IN THE COURT OF APPEALS OF TENNESSEE

RICHARD T. HATFIELD,	)	C/A NO. 03A01-9506-CV-00209
	)	BRADLEY COUNTY CIRCUIT COURT
Plaintiff-Appellant,	)	
	)	
	)	
	)	
v.	)	
	)	
	)	HONORABLE EARLE G. MURPHY,
	)	JUDGE
	)	
	)	
CLEVELAND BANK & TRUST	)	
COMPANY, BELINDA SCHOATE,	)	
BARRY BRAKEBILL, and CITY	)	
OF CLEVELAND, TENNESSEE,	)	AFFIRMED IN PART
	)	VACATED IN PART
Defendants-Appellees.	)	REMANDED

ALBERT J. HARB and W. TYLER CHASTAIN of HODGES, DOUGHTY & CARSON, Knoxville, for Appellant

DAVID W. NOBLIT of LEITNER, WARNER, MOFFITT, WILLIAMS, DOOLEY, CARPENTER, & NAPOLITAN, Chattanooga, for Appellees Cleveland Bank & Trust Company and Belinda Schoate

RONALD D. WELLS of ROBINSON, SMITH & WELLS, Chattanooga, for Appellees Barry Brakebill and City of Cleveland, Tennessee

O P I N I O N

Susano, J.

Richard T. Hatfield (Hatfield) was charged in a criminal warrant with a violation of the Worthless Check Statute,

T.C.A. § 39-14-121[1]. When the charge was subsequently dismissed[2], he filed this malicious prosecution and false imprisonment action against Cleveland Bank & Trust Company (Bank); its employee, Belinda Schoate (Shoate), at whose urging the prosecution was commenced; Cleveland police officer Barry Brakebill (Brakebill), who swore out the warrant; and the latter's employer, the City of Cleveland. A jury was impaneled to hear the plaintiff's suit. At the conclusion of Hatfield's proof, the trial court directed a verdict in favor of all of the defendants. Hatfield appeals, raising three issues, which present the following questions for our consideration:

> 1. Does the appellant's proof-in-chief, when viewed in a light most favorable to him, make out a prima facie case of malicious prosecution and false imprisonment as to Schoate and the Bank?
>
> 2. Is the appellee Brakebill immune from suit under T.C.A. § 29-20-205?
>
> 3. Did the trial court err in denying the appellant's motion in limine and in allowing the appellees to offer proof of the character of the appellant by specific instances of conduct?

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[1]As pertinent here, T.C.A. § 39-14-121 provides as follows:

> (a) A person commits an offense who, with fraudulent intent or knowingly:
>
> (1) Issues or passes a check or similar sight order for the payment of money . . . *for the purpose of obtaining money, services, labor, credit or any article of value*, knowing at the time there are not sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check or order, as well as all other checks or orders outstanding at the time of issuance; . . . (Emphasis Added).

[2]The dismissal was arguably based upon the fact that the insufficient funds check given to the bank was a payment on a pre-existing note obligation, and hence its passing could not be the basis of a worthless check prosecution. *Cf.* ***State v. Newsom***, 684 S.W.2d 647, 649 (Tenn. Cr. App. 1984).

The appellee Brakebill raises an additional issue, which requires us to address the following question:

> Assuming Brakebill is not immune, was the appellant responsible for or otherwise chargeable with the trial court's error in dismissing the action against Brakebill, and thus not entitled to relief on appeal, pursuant to the provisions of T.R.A.P. 36(a)?

The appellant has not raised an issue with respect to the trial court's holding that the City of Cleveland is immune from suit pursuant to the provisions of T.C.A. § 29-20-205. Therefore, that holding is affirmed.

I

The first two questions posed for our review by the appellant's issues bring into play well-known and established principles of law governing the evaluation of evidence on an appeal of a directed verdict. We must "take the strongest legitimate view of the evidence in favor of the [appellant], allow all reasonable inferences to [him], discard all countervailing evidence and [vacate the trial court's directed verdict] if there is any doubt as to the conclusions to be drawn from the whole evidence." ***Hill v. John Banks Buick, Inc.***, 875 S.W.2d 667, 669 (Tenn. App. 1993). A directed verdict is only appropriate when reasonable minds considering the proof could reach only one conclusion. *Id*. In our analysis, we are not permitted to weigh the evidence. *Id*. A court "should not direct a verdict if there is any material evidence in the record that would support a verdict for the plaintiff under any of the

theories he has advanced." ***Potter v. Tucker***, 688 S.W.2d 833, 835 (Tenn. App. 1985).

