *prima facie* rule represents the better reasoned rule. This is because, while the conclusive presumption rule may provide a just conclusion in many cases, there are situations, such as the instant case, where its rigid application may result in unjust and illogical results. The *prima facie* rule, on the other hand, provides for dismissal of a malicious prosecution case in those instances where the presumption of probable cause is clearly warranted, and where the plaintiff cannot present evidence to overcome it; yet maintains the flexibility to insure that a plaintiff will at least be able to be heard when he or she does have competent and convincing evidence suggesting a lack of probable cause.

The *prima facie* rule has been adopted in a substantial and growing minority of states.[7] In ***Lind v. Schmid***, 337 A.2d

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[5]This is a paraphrased version of Restatement 2d of Torts, § 667(1), which states:

> The conviction of the accused by a magistrate or trial court, although reversed by an appellate tribunal, conclusively establishes the existence of probable cause, unless the conviction was obtained by fraud, perjury or other corrupt means.

[6]*See generally* 86 A.L.R.2d 1090.

[7]*See, e.g.,* ***Brown v. Parnell,*** 386 So.2d 1137, 1138-39 (Ala. 1980); ***Goodrich v. Warner***, 21 Conn. 432 (1852); ***Miller v. Runkle,*** 114 N.W. 611, (Iowa 1908); ***Jones v. Soileau,*** 448 So.2d 1268, 1272 (La. 1984); ***Skeffington v.***

365, 369 (N.J. 1975), the respected New Jersey Supreme Court, in adopting the minority rule, discusses one of the problems with the inflexible conclusive presumption rule:

> The Restatement Rule is apparently bottomed on the assumption that the magistrate has upon a full and fair trial proceeded to conviction predicated upon evidence that would convince a prudent and reasonable man of the guilt of the accused. Therefore there must have been probable cause for the criminal proceeding. But the difficulty with the rationale is that the assumption may not be true. If the magistrate erred as a matter of law, should the plaintiff be deprived of

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Eylward, 105 N.W. 638, 639 (Minn. 1906); ***Gaylord's of Meridian, Inc. v. Sicard***, 384 So.2d 1042, 1044 (Miss. 1980); ***Chapman v. Reno,*** 455 P.2d 618, 620 (Nev. 1969); ***MacRae v. Brant,*** 230 A.2d 753, 755-56 (N. H. 1967); ***Lind v. Schmid***, 337 A.2d 365 (N.J. 1975); ***Miera v. Waltemeyer***, 642 P.2d 191, 194 (N.M. App. 1982); ***Cap v. K-Mart Discount Stores, Inc.,*** 515 A.2d 52, 54 (Pa. Super. 1986); ***Kennedy v. Burbidge,*** 183 P. 325, 326 (Utah 1919). Furthermore, several courts have adopted the majority rule only over the most vigorous and telling dissents in favor of the *prima facie* alternative. *See* ***Deaton v. Leath***, 302 S.E.2d 335, 336 (S.C. 1983) (Lewis, C.J., dissenting); ***Hanson v. City of Snohomish***, 852 P.2d 295, 301 (Wash. 1993) (Utter, J., dissenting).

> his cause of action? If that trial court had acted correctly there would have been an acquittal. Then the plaintiff would have been able to maintain the malicious prosecution suit. The inequity of a rule which in that situation bars the cause of action is obvious. The better principle is that the magistrate's conviction raises a rebuttable presumption of probable cause.

Chief Justice Lewis, dissenting from the South Carolina Supreme Court's decision to adopt the majority rule, convincingly makes a similar point:

> To say that, if a court proceeds to conviction, it *necessarily* had evidence before it to convince a reasonable man of guilt, is conclusively refuted by the number of cases in which this Court has set aside convictions on the ground that there was no evidence reasonably tending to establish guilt. Surely, a conviction, set aside because there was a total lack of evidence to support it, is not to be regarded as *conclusive* of the issue of probable cause. Yet, the rule adopted by the majority accomplishes that result.
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> Many factors enter into the reversal of cases, which the *conclusive* rule, adopted by the majority, simply refuses to recognize. I fear that the majority opinion takes a leap without looking, the impact of which may be felt by parties who should, but now never will, have their day in court.