In granting the Bank and Schoate a directed verdict, the trial judge focused on whether Schoate was legally culpable for the institution of the prosecution against the appellant.[3] He concluded, under the authority of ***Wykle v. Valley Fidelity Bank & Trust Co***., 658 S.W.2d 96 (Tenn. App. 1983), that she was not. ***Wykle*** was "principally" a malicious prosecution case. *Id*. As pertinent here, that case addresses one of the essential elements of a malicious prosecution action--the "institution" of the action that was subsequently terminated in favor of the charged party. ***Roberts v. Federal Express Corp***., 842 S.W.2d 246, 247-48 (Tenn. 1992). The trial judge determined that Schoate did not institute the criminal prosecution at issue in this case. This prompted him to dismiss the appellant's suit against Schoate and her employer. We review the evidence presented by the appellant to determine if it makes out a prima facie case upon which a jury could reasonably conclude that Schoate procured the institution of the prosecution.

II

Schoate was the collection manager of the Bank and, as such, was charged with the duty "to handle bad debts." In that capacity, she had had a working relationship with Officer Brakebill for at least five years. During that period, she had

[3]In the instant case, the parties do not focus on the appellant's theory of false imprisonment. The trial court apparently directed a verdict on both of the appellants' theories predicated on its determination that Schoate, and hence the Bank, were not legally culpable for the criminal prosecution and its effects.

been involved with Brakebill on "numerous" worthless check prosecutions. When she received a bad check, she would normally contact Brakebill by phone. If an arrest was to be made, the officer would open a file. If the Bank wanted to prosecute, Brakebill would take out a warrant. He followed Schoate's "marching orders and her instructions." There is no indication in the record that Brakebill made any independent investigation of the facts related to him by Schoate.

In the latter part of January, 1991, Schoate contacted Brakebill regarding two worthless checks the Bank had received from the appellant. One check was in the amount of $1,311.65; while the other check was for a lesser amount. Brakebill told Schoate that she could not prosecute on the smaller of the two checks because it was a payment on a preexisting debt. As to the other check, the one involved in the prosecution at issue in this case, Schoate apparently indicated to Brakebill that the Bank did not repossess collateral securing Hatfield's note in exchange for the check. Brakebill told Schoate that if she wanted him to pursue prosecution, she would have to write him a letter to that effect. This she did by correspondence dated February 1, 1991, in which she said

> Please continue legal action on Richard Hatfield dba Frank A. White Co. Mr. Hatfield did not do as he promised.

Schoate admitted that her letter was not a request that Brakebill proceed with a civil lawsuit against Hatfield. Schoate knew that Brakebill had never filed a civil warrant on any of the bad checks she had referred to him in the past. On the contrary, she

knew that all of those referrals had resulted in criminal charges. She knew the difference between a civil suit and a criminal action.

When Schoate left the $1,311.65 check at Brakebill's office, she penned him a note asking that he "[p]lease prosecute for check." This occurred before Brakebill took out the bad check warrant.

On February 7, 1991, Brakebill swore out a warrant against Hatfield. The next day, Hatfield appeared before a magistrate and the charge was dismissed.

III

Under ***Wykle***, it is clear that "it is not necessary that a person actually swear out the warrant to be liable" for malicious prosecution. 658 S.W.2d at 98; but it is likewise clear that before one can be liable, that person "must do something more than merely give information." *Id*. at 99. The person sought to be found liable must "take[] some active part in instigating or encouraging the prosecution." *Id*. at 98 (quoting from ***Prosser on Torts***, 4th ed., page 836). This latter concept is further explained by the following from Comment D to Section 653 of the Restatement of Torts, Second, page 407-08, an earlier version of which was quoted with approval in ***Wykle:***

> . . . one who procures a third person to institute criminal proceedings against another is liable under the same conditions as though he had himself initiated the proceedings. A person who does not himself initiate criminal proceedings may procure

> their institution in one of two ways: (1) by inducing a third person, either a private person or a public prosecutor, to initiate them, or (2) by prevailing upon a public official to institute them by filing an information. It is, however, not enough that some act of his should have caused the third person to initiate the proceedings. One who gives to a third person, whether public official or private person, information of another's supposed criminal conduct or even accuses the other person of the crime, causes the institution of such proceedings as are brought by the third person. The giving of the information or the making of the accusation, however, does not constitute a procurement of the proceedings that the third person initiates if it is left to the uncontrolled choice of the third person to bring the proceedings or not as he may see fit.

See ***Wykle***, 658 S.W.2d at 99.

When the evidence in this case is viewed in a light most favorable to the appellant, it arguably shows that Schoate was an active participant in the swearing out of the criminal warrant against Hatfield. One could conclude, based upon prior dealings between Schoate and Brakebill, that the latter swore out warrants for the Bank based solely upon Schoate's request. This is a fair reading of Brakebill's testimony. It is true that Schoate painted a somewhat different picture of their relationship. According to her, she referred checks to Brakebill and it was then up to him to make a decision as to what he should do; but we are directed to ignore this "countervailing testimony" on a motion for directed verdict.

> Officer Brakebill gave the following testimony:
>
> Q You would not have proceeded with this investigation until she asked you to?

A That's correct.

Q All right. The reason that you --

A You don't have a complainant, you don't have a crime.

Q Sure. In practical effect, the complainant in this case was going to be Belinda Schoate and the bank?

A That's correct.

Q You were just following her instructions and marching orders?

A That's correct.

Q All right. Now, did she, in fact, drop you a letter?

A Yes, sir, she did.

* * *

Q You received a letter from Mrs. Schoate before that date?

A That's correct.

Q And that's the letter that we have dated February 1, 1991?

A Yes, sir.

Q Is it fair to say that -- it was not a trick question before, but that you had this letter in your file before you proceeded with the prosecution?

A Yes, sir, it is.

Q All right. That letter, then, plus what we have previously marked as Exhibit No. 2 were the two pieces of information that you had in your file?

A That's correct.

* * *

Q Let me rephrase the question. Do I understand, then, that the totality of your investigative file --

A Is here on this desk today.

Q -- was -- let me just enumerate those - would be the check which is listed as Exhibit No. 2?

A (Witness moves head up and down.)

Q The letter which is Exhibit No. 5?

A (Witness moves head up and down.)

Q The warrant which is Exhibit No. 3 and 4, the warrant and affidavit?

A That's correct.

Q Did you have any other documents other than what I have just identified?

A The arrest report.

* * *

Q Did [Hatfield] try to explain to you what had transpired between he and Belinda Schoate?

A He may have, but --

Q You were following orders at that time?

A I just -- I was acting basically as a civil processor.

* * *

Q All right. I take it were it not for the insistence of Mrs. Schoate to prosecute that you would not have taken it upon your own to do so?

A If I had not had a complainant, I would not have filed a complaint.

From this testimony, and reasonable inferences to be drawn from it, a jury could reasonably conclude that Schoate made the decision to prosecute Hatfield and that Brakebill, without further investigation, simply swore out the warrant, i.e., that Brakebill was merely doing the Bank's "bidding." While it is obvious that Schoate and the Bank had no legal control over Brakebill, a jury could reasonably conclude that Brakebill had vested Schoate with practical control over his actions as they pertained to the Bank's worthless check prosecutions. When the evidence is construed most favorably to the appellant, a jury

could conclude that Schoate, and vicariously the Bank, took an "active part in instigating or encouraging the prosecution."

Based on the foregoing, we conclude that the trial court erred in directing a verdict for Schoate and the Bank.