Deaton v. Leath, 302 S.E.2d 335, 337 (S.C. 1983) (Lewis, C.J., dissenting) (emphasis in original).

The plaintiff in ***Gaylord's of Meridian, Inc. v. Sicard***, 384 So.2d 1042 (Miss. 1980) was an elderly woman accused of switching price tags on merchandise in a store. She was found guilty in City Court, and on appeal, where the charge was changed to false pretense, was acquitted by a jury. *Id*. at 1043. On these facts, the Court adopted the minority rule:

> Also, conviction in a lower criminal court, although reversed by an appellate court, is prima facie evidence that the prosecuting party had probable cause to proceed with the prosecution, which may be overcome by the defendant's (plaintiff in the civil proceeding) proof.

Id. at 1044. *Id.*

In the present case, there are several sound reasons for refraining from holding that Brannon's General Sessions conviction conclusively establishes that Pyle had probable cause to initiate the criminal trespass charge. First, as we noted earlier, an important issue--whether Brannon's whole body crossed over the line--was never raised at the first trial. That issue turned out to be dispositive in the *de novo* Criminal Court trial. It would be anomalous to hold that Pyle is protected by a conclusive presumption that he had probable cause to believe the whole of Brannon's anatomy, as required by the statute, crossed over the line, when that issue, for whatever reason, did not arise in the first trial.

Second, since no record was generated in the first trial, there is no way to determine the possibility that the judgment of conviction was obtained by fraud or perjury, a universally recognized exception to both the majority and minority rules. Pyle's testimony in the first trial was not preserved; however, we note that in his affidavit for the warrant sworn out against Brannon, Pyle stated that "On June 6, 1992 defendant came onto affiant's property and pulled up stakes. . ." This sworn statement can be construed as inconsistent with Pyle's testimony in Criminal Court.

We express no opinion as to whether fraud or perjury actually occurred; however, the record before us at least raises a reasonable inference that it did. On summary judgment, such an inference is all that is required. ***Byrd,*** 847 S.W.2d at 211 ("If the mind of the court entertains any doubt whether or not a genuine issue exists as to any material fact it is its duty to overrule the motion.") The reasoning of Nevada's Supreme Court in adopting the minority rule is here apposite:

> However, we think the better rule, albeit minority rule, where there is a trial de novo (resulting in an acquittal) in a court of record on appeal from conviction of defendant in a minor, nonrecord court, is that the conviction is only prima facie evidence of probable cause. The reason for our rule is that without a record it is difficult, if not impossible, to know what transpired in the minor court. Except for the recollection of witnesses, and whatever the concise, summary court minutes might disclose, there is no other proof available of the circumstances surrounding the conviction, including evidence of fraud, perjury or other corrupt means. Those factors, balanced against an acquittal in the higher court, presided over by a trained judicial officer with the proceedings fully reported, justify our adoption of the announced rule.

Chapman v. Reno, 455 P.2d 618, 620 (Nev. 1969).

For the foregoing reasons, we hold that where a plaintiff's conviction is overturned on appeal, it is *prima facie* evidence, creating a presumption of probable cause to initiate the criminal charge, which the plaintiff must then rebut by competent evidence to overcome the presumption. In adopting the minority rule, we emphasize that its design is not to make it easier for a plaintiff to prove a malicious prosecution case. In cases where a plaintiff cannot overcome the presumption by competent evidence, the court can and should dismiss the

malicious prosecution case. Rather, our purpose in adopting this rule is to insure that in cases where a plaintiff can present evidence other than that narrow category of proof allowed by the conclusive presumption rule, which demonstrates a lack of probable cause in the original initiation of the charge, the evidentiary door is not slammed shut upon the presentation of that evidence.

The judgment of the trial court granting Mrs. Pyle summary judgment is affirmed. The judgment of the trial court as

to Brannon's suit against Mr. Pyle is vacated. This case is remanded to the trial court for further proceedings not inconsistent with this opinion. The costs on appeal are taxed one-half to the appellee George Thomas Pyle and one-half to the appellants.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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Herschel P. Franks, J.