IV

The trial court directed a verdict in favor of officer Brakebill because it found that he was immune from this suit under T.C.A. § 29-20-205.[4] In so holding, the court below committed error. T.C.A. § 29-20-205 does not address the subject of a governmental *employee's* immunity. That statute, by its terms, only applies to "governmental entities." A limited immunity is granted to governmental employees by T.C.A. § 29-20-

[4]T.C.A. § 29-20-205 provides, in pertinent part, as follows:

> Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury:
>
> * * *
>
> (2) Arises out of false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights;

310 (b) and (c)[5]; however, neither of those provisions justify the directed verdict for Brakebill in this case.

The appellee Brakebill in his brief does not attempt to defend the trial court's reliance on T.C.A. § 29-20-205. Rather, he argues that the appellant is not entitled to relief because, so the argument goes, he was responsible for the court's error. For this position, he relies upon T.R.A.P. 36(a) which provides as follows:

> The Supreme Court, Court of Appeals, and Court of Criminal Appeals shall grant the relief on the law and facts to which the party is entitled or the proceeding otherwise requires and may grant any relief, including the giving of any judgment and making of any order; provided, however, relief may not be granted in contravention of the province of the trier of fact. Nothing in this rule shall be construed as requiring relief be

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[5]T.C.A. § 29-20-310 provides, in pertinent part, as follows:

* * *

> (b) No claim may be brought against an employee or judgment entered against an employee for damages for which the immunity of the governmental entity is removed by this chapter unless the claim is one for medical malpractice brought against a health care practitioner. No claim for medical malpractice may be brought against a health care practitioner or judgment entered against a health care practitioner for damages for which the governmental entity is liable under this chapter, unless the amount of damages sought or judgment entered exceeds the minimum limits set out in § 29-20-403 or the amount of insurance coverage actually carried by the governmental entity, whichever is greater, and the governmental entity is also made a party defendant to the action.
>
> (c) No claim may be brought against an employee or judgment entered against an employee for injury proximately caused by an act or omission of the employee within the scope of the employee's employment for which the governmental entity is immune in any amount in excess of the amounts established for governmental entities in § 29-20-403, unless the act or omission was willful, malicious, criminal, or performed for personal financial gain, or unless the act or omission was one of medical malpractice committed by a health care practitioner and the claim is brought against such health care practitioner.

Cf. ***Johnson v. Smith***, 621 S.W.2d 570 (Tenn. App. 1981).

> granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.

Brakebill and the City of Cleveland sought a directed verdict on the sole ground that both parties were immune under T.C.A. § 29-20-205. When the trial court asked counsel for Hatfield for a response to this argument, he simply said "it [meaning T.C.A. § 29-20-205] says what it says." Brakebill argues that this statement places responsibility for the court's error on Hatfield. We disagree. There is no evidence in the record to suggest that Hatfield's counsel consciously invited the trial court to commit error. It was Brakebill, not Hatfield, who erroneously suggested that T.C.A. § 29-20-205 immunized Brakebill. If anyone prompted the trial court to commit error, it was Brakebill who affirmatively argued that the statute applied to him.

We hold that the plaintiff's proof as to Brakebill makes out a prima facie case as to his liability.

V

In view of our holding as to the appellant's first two issues and the appellee Brakebill's issue, it is not necessary for us to decide whether the appellant's third issue warrants reversal of the trial court's judgment. We will, however, address the evidentiary questions raised by the appellant for the trial court's guidance when this matter is retried.

Prior to trial, the appellant filed a motion in limine in which he sought to exclude

> [a]ny reference to the credit history, previous or subsequent bad checks, any memos furnished by the bank relating to bad checks or caution notes relating to the same and any notice of levy issued by the Internal Revenue Service.

The trial court denied the motion at a pre-trial hearing; however, following the plaintiff's announcement that he rested and before the trial court reversed an earlir ruling and granted Schoate and the Bank a directed verdict, the trial court did hold that the defendants could not present evidence of specific acts of the plaintiff that the court determined were cumulative to the plaintiff's admissions in his testimony. Since this ruling was favorable to the appellant, we do not view it as being a part of his issue with respect to the motion in limine.

In a malicious prosecution case, the plaintiff must show that the underlying action was instituted without probable cause. One of the elements of a worthless check prosecution is the issuance of a check "with fraudulent intent or knowingly." *See* T.C.A. § 39-14-121. While evidence of Hatfield's bad checks is not admissible to show that Hatfield acted "in conformity with [a] character trait," *See* Tenn. R. Evid. 404(b); such evidence is admissible for another purpose--it is relevant to show Schoate's state of mind as it pertains to the issue of probable cause to believe that Hatfield acted with a fraudulent intent or knowingly. If Schoate can show she was aware of a pattern of checks being issued by Hatfield that were not supported by funds, she could argue that this pattern impacted her decision to prosecute in this case, i.e., that his willingness to pass bad checks in the past supported her conclusion in this case--probable cause--that he had acted with a fraudulent intent rather

than innocently or with the mistaken belief that he had sufficient funds in his account to pay the check in question. We believe her knowledge of bad checks in the past is relevant to the issue of probable cause in this case. We do not believe it is rendered inadmissible by a Rule 403 analysis. *See* Tenn. R. Evid. 403.

In this case, the appellant alleged in his complaint that he had been "damaged in his self-esteem and his reputation both personal and business and [had] suffered considerable mental distress and emotional trauma." With respect to his claim of false imprisonment, he alleged "mental suffering, humiliation, injury to reputation, interruption of business and legal expenses." When he argued his motion in limine, he abruptly announced that he was no longer seeking damages for injury to his business or personal reputation. At one point in his argument, he stated that

> [t]he claim is for the shame, humiliation, embarrassment that resulted from that episode and nothing further.

Despite the appellant's concession, there is still doubt in the record as to whether damage to reputation is or is not an element of his claimed damages. This doubt comes from the fact that counsel and the court engaged in a discussion after the appellant had rested which seems to indicate that damage to reputation is still a part of the appellant's case. We will address this doubt later in this opinion.

We do not understand how the appellant's claim for "shame, humiliation, embarrassment" can be evaluated in a vaccuum, without reference to his reputation, i.e., what others think about him. It seems to us that one's preexisting reputation is important in evaluating an individual's claim that he or she has suffered an injury of an emotional and/or mental character arising out of an incident that, by its very nature, is calculated to adversely affect that reputation. By the same token, we know from our common experience that a person's reputation can be so bad as to compel an observer to conclude that he or she is beyond the point of "shame, humiliation, embarrassment" resulting from bad publicity. It seems to us that one feels "shame, humiliation, embarrassment," at least in part, as a result of the attitude of others toward that person. If others already have a low opinion of a person, can he or she honestly claim that a given act has further damaged an already poor reputation? This is obviously a question for the jury; but it is difficult for that body to fully resolve this issue unless and until it knows what a person's reputation was to begin with.

The matters alluded to in the motion in limine are all relevant on the question of the appellant's reputation. They come into evidence for some purpose other than "to show action in conformity with [a] character trait." *Id*. We do not believe this evidence should be excluded because of a Rule 403 evaluation. *See* Tenn. R. Evid. 403. Whether the evidence is otherwise admissible depends upon the context in which it is offered.

The appellant must make an election in this case--either he is seeking broad damages or he is not. If he wants to keep his reputation out, then his suit is merely one for legal expenses and one for damages for "interruption of business", if any such damages are shown. If he wants to seek any of the other damages alleged in his complaint, then his reputation is "in play" and all of the subject evidence is relevant on the issue of that reputation.

Within 30 days of the filing of the mandate in this case, the appellant will file a written election in the trial court with respect to his claim for damages; however, regardless of that election, evidence of prior worthless checks known to Schoate and other evidence known to her impacting the issue of whether she had probable cause to institute the worthless check prosecution of Hatfield are clearly relevant on that issue.

The judgment of the trial court as to the City of Cleveland is affirmed. The judgment of the trial court as to the other appellees is vacated and this cause is remanded to the court below for further proceedings consistent with this opinion. Exercising our discretion, we assessed the costs on appeal one-fourth to the appellant and three-fourths to the appellees Clevland Bank & Trust Company, Belinda Schoate, and Barry Brakebill.

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Charles D. Susano, Jr., J.

CONCUR:

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Don T. McMurray, J.

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William H. Inman, Sr.J.